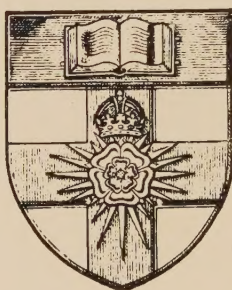


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THE ALL ENGLAND LAW REPORTS REPRINT

Being a selection from the
LAW TIMES REPORTS
1843—1935

REVISED AND ANNOTATED

1922

Editor

G. F. L. BRIDGMAN, ESQ.
of the Middle Temple, Barrister-at-Law

Assistant Editors

R. D. H. OSBORNE, ESQ.
of Gray's Inn, Barrister-at-Law

O. M. W. SWINGLAND, ESQ.
of Gray's Inn, Barrister-at-Law

HENRY SUMMERFIELD, ESQ.
of Gray's Inn, Barrister-at-Law

G. A. KIDNER, ESQ.
of the Middle Temple, Barrister-at-Law

MISS M. R. PLUMMER
of Lincoln's Inn, Barrister-at-Law

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BUTTERWORTH & CO. (PUBLISHERS) LTD.



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1960

*Made and printed in Great Britain by
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CASES REPORTED IN THIS VOLUME

	PAGE		PAGE
ADMIRALTY COMMISSIONERS <i>v.</i> NATIONAL PROVINCIAL AND UNION BANK OF EN- GLAND, LTD. [CH.D.]	260	FIFE'S SETTLEMENT TRUSTS, <i>Re</i> [CH.D.] ..	323
ADMIRALTY COMMISSIONERS <i>v.</i> VALERIA (OWNERS) [H.L.]	463	FOLKES <i>v.</i> KING [C.A.]	658
ALLESTER (DAVID), LTD., <i>Re</i> [CH.D.] ..	589	FOORD, <i>Re</i> , FOORD <i>v.</i> CONDAR [CH.D.] ..	166
AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS AND OTHERS <i>v.</i> BRAITHWAITE AND OTHERS [H.L.] ..	53	FOSTER'S SETTLED ESTATES, <i>Re</i> [C.A.] ..	383
AMBATIELOS <i>v.</i> ANTON JURGENS MARGARINE WORKS [H.L.]	543	FOWLER, <i>Re</i> , BISHOP <i>v.</i> FOWLER [CH.D.] ..	321
ATLANTIC SHIPPING & TRADING Co. <i>v.</i> LOUIS DREYFUS & Co. [H.L.]	559	FOWLER <i>v.</i> WILLIS [CH.D.]	748
ATTORNEY-GENERAL AND ANOTHER <i>v.</i> HODG- SON [CH.D.]	186	FOWLER AND OTHERS <i>v.</i> KIBBLE AND AN- OTHER [C.A.]	626
ATTORNEY-GENERAL FOR MANITOBA <i>v.</i> KELLY AND OTHERS (AND CROSS-APPEAL) [P.C.] ..	69	FOX <i>v.</i> BURGESS [K.B.D.]	754
BARCLAYS BANK <i>v.</i> TOM [C.A.]	279	FRENCH (L.) & Co., LTD. <i>v.</i> LEESTON SHIP- PING CO., LTD. [H.L.]	314
BEECH, <i>In the Estate of</i> , BEECH <i>v.</i> PUBLIC TRUSTEE [C.A.]	106	GALBRAITH AND GRANT, LTD. <i>v.</i> BLOCK [K.B.D. DIVL. CT.]	443
BLAY <i>v.</i> DADSWELL [C.A.]	750	GARRATT <i>v.</i> GARRATT AND GARRATT [DIV.] ..	728
BOWKETT <i>v.</i> FULLER'S UNITED ELECTRIC WORKS, LTD. [C.A.]	281	GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS <i>v.</i> ASHLEY [H.L.]	53
BOYCE <i>v.</i> WASBROUGH AND OTHERS [H.L.] ..	593	GRAHAM <i>v.</i> GRAHAM [DIV.]	149
BRITISH AMERICAN CONTINENTAL BANK, LTD., <i>Re</i> , CREDIT GENERAL LIEGEOIS' CLAIM [CH.D.]	219	GREAT NORTHERN RAIL CO. <i>v.</i> L.E.P. TRANS- PORT AND DEPOSITORY, LTD. [C.A.] ..	18
BRITISH AND BENNINGTONS, LTD. <i>v.</i> BAIN- GOURIE (DOOARS) TEA Co., LTD. [H.L.] ..	224	GRETTON'S INDENTURE, <i>Re</i> , HOOD <i>v.</i> LADY BYRON AND OTHERS [CH.D.]	796
BRITISH AND BENNINGTONS, LTD. <i>v.</i> MAZD- HEE TEA Co., LTD. [H.L.]	224	GREWE, <i>In the Goods of</i> [PROB.]	779
BRITISH AND BENNINGTONS, LTD. <i>v.</i> NORTH WESTERN CACHAR TEA Co., LTD. [H.L.] ..	224	GREY, <i>In the Estate of</i> [PROB.]	124
BROOKS <i>v.</i> BLOUNT [K.B.D. DIVL. CT.] ..	699	HANSON <i>v.</i> RADCLIFFE URBAN DISTRICT COUNCIL [C.A.]	160
BURNS <i>v.</i> SCHOLFIELD [K.B.D. DIVL. CT.] ..	554	HANSSON <i>v.</i> HAMEL AND HORLEY, LTD. [H.L.] ..	237
BUTT AND Co., LTD. <i>v.</i> WESTON-SUPER-MARE URBAN DISTRICT COUNCIL [H.L.]	469	HARDING, <i>Re</i> , HARDING <i>v.</i> PATERSON [CH.D.] ..	557
CAMPBELL'S TRUSTS, <i>Re</i> , PUBLIC TRUSTEE <i>v.</i> CAMPBELL [CH.D.]	79	HAY DRUMMOND, <i>Re</i> , HALSEY <i>v.</i> PECHELL [CH.D.]	330
CARDIFF CORPORATION <i>v.</i> COOK AND OTHERS [CH.D.]	651	HEAP <i>v.</i> MOTORISTS' ADVISORY AGENCY, LTD. [K.B.D.]	251
CHAMBERS AND OTHERS <i>v.</i> RANDALL AND OTHERS [CH.D.]	565	HENRY BUTT & Co., LTD. <i>v.</i> WESTON-SUPER- MARE URBAN DISTRICT COUNCIL [H.L.] ..	469
CHILD VILLIERS' APPLICATION, <i>Re</i> , VILLIERS AND ANOTHER <i>v.</i> ATTORNEY-GENERAL [C.A.]	671	HERMIONE, THE [ADM.]	570
COCHRANE <i>v.</i> COCHRANE AND OTHERS [CH.D.] ..	614	HESKETH <i>v.</i> BIRMINGHAM CORPORATION [C.A.]	243
COMMONWEALTH SHIPPING REPRESENTATIVE <i>v.</i> PENINSULAR AND ORIENTAL BRANCH SERVICE [H.L.]	207	HOARE & Co., LTD. <i>v.</i> SIR ROBERT MCALPINE, SONS & Co. [CH.D.]	759
CONRON <i>v.</i> LONDON COUNTY COUNCIL [CH.D.] ..	643	HOLT AND OTHERS <i>v.</i> MARKHAM [C.A.] ..	134
CONSETT INDUSTRIAL AND PROVIDENT SO- CIETY <i>v.</i> CONSETT IRON Co. [C.A.]	285	HORNE <i>v.</i> POLAND [K.B.D.]	551
CRUIKSHANK <i>v.</i> SUTHERLAND [H.L.]	716	HOWARD HOULDER & PARTNERS, LTD. <i>v.</i> MANX ISLES STEAMSHIP Co., LTD. [K.B.D.] ..	579
CRUISE AND ANOTHER <i>v.</i> TERRELL [C.A.] ..	130	HULLY <i>v.</i> SILVERSPRINGS BLEACHING AND DYEING Co., LTD. [CH.D.]	683
CZARNIKOW & Co., LTD. <i>v.</i> ROTH, SCHMIDT & Co. [C.A.]	45	ILE DE CEYLON, THE [ADM.]	264
DALE <i>v.</i> HATFIELD CHASE CORPORATION [C.A.]	37	JACKSON <i>v.</i> SIMONS [CH.D.]	583
DAVID ALLESTER, LTD., <i>Re</i> [CH.D.]	589	JOWITT, <i>Re</i> , JOWITT <i>v.</i> KEELING [CH.D.] ..	331
DAWSONS, LTD. <i>v.</i> BONNIN AND OTHERS [H.L.]	88	KEENE, <i>Re</i> [C.A.]	258
DE LEEUW, <i>Re</i> , JAKENS AND OTHERS <i>v.</i> CEN- TRAL ADVANCE AND DISCOUNT CORPORA- TION, LTD. [CH.D.]	528	KELSEY <i>v.</i> KELSEY [CH.D.]	536
DENNIS <i>v.</i> HUTCHINSON, TRAFFORD <i>v.</i> SAME [K.B.D. DIVL. CT.]	455	KINATAN (BORNEO) RUBBER, LTD., <i>Re</i> [CH.D.] ..	634
DEWEY <i>v.</i> FAULKNER [K.B.D. DIVL. CT.] ..	520	KING <i>v.</i> MILLEN [K.B.D. DIVL. CT.]	309
DOUBLE <i>v.</i> SOUTHAMPTON ASSESSMENT COM- MITTEE AND OTHERS [K.B.D. DIVL. CT.] ..	101	LA FABRIQUE DE PRODUITS CHIMIQUES SOCIÉTÉ ANONYME <i>v.</i> LARGE [K.B.D.] ..	372
ELLIS <i>v.</i> DEHEER [C.A.]	451	LA ROCHE <i>v.</i> ARMSTRONG [K.B.D.]	311
FARRANT <i>v.</i> OLVER [CH.D.]	783	LEACH, <i>Re</i> , MILNE <i>v.</i> DAUBENY [CH.D.] ..	714
FARROW'S BANK, LTD., <i>Re</i> [C.A.]	679	LECK <i>v.</i> EPSOM RURAL DISTRICT COUNCIL [K.B.D. DIVL. CT.]	784
		LOCKHARTS, LTD. <i>v.</i> BERNARD ROSEN & Co., LTD. [C.A.]	415
		LORILLARD, <i>Re</i> , GRIFFITHS <i>v.</i> CATFORTH [CH.D.]	500
		LOREDANO, THE [ADM.]	262
		LUCAS, <i>Re</i> , RHYS <i>v.</i> ATTORNEY-GENERAL [CH.D.]	317
		MANN <i>v.</i> MANN [DIV.]	777
		MANCHESTER LINERS, LTD. <i>v.</i> REA, LTD. [H.L.]	605
		MARCHBANK <i>v.</i> CAMPBELL AND ANOTHER [K.B.D. DIVL. CT.]	358
		MARSHALL AND Snelgrove, LTD. <i>v.</i> J. F. GOWER [K.B.D.]	302
		MATTHEY <i>v.</i> CURLING [H.L.]	1

	PAGE		PAGE
MELLOR, <i>Re</i> , ALVAREZ <i>v.</i> DODGSON [CH.D., C.A.] ..	735	R. <i>v.</i> SULLIVAN [C.C.A.] ..	431
MERCER <i>v.</i> SOUTH EASTERN AND CHATHAM RAIL CO.'S MANAGING COMMITTEE [K.B.D.] ..	459	R. <i>v.</i> WILLIAMS [C.C.A.] ..	433
MORRIS <i>v.</i> TOLMAN [K.B.D., DIVL. CT.] ..	182	R. <i>v.</i> WOODS [C.A.] ..	781
MURPHY AND OTHERS <i>v.</i> HURLY [H.L.] ..	169	RUTHERFORD <i>v.</i> RICHARDSON [H.L.] ..	13
NELSON <i>v.</i> LONDON AND NORTH WESTERN RAIL CO. [H.L.] ..	395	RUTTER <i>v.</i> PALMER [C.A.] ..	367
NICHOL <i>v.</i> FEARBY [K.B.D.] ..	790	SALES <i>v.</i> LAKE AND OTHERS [K.B.D. DIVL. CT.] ..	689
NICHOL <i>v.</i> ROBINSON [K.B.D.] ..	790	SAN ONOFRE, THE [C.A.] ..	720
NITRATE PRODUCERS STEAMSHIP CO., LTD. <i>v.</i> SHORT BROS., LTD. [H.L.] ..	710	SCRANTON'S TRUSTEE <i>v.</i> PEARSE [C.A.] ..	764
NORTHBOURNE (LORD) <i>v.</i> JOHNSTON & SONS [CH.D.] ..	144	SHEARS & SONS, LTD. <i>v.</i> JONES AND ANOTHER [C.A.] ..	378
NORTH BRITISH RAILWAY CO. <i>v.</i> SCOTT [H.L.] ..	362	SHILLITO <i>v.</i> HINCHLIFFE [K.B.D. DIVL. CT.] ..	703
NORTH WALES PRODUCE AND SUPPLY SOCIETY, LTD., <i>Re</i> [CH.D.] ..	730	SMITH (H. & C.), LTD. <i>v.</i> GREAT WESTERN RAIL CO. [H.L.] ..	404
NORWICH UNION FIRE INSURANCE SOCIETY <i>v.</i> COLONIAL MUTUAL FIRE INSURANCE CO. [K.B.D.] ..	513	STERNS, LTD. <i>v.</i> VICKERS, LTD. [C.A.] ..	126
OPPENHEIM (L.) & CO. <i>v.</i> MOHOMED HANEEF [P.C.] ..	305	SWEET <i>v.</i> WILLIAMS [K.B.D. DIVL. CT.] ..	111
PALGRAVE, BROWN & SON, LTD. <i>v.</i> TURID (OWNERS) [H.L.] ..	489	TERVAETE, THE [C.A.] ..	387
PARR <i>v.</i> SNELL AND OTHERS [C.A.] ..	270	TRAFFORD <i>v.</i> HUTCHINSON [K.B.D. DIVL. CT.] ..	455
PENNINGTON <i>v.</i> RELIANCE MOTOR WORKS, LTD. [K.B.D.] ..	466	UNITED DAIRIES, LTD. <i>v.</i> PUBLIC TRUSTEE AND ANOTHER [K.B.D.] ..	444
PETTIT, <i>Re</i> , LE FEVRE <i>v.</i> PETTIT [CH.D.] ..	163	VILLIERS' APPLICATION, <i>Re</i> , VILLIERS <i>v.</i> ATTORNEY-GENERAL [C.A.] ..	671
POPLAR METROPOLITAN BOROUGH ASSESSMENT COMMITTEE <i>v.</i> ROBERTS [H.L.] ..	191	WALLWORK <i>v.</i> FIELDING [C.A.] ..	298
POWELL <i>v.</i> POWELL [DIV.] ..	235	WALTON'S SETTLEMENT, <i>Re</i> , WALTON <i>v.</i> PIERSON [C.A.] ..	439
PULFORD <i>v.</i> PULFORD [DIV.] ..	121	WARMAN <i>v.</i> TIBBATS [K.B.D. DIVL. CT.] ..	725
R. <i>v.</i> ADAMS AND ANOTHER, <i>Ex parte</i> POPE [K.B.D. DIVL. CT.] ..	695	WHITE AND ANOTHER <i>v.</i> WILLIAMS [C.A.] ..	419
R. <i>v.</i> ARMSTRONG [C.C.A.] ..	153	WHITE, CHILD AND BENEY, LTD. <i>v.</i> EAGLE STAR AND BRITISH DOMINIONS INSURANCE CO. [C.A.] ..	482
R. <i>v.</i> CORFIELD [K.B.D. DIVL. CT.] ..	376	WHITE, CHILD AND BENEY, LTD. <i>v.</i> SIMMONS [C.A.] ..	482
R. <i>v.</i> CROCKER [C.C.A.] ..	775	WING <i>v.</i> SKINNER AND HOLFORD, LTD. AND ANOTHER [K.B.D. DIVL. CT.] ..	410
R. <i>v.</i> GODFREY [K.B.D. DIVL. CT.] ..	266	WOMBWELL'S SETTLEMENT, <i>Re</i> , CLERKE <i>v.</i> MENZIES [CH.D.] ..	115
R. <i>v.</i> INCOME TAX SPECIAL COMMISSIONERS, <i>Ex parte</i> SHAFTESBURY HOMES AND ARETHUSA TRAINING SHIP [C.A.] ..	637	WOODHEAD <i>v.</i> PUTNAM [K.B.D. DIVL. CT.] ..	157
R. <i>v.</i> NAT BELL LIQUORS, LTD. [P.C.] ..	335	WOODFIELD <i>v.</i> BOND [CH.D.] ..	742
R. <i>v.</i> PHILLIPS [K.B.D. DIVL. CT.] ..	275	YANDLE & SONS <i>v.</i> SUTTON [C.A.] ..	425
R. <i>v.</i> PILLEY [C.C.A.] ..	437	YATES, <i>Re</i> , SINGLETON <i>v.</i> POVAH [CH.D.] ..	328
R. <i>v.</i> REDD [C.C.A.] ..	435	YORKSHIRE INSURANCE CO., LTD. AND ANOTHER <i>v.</i> CRAINE [P.C.] ..	505
		YOUNG <i>v.</i> SUTTON [C.A.] ..	425

THE ALL ENGLAND LAW REPORTS REPRINT

MATTHEY v. CURLING

E [HOUSE OF LORDS (Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Wrenbury and Lord Carson), February 14, 16, 17, March 21, 1922]

[Reported [1922] 2 A.C. 180; 91 L.J.K.B. 593; 127 L.T. 247; 38 T.L.R. 475; 66 Sol. Jo. 386]

F *Landlord and Tenant—Covenant—Breach—Defence—Eviction by title paramount—Eviction by requisition of demised premises by public authority—Reinstatement of demised property—Time for performance—Reasonable time—Extension beyond term.*

G By a lease dated Mar. 25, 1898, the tenant covenanted to keep the demised premises in repair and yield them up in repair on the determination of the term, to keep the premises insured against fire in the joint names of the lessor and himself, and, in case of destruction or damage by fire, to lay out all insurance money received in re-building, repairing, and reinstating the premises. On Jan. 28, 1918, the War Office requisitioned the house and part of the land, and on Feb. 12, 1919, the house, while still under requisition, was destroyed by fire. The lease expired by effluxion of time on Mar. 25, 1919, and the military authority gave up possession to the landlord in June, 1919.

H In an action by the landlord against the tenant for the quarter's rent due at Lady Day, 1919, and damages for breaches of the covenants to repair, deliver up in repair, insure, and apply the insurance money in re-building, etc.,

I **Held:** eviction by title paramount meant an eviction by a title superior to that of the lessor and lessee and was not eviction by an authority acting under statute which the tenant could not withstand; in the circumstances the performance of the covenants had not been rendered impossible; and, therefore, the tenant was not freed by reason of the requisition from liability under the covenants in the lease.

Per LORD ATKINSON: (i) Where a party by his own contract creates a duty or charge on himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. (ii) In the case of an ordinary covenant to reinstate a

covenantor shall, in the absence of words expressly or impliedly fixing a time for the performance of his contract, have what is a reasonable time in all the circumstances of the case for its performance, whether, in the case of a leasehold, that time extends beyond the term or the contrary.

Notes. Applied: *Eyre v. Johnson* [1946] 1 All E.R. 719. Referred to: *Walton Harvey, Ltd. v. Walker and Homfrays, Ltd.*, [1931] 1 Ch. 145; *Swift v. Macbean*, [1942] 1 All E.R. 126; *Pelepah Valley (Johore) Rubber Estates, Ltd. v. Sungei Besi Mines, Ltd.* (1944), 170 L.T. 338; *Cricklewood Property and Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd.*, [1945] 1 All E.R. 252; *Denman v. Brise*, [1948] 2 All E.R. 141; *James v. Hulton* [1949] 2 All E.R. 243; *Smiley v. Townshend*, [1950] 1 All E.R. 530.

As to eviction under title paramount and covenants to repair see 23 HALSBURY'S LAWS (3rd Edn.) 552, 553, 578 et seq., and for cases see 31 DIGEST (Repl.) 349 et seq. (see, as to title paramount, p. 377).

Cases referred to:

- (1) *Upton v. Townend*, *Upton v. Greenlees* (1855) 17 C.B. 30; 25 L.J.C.P. 44; 26 L.T.O.S. 76; 19 J.P. 775; 1 Jur. N.S. 1089; 4 W.R. 56; 139 E.R. 976; 31 Digest (Repl.) 273, 4063.
- (2) *Paradine v. Jane* (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 31 Digest (Repl.) 278, 4124.
- (3) *Baily v. De Crespigny* (1869), L.R. 4 Q.B. 180; 10 B. & S. 1; 38 L.J.Q.B. 98; 19 L.T. 681; 33 J.P. 164; 17 W.R. 494; 31 Digest (Repl.) 517, 6395.
- (4) *Mills v. East London Union* (1872), L.R. 8 C.P. 79; 42 L.J.C.P. 46; 27 L.T. 557; 37 J.P. 6; 21 W.R. 142; 31 Digest (Repl.) 370, 5012.
- (5) *Harding v. Metropolitan Rail Co.* (1872), 7 Ch. App. 154; 41 L.J.Ch. 371; 26 L.T. 109; 36 J.P. 340; 20 W.R. 321, L.C.; 11 Digest (Repl.) 215, 802.
- (6) *A.-G. v. De Keyser's Royal Hotel*, [1920] A.C. 508; 89 L.J.Ch. 417; 122 L.T. 691; 36 T.L.R. 600; 64 Sol. Jo. 513, H.L.; 17 Digest (Repl.) 437, 91.
- (7) *Neale v. Mackenzie* (1836), 1 M. & W. 747; 2 Gale, 174; 6 L.J.Ex. Eq. 263; 150 E.R. 635, Ex.Ch.; 31 Digest (Repl.) 289, 4241.
- (8) *Doe d. Vaughan v. Meyler* (1814), 2 M. & S. 276; 105 E.R. 384; 40 Digest (Repl.) 774, 2589.
- (9) *Monk v. Cooper* (1727), 2 dd. Raym. 1477; 2 Stra. 763; 92 E.R. 460; 31 Digest (Repl.) 279, 4139.
- (10) *Marshall v. Schofield & Co.* (1882), 52 L.J.Q.B. 58; 47 L.T. 406; 31 W.R. 134, C.A.; 31 Digest (Repl.) 234, 3691.
- (11) *Carter v. Cummins* (1665), cited in 1 Cas. in Ch. at p. 84; 22 E.R. 706, L.C.; 31 Digest (Repl.) 281, 4155.
- (12) *Atkinson v. Ritchie* (1809), 10 East, 530; 103 E.R. 877; 41 Digest 464, 2955.
- (13) *Spence v. Chodwick* (1847), 10 Q.B. 517; 16 L.J.Q.B. 313; 9 L.T.O.S. 101; 11 Jur. 872; 116 E.R. 197; 12 Digest (Repl.) 459, 3427.
- (14) *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115; 6 B. & S. 100; 35 L.J.Q.B. 74; 13 L.J. 602; 2 Mar. L.C. 283; 122 E.R. 1134, Ex.Ch.; 12 Digest (Repl.) 418, 3243.
- (15) *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589; 53 L.J.Q.B. 156; 50 L.T. 194; 32 W.R. 761, C.A.; 12 Digest (Repl.) 444, 3370.
- (16) *Belfour v. Weston* (1786), 1 Term Rep. 310; 99 E.R. 1112; 31 Digest (Repl.) 280, 4141.
- (17) *Morrison v. Chadwick* (1849), 7 C.B. 266; 6 Dow. & L. 567; 18 L.J.C.P. 189; 13 Jur. 638; 137 E.R. 107; sub nom. *Morris v. Chadwick*, 13 L.T.O.S. 208; 31 Digest (Repl.) 272, 4052.

- A (18) *Bayton v. Morgan* (1888), 22 Q.B.D. 74; 58 L.J.Q.B. 139; 53 J.P. 166; 37 W.R. 148; 5 T.L.R. 99, C.A.; 31 Digest (Repl.) 445, 5720.
- (19) *Whitehall Court, Ltd. v. Ettlinger*, [1920] 1 K.B. 680; 89 L.J.K.B. 126; 122 L.T. 540; 36 T.L.R. 80; 64 Sol. Jo. 147; 30 Digest (Repl.) 489, 1333.
- B (20) *Moule v. Garrett* (1872), L.R. 7 Exch. 101; 41 L.J.Ex. 62; 26 L.T. 367; 20 W.R. 416, Ex.Ch.; 31 Digest 458, 5846.
- (21) *Brown v. Royal Insurance Co.* (1859) 1 E. & E. 853; 28 L.J.Q.B. 275; 33 L.T.O.S. 134; 5 Jur. N.S. 1255; 7 W.R. 479; 120 E.R. 1131; 12 Digest (Repl.) 432, 3316.

Also referred to in argument :

- C *Davies v. Underwood* (1875), 2 H. & N. 570; 27 L.J.Ex. 113; 30 L.T.O.S. 154; 22 J.P. 8; 3 Jur. N.S. 1223; 6 W.R. 105; 157 E.R. 235; 31 Digest (Repl.) 372, 5030.
- Brewster v. Kidgell* (1698), Carth. 438; Comb. 466; Holt, K.B. 175, 669; 1 Ld. Raym. 317; 5 Mod. Rep. 368; 12 Mod. Rep. 166; 1 Salk. 198; 2 Salk. 615; 3 Salk. 340; 90 E.R. 853; 31 Digest (Repl.) 324, 4597.
- D *Salmon v. Smith* (1669), 1 Wms. Saund. 202; 1 Lev. 263; T. Raym. 175; 85 E.R. 205; sub nom. *Samon v. Smith*, 2 Keb. 470; sub nom. *Sammon v. Smith*, 1 Sid. 405; 31 Digest (Repl.) 276, 4099.
- Smith v. Raleigh* (1814), 3 Camp. 513, N.P.; 31 Digest (Repl.) 276, 4100.
- Auriol v. Mills* (1790), 4 Term Rep. 94; 100 E.R. 912; 31 Digest (Repl.) 443, 5698.
- E *Ludford v. Barber* (1786), 1 Term Rep. 90.
- Hornby v. Houlditch* (1737), Andr. 40.
- Wainwright v. Ramsden* (1839), 5 M. & W. 602; 1 Ry. & Can. Cas. 714; 9 L.J.Ex. 120; 151 E.R. 255; 31 Digest (Repl.) 278, 4117.

Appeal by the tenant from an order of the Court of Appeal (BANKS and YOUNGER, L.J.J., ATKIN, L.J., dissenting) varying a judgment of BAILHACHE, J., reported [1920] 3 K.B. 608, in an action tried by him without a jury.

F By a lease dated Mar. 25, 1898, the respondent (the landlord) let to the tenant a dwelling-house known as Offley Holes House, with the gardens, stables, and cottages belonging thereto, and some fourteen acres of adjoining land, for a term of twenty-one years expiring at Lady Day, 1919. The lease contained a full repairing covenant and a covenant to keep and deliver up the premises in the state of repair required by that covenant. It also contained a covenant on the part of the lessee to insure against damage by fire in a sum of £7,000 at least in the joint names of lessor and lessee, and, if the premises were destroyed or injured by fire during the term, forthwith to lay out all moneys to be received in respect of such insurance in re-building, repairing, and reinstating the premises, and in case such moneys were insufficient for the purpose to provide the deficiency out of his own moneys. Major Richardson, the last assignee of the term, had died some time prior to Jan. 28, 1918, and the house had been for some time unoccupied. On that date a notice was served upon one of the executors of Major Richardson by the competent military authority, acting under reg. 2 of the Defence of the Realm (Consolidation) Regulations, 1914, taking possession of "all that private dwelling-house and premises situated and known as Offley Holes Preston near Hitchin in the county of Hertford together with the garden and appurtenances belonging thereto as from Jan. 28, 1919." No evidence was given as to how much of the premises comprised in the lease could be said to be included in this notice, or as to how much of them were in fact occupied by the military authorities. The use to which the premises were put was to house German prisoners employed in agriculture, but no evidence was given as to what portion of the premises were used for that purpose, or whether any part of the mansion house itself was so used. The farm buildings, cottages, and land remained in the occupation of Major Richardson's executors, who raised no

objection to the action of the military authority. The landlord, on the other hand, vigorously protested, but without effect. On Feb. 12, 1919, while the military authorities were still in possession, the dwelling-house was destroyed by fire. The military authorities did not go out of possession until June 4 following. At the time of the fire the premises were insured, but in the name of Major Richardson's executors only, and apparently for a somewhat less amount than that required by the covenant in the lease. After the fire nothing was done in the way of re-building the house. The military authorities repudiated any liability for the fire. The insurance company was not prepared to admit any liability either to the appellant, as his name did not appear in the policy, or to Major Richardson's executors, as they were disputing their liability under the covenants in the lease. Major Richardson's executors contended that in the events which had happened they were discharged from any liability under the covenants of the lease. The tenant was made aware of the position taken up by the other interested parties, but the writ in the present action was issued without requiring him formally to accept or repudiate liability upon the covenants in the lease. The writ was issued on June 6, 1919, and the claim was for a quarter's rent due at Lady Day, 1919, and for damages for breaches of the covenants to repair and to deliver up in repair and to insure and to lay out the insurance money in re-building. Third-party notices were served upon the assignees of the term, and by an order dated Nov. 11, 1919, the executors of Major Richardson were given leave to undertake the defence of the action in the name of the tenant. At the trial the parties agreed that the learned judge should deal with the question of liability only, leaving all questions of damage to be dealt with in some subsequent proceeding. BAILHACHE, J., held that the tenant had not been evicted by title paramount, and that he must, therefore, pay the last quarter's rent, but that the action of the military authorities was equivalent to an act of State, which prevented, and, therefore, excused, the performance of the covenants. The landlord appealed, and the tenant cross-appealed, to the Court of Appeal who held that the tenant was liable under the covenant to repair and reinstate and directed an inquiry into damages. The tenant's cross-appeal, which related to his liability to pay the last quarter's rent, was dismissed, the tenant appealed.

Leslie Scott, K.C. and *Foa* for the tenant.

Maugham, K.C. and *C. M. Pitman* for the landlord.

Their Lordships took time for consideration.

Mar. 21. The following opinions were read :

LORD BUCKMASTER [after stating the facts].—The War Office are not parties to this litigation, and it has, therefore, been impossible to ascertain what is the suggested explanation—I might indeed say excuse—for the attitude which they adopted; but I find it difficult to understand upon what ground or by what authority any government is at liberty, having dispossessed a man of his property, to refuse responsibility for its restoration when their occupation ceased. The result of their action was inevitable. The lessor took proceedings out of which this appeal has arisen, claiming against the lessee the amount due for non-payment of rent and damages for breaches of covenant, and it necessarily followed that, whatever might be the result of that litigation, the entire cost must be thrown upon one of two completely innocent parties.

The controversy before this House is, however, confined to the question of liability as between lessor and lessee. Rent was paid to the lessor by the lessee up to and including the rent due on Dec. 25, 1918. The quarter's rent, therefore, up to Mar. 25, 1919, and the damages for breach of covenant, are the questions which now come forward for determination. The defences to these two branches of the claim vary. As to the first, the lessees say that they were evicted by title paramount or by authority which they could not withstand, while, as to the second,

A in addition to the former defence, they rely on the allegation that they were prevented by superior force from performance of the covenant, and, therefore, ought to be excused for its breach. In my opinion, both these defences fail. There has been throughout the case some confusion as to what constitutes a defence on the ground of eviction by title paramount. It is assumed that this means by an act which the lessee could not control, but there is no trace of such a doctrine in any of the authorities. Eviction by title paramount means an eviction due to the fact that the lessor had no title to grant the term, and the paramount title is the title paramount to the lessor which destroys the effect of the grant, and with it the corresponding liability for payment of rent. Eviction by the lessor himself is with equal reason an answer to the claim upon the covenant, and in such cases, as JERVIS, C.J., said in *Upton v. Townend* (1) (17 C.B. at p. 64), the question is whether there is an eviction in fact, and whether the lessor was a party to it, and, again, later on in the judgment, he repeats :

"It is for the jury to say whether the act was done by the landlord, and whether it was done with the intention of depriving the tenant of the enjoyment."

D But mere eviction has never been held to have this effect. In *Paradine v. Jane* (2) eviction of a tenant took place by the action of Prince Rupert, and it was held that this did not relieve the lessee of liability. The force was undoubtedly superior force, but it was said that it was unlawfully exercised. I am unable to see that this constitutes any real distinction; the question for consideration is how far the lessor has been deprived of the benefit of his covenant, and an act lawfully or unlawfully done, for which he is in no way responsible, cannot, in my opinion, have that effect, unless the covenant can be construed as excluding the event. It was, however, urged that there were authorities to the contrary effect, and the one chiefly relied upon was *Baily v. De Crespigny* (3). In that case a lessor had demised property and had entered into a covenant with the lessee that neither he nor his assigns would permit building upon a paddock which fronted the demised premises. A railway company acquired this paddock under compulsory powers, and erected upon it urinals and other unsightly buildings. The lessee claimed damages against the lessor for breach of his covenant, and it was held that he could not recover. I cannot help thinking that the real ground of this decision is to be found in the passage of HANNEN, J. (L.R. 4 Q.B. at p. 185), where he says that if an event happens of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened. The learned judge then points out that the word "assign" in the covenant under which alone the lessor could have been made responsible was intended to have a definite meaning, which was that the lessor was able to foresee and guard against the liabilities which might arise from his contract. The legislature, by compelling him to part with his land to a railway company, whom he could not bind, had created a new kind of assign which was not in the contemplation of the parties. I find myself unable to think that this has any application to a covenant entered into by a lessee, either to pay rent or to deliver up the premises. He has bound himself to do these definite acts, and it is no excuse that circumstances have happened which he could not control which had prevented his compliance. Acts which would have been done by any sub-tenant or assignee of the premises might equally have been beyond his control, and it does not seem to me to make any difference that in the one case he would have allowed the occupation which resulted in the loss, and in the other he did not.

Mills v. East London Union (4) affords little assistance, for the point was never argued. The real decision was as to the liability of a lessee for damages on a repairing covenant between February, 1866, when a notice to treat was served upon

him, and Nov. 21, 1870, when the lease was assigned to the union. It was held that liability continued up to the later date, but KEATING, J. (L.R. 8 C.P. at p. 84) points out that the "parties have agreed that the intermediate time between the date (Nov. 2 and 21, 1870) and the commencement of the action is of no importance," and DENMAN, J. (L.R. 8 C.P. at p. 86) adds that "The argument has been confined to the question whether the liability enured until Nov. 21, 1870." These statements remove the weight which would otherwise attach to the dictum of GROVE, J., that where possession passed to the railway company, "the defendants would not effect the repairs and their liability ceased." This case was subsequent to *Harding v. Metropolitan Rail. Co.* (5), and DENMAN, J., supports his judgment by that authority.

But when examined, *Harding v. Metropolitan Rail. Co.* (5) appears to me fatal to the present tenant's contention. In that case a railway company had acquired, under their compulsory powers, certain leasehold premises, and the lessee required that they should accept an assignment of the property with the usual indemnity. This they refused to do. LORD HATHERLEY, in deciding that they must be compelled to accept such an assignment, used the following words (7 Ch. App. at p. 159):

"As to the abstract principle, I have no doubt that a company purchasing a leasehold interest, as this company had done, is bound to take an assignment and bound to enter into an engagement to indemnify the vendor against the covenants of his lease. It would be a grievous injustice to take property by force from a man who is unwilling to dispose of it, and to leave him subject to a substantial rent of £600 a year and to the other covenants and conditions of his lease."

That statement has never been questioned, has formed the foundation of procedure in similar circumstances from that date, and, to my mind, is an accurate statement of the true position in such circumstances; but if it be accepted, the tenant's defence in the present case is taken away, for it establishes the proposition that the lessee remains liable on his covenants in the lease, notwithstanding that he has been deprived of the term by the exercise of legal powers. In the present instance it is true that there was no assignment, nor do I think that the War Office intended to acquire the leasehold interest. They entered into possession by virtue of the authority conferred by the Defence Act, 1842, which empowered them to take, and compelled them to pay compensation as therein provided: *A.-G. v. De Keyser's Royal Hotel* (6). The preliminary conditions and restrictions imposed by this Act were removed by the Defence of the Realm Act, 1914, and the regulations made thereunder, but though this prevented the necessity for formal vesting by assignment or otherwise in the Crown, it left untouched the liability to make the compensation. It is, therefore, closely analogous to, though it is not identical with, the compulsory acquisition by a railway company, and there is no principle upon which it is possible to hold that the lessee remains liable to the lessor in the one case and not in the other.

The first part of the argument, therefore, must fail. The second, so far as it is not embraced in the first, depends upon a slightly different contention. It is said that performance had become impossible, and that, consequently, it must be excused. Impossibility of performance is a phrase which is often lightly and loosely used in connection with contractual obligations. There is no question here of performance having become impossible owing to its prohibition by statute, because no law has prohibited performance, although enjoyment of the premises has been interfered with by legal powers. Further, I entertain grave doubt whether there was impossibility in fact at all. At any rate, I am satisfied that a terminable occupation by military authorities during an uncertain time, for which compensation may prove to be recoverable, constitutes no answer to the obligations of this repairing covenant. It thus becomes unnecessary to express any opinion

A about the covenants to insure and to apply the insurance moneys in reinstating the premises. For the reasons given, however, I think that this appeal must fail, and should be dismissed with costs.

B **LORD ATKINSON.**—It is, I think, essential, in this case, to ascertain clearly and bear in mind what is the true nature and extent of the right or interest which the officers of the Crown have acquired, in trust for His Majesty, in a portion of the appellant's leasehold property, and what are the conditions upon which that right or interest has been acquired. This is all the more necessary because the case has been occasionally treated in argument as if the Crown had become the compulsory assignee of all the estate and interests of the appellant in the portion of the leasehold property occupied by these officers.

C Section 18 of the Defence Act, 1842, provides that the several persons and bodies therein mentioned are thereby, respectively, empowered to contract and agree with the officers of the Crown, therein described, for the absolute sale of any of the hereditaments therein mentioned, or for the grant of a lease thereof, either for a term of years certain or for such period as the exigency of the public service may require, and to convey, surrender, demise or grant the same to such officers in trust for His Majesty. By s. 19 of this same statute it is provided that in case the persons or bodies in the previous section mentioned shall decline to treat or agree with the aforesaid officers, or refuse to accept the sum of money offered by the latter for the absolute sale of any of the before-mentioned hereditaments, or such annual rent or sum for the hire thereof, either for a term certain, or for such period as the exigencies of the public service may require, then these principal officers are, by the authorities named, to be put into immediate possession of the hereditaments or premises which they desired to acquire or hire, and a jury are to be empanelled to find the compensation to be paid either for the absolute purchase of the property desired to be acquired or for the "possession or use" thereof as the case may be. The Defence of the Realm Act, 1914, and the regulations made thereunder, have altered the machinery by which this compensation is to be fixed, and this entry into possession effected, but as was decided in the *De Keyser's Hotel Case* (6), they have not altered the nature of the interest which can be acquired in trust for His Majesty, nor taken away or abridged the right of the owners of that interest to receive compensation, which it must, I think, be assumed will in every case be adequate. The lease under which the appellant held this property was not in any degree, or to any extent invalidated. G His title to the hereditament demised was not in any way weakened. He had, no doubt, been inconvenienced by being deprived of the occupation or use of portion of the demised premises, but nothing could less resemble in cause, character or nature eviction by title paramount, than what has happened.

H Eviction by title paramount has in *Neale v. Mackenzie* (7) been, by LORD DENMAN, defined or described to be an eviction by a title superior to the title of lessor and lessee against which neither is able to make a defence. *Doe d. Vaughan v. Meyler* (8) is a good example of an eviction from a portion of demised property by title paramount, requiring the rent reserved to be consequently apportioned. There, a lessor who was seized in fee of certain lands, and was also entitled as tenant for life to other land, with a leasing power, leased both I lands, reserving one entire undivided rent for the two. On his death the lease of the land of which he had been tenant for life was impeached on the ground that it was not warranted by the power. It was held void, and the rent was apportioned. The decision was rested on the following passage in COKE ON LITTLETON 148b.

"If a man be seized of two acres of land one in fee and the other in tail and makes a lease for life or for years of both acres and the issue in tail avoided the lease the rent will be apportioned."

The only reason for this rule of law apparently is that the lessee loses, not merely the use and enjoyment of the portion of the demised land from which he has been evicted, but all right and title to any estate or interest in it, although the rent reserved issued out of it together with the residue of the leasehold. I cannot find any case in which the rent reserved by a lease was apportioned simply because the lessee was deprived of the use and enjoyment of a portion of the demised property, his title to that portion not being either assailed, displaced or weakened. On the contrary, the trend of the authorities is, I think, strongly against any such a result. A
B

Counsel on behalf of the appellant based his argument on the question of apportionment of the rent reserved on the ground that his client was by an act of supreme authority deprived of the enjoyment of portion of his leasehold property. But a man who is the lessee of his dwelling-house with the grounds around it cannot be more completely deprived of the use and enjoyment of his house than if it be destroyed by fire, yet the rent reserved is not apportioned though the dwelling-house may have been the most valuable portion of the property demised, and its existence may have been the man's principal inducement to become the lessee of it: *Monk v. Cooper* (9). There, the lease contained a covenant to repair the premises except they were demolished by fire. The lessee was sued for a year's rent. He pleaded that before the beginning of the year for which the rent was claimed, the premises were, against his will, destroyed by fire, that they were not re-built by the plaintiff during the whole year for which the rent was demanded, and that, therefore, the defendant had not had any enjoyment of the premises. This plea was demurred to and was held to be bad, the court observing (2 Stra. at p. 763): C
D
E

"If the defendant has an injury, he will have his remedy; but he cannot set it off against the demand for rent. The plaintiff must have judgment."

Marshall v. Schofield (10) is to the same effect. The same principle applies if the demised property be carried away by an extraordinary flood: *Carter v. Cummins* (11); or be occupied by an alien enemy: *Paradine v. Jane* (2). It was in this later case resolved by the court that if the lessee covenanted to repair a house though it be burned by lightning, he ought to repair it. Where a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; but where the law creates the duty or charge and the party is disabled to perform it without any default on him, and he has no remedy over there the law will excuse him. The rent is a duty created by the parties upon the reservation, and had there been a covenant to pay it there had been no question, but the lessee must have made it good notwithstanding the interruption by enemies, for the law would not protect him beyond his own agreement no more than in the case of reparation. F
G

In *Atkinson v. Ritchie* (12), LORD ELLENBOROUGH is reported to have said (10 East. at p. 533): H

"The rule laid down in the case of *Paradine v. Jane* (2) has been often recognised in courts of law as a sound one; i.e., that when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may; notwithstanding any accident of inevitable necessity; because he might have provided against it by his contract." I

This statement of the law is quoted with approval by LORD DENMAN, C.J., PATTESON and WIGHTMAN, JJ., in *Spence v. Chodwick* (13). In *Lloyd v. Guibert* (14), WILLES, J., delivering the judgment of the Exchequer Chamber (L.R. 1 Q.B. at p. 121), expresses approval of it, stating the rule to be that by the common law of England a person who expressly contracts absolutely to do a thing not naturally impossible is not excused from non-performance because of being prevented by the act of

A God or the King's enemies, and in *Jacobs v. Crédit Lyonnais* (15), BOWEN, L.J., when delivering the judgment in the Court of Appeal, said (12 Q.B.D. at p. 603):

B "Now one of the incidents which the English law attaches to a contract is that (except in certain excepted cases as that of common carriers and bailees, of which this is not one), a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by vis major."

C He then cites *Paradine v. Jane* (2) in support of this proposition. This last-named case must, therefore, I think, be recognised as one of well-established authority. On this principle it was in *Belfour v. Weston* (16) decided that a lessee who covenants to pay rent and repair with express exception of casualties by fire, is liable on the covenant for rent, though the premises were not re-built by the lessee after notice. Again, another instance in which the lessee is deprived of the enjoyment of part of the demised property, is where the lessor tortiously evicts the lessee from that part. The effect of such an act was dealt with in *Morrison v. Chadwick* (17) and it was decided that such an eviction creates a suspension of the entire rent during its continuance, but that the tenancy is not thereby put an end to, nor is the tenant thereby discharged from the performance of his covenants other than the covenant for the payment of rent. COLTMAN, J., in delivering a judgment of the court, made the following observations, which are rather applicable to this case. He said (7 C.B. at p. 283):

E "It may be urged that the landlord may have evicted the tenant from the possession of a part of the demised premises, the possession of which part was the main inducement to him to enter into the covenants of the lease, and therefore that he ought no longer to be bound by them. But it is to be borne in mind, that, in addition to the suspension of the rent, the lessee may maintain his action against the lessor for the eviction; by which, it is to be presumed, he will obtain satisfaction for the inconvenience or loss which he may suffer."

F The last case to which I think it necessary to refer relates to the consequences of a surrender by the lessee of a part of demised premises. It is *Baynton v. Morgan* (18). In this case the plaintiff demised to the defendant by deed a house and premises for twenty-one years at a rent of £50 per annum. The lessee covenanted in the ordinary way for himself, his executors, administrators and assigns to pay this rent. He assigned to a third party all his interest in a portion of the premises. This third party, with the assent of the lessee, surrendered to the landlord the part so assigned to him. The quarter's rent of £12 10s., due September, 1887, not having been paid, the lessor sued the lessee to recover the quarter's rent less £1, the apportioned part of the rent in respect of the portion of the premises surrendered. The lessor agreed at the trial to take judgment for the quarter's rent less the £1, namely £11 10s. It was held that the liability of the lessee on the covenant was not extinguished by the surrender of part of the premises, that he still remained liable thereon, at all events for the amount claimed. On the appeal, LORD ESHER, after having pointed out that nothing in the nature of an eviction by the lessor (which is something wrongfully done by him) had occurred, said (22 Q.B.D. at p. 79):

I "It is no doubt true that the original consideration which in fact existed . . . has been altered, for such consideration being the enjoyment of the premises for a certain term, a part of the premises is no longer enjoyed, and that being so, it is suggested that the whole of the rent can no longer be payable and the covenant cannot be apportioned, and therefore has gone altogether. It is not necessary under the circumstances to decide whether there can be an apportionment for the purpose of the covenant or not. If there cannot be an apportionment the result must be that the defendant must pay the whole.

I am not prepared to say that if there cannot be an apportionment, therefore, the covenant is wholly gone. There does not appear to me to be any authority for that proposition, and in fact, so far as they go, the authorities to which our attention has been called seem to trend the other way. It is only necessary for the purposes of this case to decide that the surrender of part of the premises by the assignee did not destroy the covenant altogether."

FRY and LOPES, L.JJ., concurred in these views. It cannot, in my view, make any difference in the result if the lessee be deprived of the use and enjoyment of his premises by the exercise by the Crown of powers conferred upon it by statute.

I am clearly of opinion on principle and authority that the rent payable by the tenant in this case was not on the fact apportionable, that the tenant is bound by the covenants of his lease, and that, save with one exception, to be presently dealt with, he is not excused from performing them. I think that *Whitehall Court, Ltd. v. Ettlinger* (19) was rightly decided. In *Moule v. Garrett* (20) it was decided by the Exchequer Chamber that an assignee of a lease by mesne assignment is bound to indemnify the original lessee against the breach of a covenant in the lease committed during his own tenancy, and by LORD HATHERLEY in *Harding v. Metropolitan Rail. Co.* (5), that the rule that the purchaser of a leasehold is bound to indemnify his vendor against the rent and covenants contained in the lease applies equally to a compulsory purchase made by a railway company under the Lands Clauses Act.

It is in the next place necessary to consider what is the effect of the events which have happened on the four following covenants by the lessee contained in the lease under which he held. (i) The covenant to keep the demised premises in repair during the continuance of the lease. (ii) The covenant to surrender peaceably the demised premises well and substantially repaired and maintained at the expiration or sooner determination of the demise. (iii) The covenant to insure and keep insured against loss or damage by fire the messuage and buildings for a sum of £7,000 at least by the Phoenix Fire Office, or any other fire office, to be approved in writing by the lessor in the joint names of the lessor and the lessee. (iv) The covenant that in case the messuage and buildings should at any time during the term be destroyed or damaged by fire to forthwith lay out all moneys received in respect of the insurance on re-building, repairing and reinstating in a good and substantial manner the said messuage and buildings, and in case the aforesaid moneys should be insufficient, to make good the deficiency out of the appellant's own moneys. The military authorities continued in possession till June 4, 1919. The lease had expired by effluxion of time on Mar. 25 previous, and the dwelling-house was burned down about six weeks before the latter date, namely on Feb. 15, 1919. In March, 1918, a survey of the state of the premises was made on behalf of the landlord, and a schedule of dilapidations was prepared and served upon the tenant on June 13, 1918. A fresh policy of insurance was effected on the premises by the tenant in his own name alone, not, as required by the covenant, in the joint names of the lessor and lessee, and the amount of the policy has been received by the tenant. During the year 1918, the tenant, in performance of his covenant in the lease, paid the rent reserved. It was contended on his behalf (i) that the possession by the military while it lasted rendered the performance of the covenant to repair impossible; (ii) that for the same reason the performance of the covenant to yield up the premises in good repair at the expiration of the term was rendered impossible; (iii) that for the like reasons the performance of the covenant to lay out all the moneys (admittedly received) in respect of the insurance, in re-building and reinstating the premises was rendered impossible, and that, therefore, in each of the three cases the performance of these covenants by the tenant was excused. No doubt, the last-mentioned covenant provides that, if the premises should be damaged by fire during the term, the lessee shall forthwith lay out the moneys to be received in respect of

A the insurance in re-building and reinstating the premises, but, in my opinion, that does not mean that the tenant is bound to anticipate the receipt of the amount of the policy of insurance, and out of his own proper moneys at once begin to build, and continue to defray the cost of building, till the premises have been reinstated, but merely that he is on receipt of the moneys in respect of the insurance forthwith to expend it in reinstating the premises. If these moneys B should prove insufficient, the tenant is then, but only then, burdened with any payment towards reinstating the premises. The liability of the tenant for the breach during the term of the covenant to repair in respect of the portion of the premises of which the military officers had not taken possession has, I understand, been settled by the parties.

C Of course, if there has been any similar breach of covenant in relation to the portion of the premises taken possession of on behalf of the Crown, the tenant will be liable for it. Owing to the date at which the fire took place and the fact that the military officers were in occupation on behalf of the Crown till June 4, 1919, I assume that it was physically impossible for the tenant to have delivered up the possession of the demised premises as he was by the covenant bound to do in good repair and condition at the termination of the lease of Mar. 25, 1919. D But the covenant to deliver up in repair was absolute in form, and, having regard to the decision in *Brown v. Royal Insurance Society* (21), I have the very gravest doubt whether the performance of this covenant can be excused by reason of that impossibility. As to the covenant to reinstate, the case is, in my view, altogether different. It has been contended that the tenant was bound to perform this covenant before the termination of the lease, which of course was physically E impossible. I don't know upon what principle of law this contention is based. The language of the covenant, which is "to lay out the moneys to be received in respect of the insurance in reinstating the premises," appears to me to be quite inconsistent with any such construction of it. No particular time is definitely fixed within which this covenant is to be performed. To hold that such a F covenant must be performed while the lease is current would reduce it in many instances to a mere mockery. Dwelling-houses and mansion-houses cannot be re-built by magic, and without that, it would be quite impossible to reinstate them, if they were consumed by fire, within perhaps a few months of the end of the term of the leases under which they were respectively held. Besides, it has not been indicated at all what is to become of the policy of insurance in such a case. Is the amount of it to be paid, or is the company which may have been G receiving the premium for years to be entitled to refuse to pay it? And if it should be paid, but not till a day or a week after the term has ended, how is the money to be disposed of? In the present case the policy of insurance dated July 13, 1918, was paid, but at a date which is not stated. In any case where the fire occurred near the end of the term of the lease and the insurance company contested its liability, even unsuccessfully, the amount of the policy would not be received H during the term. The very fact that the lessor was in this case insisting on the performance by the lessee of the latter's covenant to reinstate, necessarily implied that so far as he was concerned he consented to the lessee and his authorised agents entering on the demised premises to commence and complete that work. It is much to be regretted, I think, that the appellant did not apply to the War I Department for a like consent and permission, but, after all, the military only remained in occupation till June 4.

We have not been referred to any authority establishing that in such a case as this reinstatement must take place within the term of the lease. Nor have I myself been able to find one. Until I have been referred to it, or discovered it, I fear that I shall remain of opinion that in the case of an ordinary covenant to reinstate a covenantor shall, in the absence of words expressly or impliedly fixing a time for the performance of his covenant, have what is a reasonable time in all

the circumstances of the case for its performance, whether, in the case of a leasehold, that time extends beyond the term or the contrary. A

The landlord cannot, however, have redress both in meal and in malt. He cannot be entitled to have a dwelling-house re-built for him under the covenant to reinstate, and to recover under the covenant to deliver up in repair damages because possession of the premises leased has been delivered up without any house upon them. Thus the two covenants overlap, and for practical purposes have, to a great extent, been merged in one another. If the dwelling-house and other buildings be reinstated the damages recoverable for the breach of the other covenant must necessarily be trifling. One has some difficulty in dealing with the covenant to insure in the joint names of the lessor and lessee. The tenant has, undoubtedly, broken this, and the lessor has, undoubtedly, lost the control over the money paid by the insurance company, which he would have had had the covenant been performed. But if the money which has been received be properly applied to the reinstatement of the premises, he would not suffer any pecuniary loss by the breach of covenant, and as to control, counsel for the tenant stated that his client was quite willing to be declared a trustee of this money for himself and the lessor. Owing to the controversy which has arisen as to what took place at the trial, it is evident a matter for arrangement between the parties, but if no arrangement be arrived at, I think that the appellant is liable for this breach of contract. For the foregoing reasons I am clearly of opinion that this appeal fails, and should be dismissed with costs. B C D

LORD SUMNER and **LORD WRENBURY** concurred in the judgment of **LORD BUCKMASTER**. E

LORD CARSON. -I think that this appeal fails. It is greatly to be regretted that two subjects, equally innocent of any wrongful act, should be driven to undertake this very expensive litigation by events arising out of the action of the military authorities, over which they had no control, and for which they were not responsible. F

Appeal dismissed.

Solicitors: *C. E. W. Ogilvie; Corbould, Rigby & Co.*

[*Reported by W. C. SANDFORD, Esq., Barrister-at-Law.*]

A

RUTHERFORD v. RICHARDSON

[HOUSE OF LORDS (Viscount Birkenhead, Lord Dunedin, Lord Atkinson, Lord Sumner, Lord Wrenbury and Lord Carson), July 20, 21, 24, November 3, 1922]

[Reported [1923] A.C. 1; 92 L.J.P. 1; 128 L.T. 399; 39 T.L.R. 42;
67 Sol. Jo. 78]

B

Divorce—Appeal—Court of Appeal—Appeal against decree nisi—Reversal of finding of adultery—Jurisdiction to rescind decree nisi and grant decree of judicial separation.

C

A wife obtained a decree nisi dissolving her marriage with her husband on the ground of his cruelty to her and his adultery with the intervener. The intervener appealed, the wife being respondent to the appeal, but the husband was not a party thereto. The Court of Appeal reversed the finding of adultery, rescinded the decree nisi, and granted the wife a judicial separation on the ground of cruelty, a finding as to which they affirmed.

D

Held: by VISCOUNT BIRKENHEAD, LORD DUNEDIN, LORD ATKINSON and LORD SUMNER, when the Court of Appeal decided that a decree of dissolution of marriage brought before it for review ought not to have been pronounced, its duty was to pronounce the right decree in the cause and not merely to limit its conclusion to the issue raised between the parties, e.g., in the present case whether there was proof of the husband's adultery with the intervener, and, therefore, the Court of Appeal had jurisdiction to rescind the decree for divorce and make the decree for judicial separation.

E

LORD WRENBURY dissented on the ground that the decree nisi could not be rescinded at the instance of the intervener in the absence of the husband who was affected by it.

Decision of Court of Appeal, [1922] P. 144, affirmed.

F

Notes. Incurable insanity is now a ground for divorce: see s. 1 (1) (d) of the Matrimonial Causes Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 388).

Considered: *Croker v. Croker*, [1932] All E.R. Rep. 622. Distinguished: *Spring v. Spring and Jiggins*, [1947] 1 All E.R. 886; *Sapsford v. Sapsford and Furtado*, [1954] 2 All E.R. 373; *Dennis v. Dennis*, [1955] 2 All E.R. 51. Referred to: *Russell v. Russell*, [1924] A.C. 687; *Sandler v. Sandler, Davies and Johnstone*, [1934] P. 149; *Thompson (Otherwise Hulton) v. Thompson*, [1938] 2 All E.R. 727.

G

As to appeals in matrimonial causes see 12 HALSBURY'S LAWS (3rd Edn.) 420 et seq., and for cases see 27 DIGEST (Repl.) 592 et seq.

Appeal by Alice Maud Mary Rutherford, the wife of Norman Cecil Rutherford, against the judgment of the Court of Appeal rescinding the decree nisi for dissolution of marriage granted to her by BRANSON, J., on her petition for divorce on the ground of the husband's cruelty and adultery with the intervener.

H

On Aug. 16, 1920, the petition was personally served on the husband, and on Aug. 23 he entered an appearance, but filed no answer and did not defend the suit. He was at that date, and still was, detained as a criminal lunatic, having been found guilty of murder but insane. On Feb. 11, 1921, an order was made giving Amy Elizabeth Richardson leave to intervene in the suit. The petition was heard before BRANSON, J., and on June 14, 1921, he delivered a reserved judgment, finding that the husband had been guilty of cruelty to the petitioner and had committed adultery with the intervener, and that the intervener had committed adultery with him, and he granted the petitioner a decree nisi for the dissolution of her marriage. The intervener appealed. On Nov. 29 and 30, 1921, the appeal was heard by LORD STERNDALÉ, M.R., WARRINGTON and ATKIN, L.J.J., who reversed the finding of adultery against the intervener and reserved judgment with regard to the effect of such finding on the decree nisi. The court further directed that in pursuance of s. 5 of the Matrimonial Causes Act, 1860 [see now

I

Matrimonial Causes Act, 1950, s. 10 (1)], all papers herein be sent to the King's Proctor, and directed that the King's Proctor should argue the question whether the decree nisi pronounced on June 14, 1921, should be deemed valid and effectual in law, notwithstanding the finding of the Court of Appeal on hearing of the appeal of the intervener. On Feb. 13, 1922, the Attorney-General appeared for the King's Proctor and argued the effect of the finding on the decree nisi, and the Court of Appeal then rescinded the decree nisi and granted a decree of judicial separation on the ground of cruelty. The petitioner appealed on the grounds that (i) the respondent (the husband) never appealed from the decree nisi; (ii) the evidence proved that the husband had committed adultery; (iii) the medical evidence was insufficient in view of the facts proved to rebut the natural inference that adultery had been committed; (iv) there was evidence to justify the finding of BRANSON, J., that adultery had been committed; (v) that the judge who heard and saw the witnesses was better able to judge the weight that should be given to such evidence than a tribunal which had not seen or heard the witnesses. The intervener submitted that the judgment of the Court of Appeal was right and should be affirmed.

Sir John Simon, K.C., Bayford, K.C., Cotes-Preedy, and R. Bush James, for the appellant.

W. H. Cartwright Sharp and C. B. Guthrie for the respondent, the intervener.

Their Lordships took time for consideration.

Nov. 3. The following opinions were read.

VISCOUNT BIRKENHEAD.—This case is by no means free from difficulty, but I have myself formed a clear view upon it. I find it convenient to examine, in the first place, the various legal difficulties which have been the subject of argument at the Bar, and then to address myself to the facts which, after such examination, appear to be relevant and important.

It is, of course, a commonplace that the decision of legal issues must depend on rigid rules of evidence necessarily general in their scope, and very likely, therefore, in individual applications, to present an appearance of artificiality and even of inconsistency. But there must be a general code, for otherwise the admission or rejection of evidence would depend upon the caprice of an individual judge—*quot judices tot sententiæ*—and it is undoubtedly true that it is even better that some slight degree of injustice should be done in an individual case than that the courts should abandon the sure anchorage of an established rule. Such an injustice may occasionally occur, for it is almost a commonplace that a sensible and experienced citizen, in the course of reaching a decision whether a certain thing has or has not happened, will allow his judgment to be influenced by evidence which would not be accepted in the courts. Indeed, I have no doubt that judges of the highest eminence reach conclusions in their own private and domestic affairs by reference to a standard more relaxed than that which the courts allow. But this is not the point, or, at least, it is not the whole point. The issues pronounced upon by courts in criminal, and, indeed, in civil, matters are attended with such decisive consequences that the adoption in matters of evidence of a standard of admissibility which is so cautious as to be meticulous may not only be defended, but is in fact essential. Applying these considerations to the kind of difficulty which has often presented itself in the Divorce Court, we find that a case which has sometimes been ignorantly derided is in fact both logical and defensible. For instance, A, a husband, brings against his wife, B, a petition for divorce on the ground of her adultery with a named co-respondent, C. There is some independent evidence against both B and C, but not sufficient to justify a positive adverse conclusion. B, however, makes full confession. Here the court may very reasonably pronounce a decree against B, while concluding that the matter is not established as against C. Indeed, to hold otherwise would be to lay it down that

A the admission or confession of B, which may be quite untrue and may be induced by hidden and private motives, is to be treated as good evidence against C; and so it happens that the court may quite reasonably conclude that it is proved that B has committed adultery with C, but not that C has committed adultery with B. The law of England does not technically recognise a verdict of "Not proven," but substantially this is the nature of the verdict which in the circumstances B supposed exculpates C. But still another case requires consideration. Supposing that the case presented, and the impression made by C upon the court, is of such a character that the judge, summarising his impression, may record it in this way: "Not only has C convinced me that I must give him the benefit of the doubt, because the admissions are not evidence as against him, but he has positively satisfied me that no adultery was ever committed at all between the parties charged." Such a conclusion, if plainly reached by a judge or a jury, makes it impossible for any purpose whatever to act upon the admissions which would otherwise have been a trustworthy guide in relation to him or her who made them; for in the case supposed that which has been proved by C is, as LORD DUNEDIN suggested in the course of the argument, absolutely destructive of the case made by B, and, therefore, (inter alia) of the admissions upon which, and upon which D alone, that case depended.

E These observations apply equally to a converse case, where A is the wife petitioning for divorce, B being the husband, the respondent, and C the intervener. But here, owing to the fact that adultery is not the only issue*, a fresh question of law arises. Assume, as before, that, in spite of B's admissions, a conclusion is reached which, so far as adultery is concerned, is destructive of the case against B. But assume also an issue of cruelty raised by A admitted by B, and determined in favour of A. Here the proper order is a decree of judicial separation, and no one doubts the power of a judge on this hypothesis to make such a decree in the respondent's absence. Next, suppose that the judge has pronounced a decree of dissolution of marriage, and that the Court of Appeal, on a re-hearing, finds that the adultery on which the decree was based never took place. It has been F urged in the present case that on that hypothesis the Court of Appeal has no power to decree judicial separation. But what is the difference? The Court of Appeal has before it a petition founded on adultery and cruelty, in which the case for adultery has been destroyed, and the case for cruelty has been proved and still stands. In my view it is open to the Court of Appeal to pronounce the decree of judicial separation which the judge, if he had determined the other issue G differently, might have pronounced in the first instance. By not defending either issue B had put it out of his power to prevent the judge from making a decree of judicial separation in his absence. How can B reasonably complain if also in his absence the same decree is made by the Court of Appeal?

H The foundation of these rules is the fact that marriage is more than a simple contract between spouses, or a thing which they can dissolve by their own acts and choice, even consensually. It is a status, involving other and more important interests; and the statutory power of dissolving it depends in this case on the court's being satisfied that adultery in fact took place. A court, not satisfied of that fact, irrespective of the persons concerned in admitting or denying it, ought not to pronounce a decree, which can only be pronounced on the footing that adultery has occurred. Similarly, when a Court of Appeal decides that a decree of dissolution, I duly brought before it for review, ought not to have been pronounced its duty must be to pronounce the right decree in the whole matrimonial cause, and not merely to limit its conclusion to the issue raised between the parties, who have been served with notice of the appeal, or have chosen to appear before it. Otherwise the

* At the date of this decision a wife, to obtain a divorce, had to prove adultery by the husband, coupled with another matrimonial or other offence. The Matrimonial Causes Act, 1923, enabled her to present a petition on the ground of adultery alone. See now Matrimonial Causes Act, 1950, s. 1.

result would be that, by the voluntary act of a party in regard to the conduct of legal proceedings, a competent court might allow a marriage to be dissolved on the footing that adultery had occurred, while declaring that no such adultery had really taken place. If this is to be the law, it is for the legislature to enact it, for courts are interpreters of the law, and cannot so conclude. A

A further point of law has been raised whether by reason of s. 9 of the Supreme Court of Judicature Act, 1881, the decision of the Court of Appeal is final, in which case the present appeal does not lie, or whether the case falls within the exception as being an appeal from a decision on a petition for dissolution of marriage. The appeal is from the order of the Court of Appeal, and that order is the decision refusing a decree on a petition for dissolution of marriage. In my opinion, the case falls clearly within the exception, so that your Lordships have jurisdiction to deal with the case. [See now Supreme Court of Judicature (Consolidation) Act, 1925, s. 27 (2), and Administration of Justice (Appeals) Act, 1934, s. 1 (1), the effect of which is to give an appeal to the House of Lords from the Court of Appeal on a grant or refusal of a decree for divorce, but with the leave of the Court of Appeal or the House.] B C

Such being, in my judgment, the law applicable to the case, I turn to consider the facts. The story is in its main lines simple and short. So far as the petition is founded on cruelty, the charge is made out without any possibility of doubt. So far as it is based upon adultery, it depends upon one isolated act, charged in the petition as having been committed by the respondent with Amy Richardson "about the end of August or the beginning of September, 1916, at Frith Manor, Mill Hill, in the county of Middlesex." There is no doubt that, upon the day, or rather upon the night, on which it is alleged that adultery took place, the husband visited the room of the intervener with the intention of committing adultery with her. It is alleged by the intervener that no act of adultery took place on that or any other occasion; and there is no evidence against the intervener on this point, except statements which she is alleged to have made to certain persons, both before and after the visit to her room. There is, or it is suggested that there is, evidence against the husband of such an act on that occasion, based upon his admissions to third parties. This evidence is not available against the intervener; but as the admissions formed an integral part of the narrative, I shall set them out also. [His Lordship reviewed the evidence, and continued.] The sum of the whole evidence seems to me clearly to establish Miss Richardson's innocence of the charge. I use this expression with deliberation. The English law, admitting no verdict of "Not proven," may leave the respondent and the co-respondent or intervener in the unfortunate position that the court has discharged them from the proceedings, whilst leaving him or her under the implication that they have escaped only through lack of sufficient evidence. This, in my view, is not the case here. I think that the evidence is such as wholly to acquit Miss Richardson of any guilt. I am of opinion that the appeal fails, and I so move your Lordships. D E F G H

LORD DUNEDIN.—I concur.

LORD ATKINSON.—I concur. I entirely agree with the opinion which has been read by the noble and learned lord on the Woolsack.

LORD SUMNER.—I concur.

LORD WRENBURY.—The trial judge (BRANSON, J.), upon the wife's petition against the husband (Miss Richardson intervening), granted a decree nisi for divorce and condemned the husband and the intervener in costs. The intervener appealed, naming the wife only as respondent. The husband was no party to the appeal. Upon that appeal the Court of Appeal made an order, consisting of two parts. They allowed the appeal, and (i) dismissed the intervener from the suit with costs, and (ii) rescinded the decree nisi and made a decree for judicial separation. From this order the wife appeals to this House. The husband, having been no I

A party to the order in the Court of Appeal, is again, of course, no party to the present appeal. I must deal separately with the two points in the order of the Court of Appeal.

As regards the former, the wife has argued in support of the order made by the trial judge against the intervener, and has asked that the order of the trial judge be restored. The majority of your Lordships are of opinion that the wife fails upon this point, and have given reasons for holding that the accusation against the intervener of adultery with the husband is not made out. I cannot myself concur in this opinion. I think that the order of the trial judge ought to be restored; but I do not go on to give the grounds for my opinion, and for this reason—namely, that, inasmuch as the majority of your Lordships acquit the intervener in the matter, it could serve no useful purpose to marshal facts to show the contrary, and it would be, I think, an unnecessary hardship upon the intervener for me to do so.

As regards the question of jurisdiction of this House, having regard to s. 9 of the Judicature Act, 1881, to entertain an appeal upon a matter in dispute between the petitioner and the intervener, inasmuch as the result so far will be to dismiss the appeal, the question of jurisdiction to entertain it does not arise, and I say nothing about it.

As regards the latter question, it seems to me that, upon an appeal by the intervener to the Court of Appeal to which the husband was not a party, the order nisi, which was one between husband and wife only, could not be varied or altered in any way. It is impossible, I think, that that order should be discharged at the instance of a party who is not affected by it, and in the absence of a party who is. The intervener had no concern with that part of the order which consisted of the order nisi. Marriage is a contract; that contract is by statute capable of being determined. But a contract between A and B cannot be determined at the instance of C, and in the absence of A. Upon the appeal of the intervener, and in the absence of the husband, the Court of Appeal had, I think, no jurisdiction to rescind the order nisi or to substitute an order for judicial separation. This part of the order under appeal ought, I think, to be reversed. If and when application is made for an order absolute, the court may have to regard considerations which seem to me at present irrelevant.

LORD CARSON.—I am of opinion that there was ample evidence given before BRANSON, J., to support the conclusion at which he arrived, if he believed such evidence. He had the advantage of seeing the witnesses and hearing their examination and cross-examination, and was, therefore, in a much better position to judge of their credibility than we are; an observation which applies with special force in such a case as the present. Personally I see no reason for dissenting from the opinion which he formed. LORD WRENBURY has stated that, inasmuch as the majority of your Lordships acquit the intervener in the matter, it could serve no useful purpose to marshal facts to show the contrary, and that it would be an unnecessary hardship upon the intervener to do so. I am prepared to fall in with this view, and for the reasons which he has stated, and I certainly have no desire to detract from the acquittal which the intervener has obtained. As the majority of your Lordships have come to the conclusion that no adultery was committed, no necessity arises for considering separately the evidence properly admissible against the husband and the intervener respectively, and, upon such a conclusion being arrived at, I think that it was the duty of the Court of Appeal and is the duty of this House to rescind the decree nisi, having regard to the terms of s. 29 and 30 of the Matrimonial Causes Act, 1857.

Appeal dismissed.

Solicitors: Withers, Benson, Currie, Williams & Co.; F. H. Richardson, Bradford.

[Reported by W. C. SANDFORD, Esq., Barrister-at-Law.]

GREAT NORTHERN RAIL. CO. v. L.E.P. TRANSPORT AND DEPOSITORY, LTD.

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.J.J.), May 18, 19, 22, 24, 1922]

[Reported [1922] 2 K.B. 742; 91 L.J.K.B. 807; 127 L.T. 664;
38 T.L.R. 711]

Carriage of Goods—Common carrier—Railway—Right to limit liability—Variation of full liability by special condition—General lien and power of sale—Special contract—Implied warranty that goods not dangerous—Warranty by forwarding agents.

A common carrier is entitled to limit his liability by a special condition, and, if he does so, and the special condition is not inconsistent with his position as a common carrier, that position is not affected. He remains a common carrier save in so far as he has varied his liability by special contract. In every case the terms of the special contract must be considered to determine whether they are such that the whole of the common carrier's liability is excluded or whether it has only been varied in a certain particular. There is nothing in a provision for a general lien and a power of sale which is inconsistent with the duty of a common carrier to be an insurer except so far as his risk is limited.

Where a carrier gives notice that he will not carry a certain class of goods as a common carrier, but carries such goods under a special contract, there is an implied warranty by the consignor, or by a forwarding agent dealing with the goods, that the goods are not dangerous, but are fit to be carried. This is so in the case of a railway company who are under a statutory duty to carry the goods.

Notes. Considered: *Ludditt v. Ginger Coote Airways, Ltd.*, [1947] 1 All E.R. 328. Referred to: *Burley, Ltd. v. Stepney Corpn.*, [1947] 1 All E.R. 507.

As to the liability of a common carrier and variation of it see 4 HALSBURY'S LAWS (3rd Edn.) 141 et. seq., and as to the carriage of dangerous goods see *ibid.* pp. 171–173. For cases see 8 DIGEST (Repl.) 17 et seq., 148–150, and as to railways p. 170 et seq.

Cases referred to:

- (1) *Johnson v. Midland Rail. Co.* (1849), 4 Exch. 367; 6 Ry. & Can. Cas. 61; 18 L.J.Ex. 366; 13 L.T.O.S. 305; 154 E.R. 1254; 8 Digest (Repl.) 13, 53.
- (2) *M'Manus v. Lancashire and Yorkshire Rail. Co.* (1859), 4 H. & N. 327; 28 L.J.Ex. 353; 33 L.T.O.S. 259; 24 J.P. 4; 5 Jur. N.S. 651; 7 W.R. 547; 157 E.R. 865, Ex.Ch; 8 Digest (Repl.) 63, 416.
- (3) *Latham v. Rutley* (1823), 2 B. & C. 20; 3 Dow & Ry. K.B. 211; 1 L.J.O.S.K.B. 225; 107 E.R. 290; 8 Digest (Repl.) 17, 89.
- (4) *Shaw v. York and North Midland Rail. Co.* (1849), 13 Q.B. 347; 6 Ry. & Can. Cas. 87; 18 L.J.Q.B. 180; 13 L.T.O.S. 43; 13 Jur. 385; 116 E.R. 1295; 8 Digest (Repl.) 145, 928.
- (5) *York, Newcastle and Berwick Rail. Co. v. Crisp* (1854), 14 C.B. 527; 23 L.J.C.P. 125; 23 L.T.O.S. 78; 18 J.P. 361; 18 Jur. 606; 2 W.R. 428; 139 E.R. 217; sub nom. *Crisp v. York and Newcastle Rail. Co.*, 2 C.L.R. 1357; 8 Digest (Repl.) 146, 936.
- (6) *Hughes v. Great Western Rail. Co.* (1854), 14 C.B. 637; 23 L.J.C.P. 153; 18 Jur. 1001; 2 C.L.R. 1360; 139 E.R. 262; 8 Digest (Repl.) 41 243.
- (7) *Peek v. North Staffordshire Rail. Co.* (1863), 10 H.L. Cas. 473; 3 New Rep. 1; 32 L.J.Q.B. 241; 8 L.T. 768; 9 Jur. N.S. 914; 11 W.R. 1023; 11 E.R. 1109, H.L.; 8 Digest (Repl.) 60, 394.
- (8) *Wyld v. Pickford* (1841), 8 M. & W. 443; 10 L.J.Ex. 382; 151 E.R. 1113; 8 Digest (Repl.) 15, 73.

- A** (9) *Crouch v. London and North Western Rail. Co.* (1854), 14 C.B. 255; 7 Ry. & Can. Cas. 717; 23 L.J.C.P. 73; 22 L.T.O.S. 224; 18 Jur. 148; 2 W.R. 166; 2 C.L.R. 188; 139 E.R. 105; 8 Digest (Repl.) 5, 9.
- (10) *Baxendale v. Great Eastern Rail. Co.* (1869), L.R. 4 Q.B. 244; 10 B. & S. 212; 38 L.J.Q.B. 137; 17 W.R. 412, Ex.Ch.; 8 Digest (Repl.) 54, 360.
- B** (11) *Smith & Sons v. London and North Western Railway* (1918), 88 L.J.K.B. 742; 120 L.T. 273; 35 T.L.R. 99; 8 Digest (Repl.) 7, 23.
- (12) *Sutcliffe v. Great Western Rail. Co.*, [1910] 1 K.B. 478; 79 L.J.K.B. 437; 101 L.T. 930; 26 T.L.R. 205; 54 Sol. Jo. 198, C.A.; 8 Digest (Repl.) 64, 429.
- C** (13) *Bamfield v. Goole and Sheffield Transport Co., Ltd.*, [1910] 2 K.B. 94; 79 L.J.K.B. 1070; 103 L.T. 201, C.A.; 8 Digest (Repl.) 149, 940.
- (14) *Brass v. Maitland* (1856), 6 E. & B. 470; 26 L.J.Q.B. 49; 27 L.T.O.S. 249; 2 Jur. N.S. 710; 4 W.R. 647; 119 E.R. 940; 8 Digest (Repl.) 148, 938.
- (15) *Sheffield Corp'n. v. Barclay*, [1905] A.C. 392; 74 L.J.K.B. 747; 93 L.T. 83; 69 J.P. 385; 54 W.R. 49; 21 T.L.R. 642; 49 Sol. Jo. 617; 3 L.G.R. 992; 10 Can. Cas. 287; 12 Mans. 248, H.L.; 26 Digest 228, 1782.
- D** (16) *Lane v. Cotton* (1701), 1 Salk. 17, 143; Holt, K.B. 582; Carth. 487; 5 Mod. Rep. 455; 11 Mod. Rep. 12; 12 Mod. Rep. 472; 1 Com. 100; 1 Ld. Raym. 646; 91 E.R. 17, 133; 8 Digest (Repl.) 17, 83.
- (17) *Acatos v. Burns* (1878), 3 Ex.D. 282; 47 L.J.Q.B. 566; 26 W.R. 624, C.A.; 39 Digest 439, 684.
- E** (18) *The Winkfield*, [1902] P. 42; 71 L.J.P. 21; 85 L.T. 668; 50 W.R. 246; 18 T.L.R. 178; 46 Sol. Jo. 163; 9 Asp. M.L.C. 259, C.A.; 3 Digest 111, 357.
- (19) *Shaw v. Great Western Rail. Co.*, [1894] 1 Q.B. 373; 70 L.T. 218; 58 J.P. 318; 42 W.R. 285; 10 T.L.R. 176; 38 Sol. Jo. 154; 10 R. 85, D.C.; 8 Digest (Repl.) 56, 364.
- (20) *Scaife v. Farrant* (1875), L.R. 10 Exch. 358; 44 L.J.Ex. 234; 33 L.J. 278; 23 W.R. 840, Ex.Ch.; 8 Digest (Repl.) 41, 244.
- F** (21) *Austin v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1852), 10 C.B. 454; 7 Ry. & Can. Cas. 300; 21 L.J.C.P. 179; 19 L.T.O.S. 256; 16 Jur. 763; 138 E.R. 181; 8 Digest (Repl.) 146, 933.
- (22) *Southcote's Case* (1601), 4 Co. Rep. 836; 76 E.R. 1061; sub nom. *Southcot v. Bennet*, Cro. Eliz. 815; 8 Digest (Repl.) 20, 105.
- G** (23) *Mors v. Slew* (1672), 2 Keb. 866; 3 Keb. 72, 112, 135; 2 Lev. 69; 1 Mod. Rep. 85; T. Raym. 220; 1 Vent. 190, 238; 84 E.R. 548, 601, 624, 638; 8 Digest (Repl.) 20, 106.
- (24) *Gibbon v. Paynton* (1769), 4 Burr. 2298; 98 E.R. 199; 8 Digest (Repl.) 20, 107.
- (25) *Dickson v. Great Northern Rail. Co.* (1886), 18 Q.B.D. 176; 56 L.J.Q.B. 111; 55 L.T. 868; 51 J.P. 388; 35 W.R. 202; 3 T.L.R. 200, C.A.; 8 Digest (Repl.) 7, 25.
- H**

Appeal and Cross-Appeal from an order of HORRIDGE, J.

I On May 23, 1919, the defendants delivered to the plaintiff company twenty carboys described as containing "oxigine water" to be carried by the plaintiffs by railway from Tilbury Docks to Luton and there delivered to Messrs. T. Lye & Sons. The contents of the carboys consisted of a strong corrosive solution known as "Perhydrol." While the goods were being carried by the plaintiffs, the contents of ten of the carboys escaped and damaged six bales of felt hats which were being carried in the same wagon. The owner of the hats sued the plaintiffs for £569 13s. 4d. in respect of the damage; the plaintiffs admitted liability and paid into court £399 6s. 3d. which was accepted; the costs were taxed at £37 13s. 11d., a total of £437 0s. 2d., which sum the plaintiffs paid to the plaintiff in that case. The plaintiffs contended that the defendants impliedly warranted that the carboys

were fit to be carried by railway in the ordinary way and were not dangerous, and impliedly agreed to indemnify the plaintiffs against any damages or liabilities for which they might become liable in consequence of the goods being unfit to be so carried and being dangerous. The defendants contended that the plaintiffs were not common carriers, but received the carboys under a special contract, that there was in the circumstances no implied warranty that the goods were not dangerous, that they did not agree to indemnify the plaintiffs against any loss which might be caused, and that the plaintiffs were not liable to the owner of the hats for the damage alleged to have been caused to them. **HORRIDGE, J.**, held that the solution had, in fact, caused serious damage to the hats; that there was an implied warranty by the defendants that the goods were fit to be carried by railway which had been broken by the defendants who would have been liable in damages, but in the circumstances and in the absence of any proof of negligence, the plaintiffs were not liable to the owner of the hats in respect of the damage to them, and so they were not entitled to recover from the defendants in respect of the payment made to him. The plaintiffs appealed and the defendants cross-appealed.

F. T. Barrington Ward, K.C., and *W. Bruce Thomas* for the plaintiffs.

Eustace Hills, K.C., and *R. A. Willes* for the defendants.

BANKES, L.J.—This action presents the curious and unusual feature of a railway company, contrary to all previous experience, contending that it was a common carrier of certain goods, by reason of the fact that a special contract had been entered into with the consignor in reference to the carriage of them.

The action was brought by the railway company to recover damages in the following circumstances. The defendants delivered to the company twenty carboys, containing what was described as oxigine water, to be carried by them from Tilbury Docks to Luton. Another consignor had delivered to the railway company a quantity of felt hats, to be carried between the same places. Both sets of goods were placed in the same van. During the journey the stoppers came out of some of the carboys, and a quantity of the liquid was spilt, came into contact with the felt hats, and seriously damaged them. It appeared from the evidence that the liquid contained in the carboys was really a solution of hydrogen peroxide, which at one time passed under the description of oxigine or oxygenated water. As commercially known in this country, it was a harmless liquid giving off not more than twenty volumes of oxygen, and in the general Railway Classification of Goods it is included among the non-dangerous articles when packed, among other ways, "in glass carboys (with an effective vent in the bung) containing not more than 130 lbs." The liquid which was in fact consigned was something very different from the ordinary hydrogen peroxide solution; it gave off 100 volumes of oxygen, and was, in fact, a highly destructive liquid if it came into contact with goods such as the felt hats in question. It is apparently known as perhydrol. Moreover, it was not securely packed, nor packed in accordance with the classification, in that the liquid, owing to its strength, had affected the wood forming the stoppers, and so closed up any vent-holes there may have been, with the result that the gas accumulating in the carboys forced out the stoppers, the string tying them having also been affected by the liquid. The railway company paid the consignees of the felt hats for the damage done to the hats during transit in consequence of their coming into contact with the liquid and they sought in this action to recover from the defendants the amount which was paid upon the ground of a breach of an implied warranty that the liquid was fit to be carried by railway and was not dangerous. **HORRIDGE, J.**, found all the facts in favour of the railway company, and he also held that there was an implied warranty as alleged. But he decided against the railway company upon the ground that they were not common carriers of felt hats, and, there being no negligence on their part, they were not liable for the damages they had paid to the owners of the hats so that the payment must be regarded as a voluntary payment not recoverable at law. Both parties appealed—the railway

A company on the ground that they were common carriers of the hats; the defendants upon the ground that no warranty with reference to the liquid should be implied.

The facts with regard to the special contract were as follows. The defendants are forwarding agents, and in June, 1918, an arrangement was come to in reference to their using their own consignment notes. The arrangement is contained in a letter of June 18 and a document accompanying it. The letter is from the

B defendants to the Great Northern Railway Co., and is in these terms :

"Dear Sir,—We have been in correspondence with Mr. Painter, secretary of the Metropolitan Conference of the Railway Companies, with respect to our using our own consignment notes instead of those supplied by your company, and send you herewith form of agreement duly signed. Will you kindly acknowledge receipt."

C The agreement was in these terms :

"We agree that the private form of consignment note in use in our business will be deemed to incorporate the terms of the railway company's standard form of consignment note applicable to the particular traffic at the rate charged."

D That was signed on behalf of the defendants. The railway company's consignment note, which is referred to in the agreement, and which was used in reference to both the carboys and the felt hats, was in these terms. It is headed with the name of the Great Northern Railway Co., and it is described as being "Consignment note for goods to be carried at carrier's risk." Then there is the request

E to receive and forward, as per address and particulars on note, the under-mentioned goods, on the conditions stated on the other side, and that is followed by the signature of the sender or his representative. Then there is a note requiring the senders fully and accurately to describe the contents of the packages. On the back there are the general conditions, sixteen in number, and a general note, to which I will refer later. HORRIDGE, J., held that, in these circumstances the felt hats

F were carried by the railway company under a special contract, and not as common carriers.

We have had an elaborate argument on this point from counsel on both sides. There is this essential peculiarity about this case which differentiates it from any other that I know of on its facts. The railway company assert that they are common carriers of felt hats. The chief goods manager of the railway company

G was called to prove that fact, and in the judge's note his evidence is summarised thus: "Company hold themselves out as ready to carry traffic from the docks to any place on their system as tendered to them. With the exception of certain goods, which are specified, the company hold themselves out as willing to carry with the liability of a common carrier. The exceptions are specified at page No. A on the first sheet of the General Railway Classification of Goods by merchandise train, para. 4. We do, in carrying goods, which are otherwise at carrier's risk, as a common carrier, attach conditions which are known as general conditions. These appear on the documents attached to the agreement of June 18, 1918." In

H cross-examination the witness left the question with regard to the carboys in a somewhat obscure position, but he did, I think, clearly maintain the position with regard to the felt hats—namely, that the railway company held themselves out

I as common carriers of those goods on the terms contained in the printed conditions of the special contract. The question for decision on this point is, therefore, this: Are the railway company, as a matter of law, entitled to take up this position? The argument for the railway company is that a common carrier has always, subject to certain statutory limitations, been entitled to limit or define his liability, and that the special conditions do not offend against any statutory provision, and are not inconsistent with the position of a common carrier. On the other hand, the defendants contend that, both upon the facts and upon principle and authority,

the fact that a railway company enters into a special contract such as the present one negatives the existence of the common law relationship of common carrier and customer, and, further, that the terms of the special contract in the present case are inconsistent with the existence of that relationship. A

In these circumstances, it is, I think, necessary to consider somewhat carefully what the law on this point is. No question arises whether the special contract complies with statutory requirements. It is properly signed, and the reasonableness of its provisions is not in question. One can consider the question apart, therefore, from any statutory complication. The common carrier is a creation of the common law. His rights, his obligations, his very existence, depend on the common law. He comes into existence by his own volition, and, until Parliament clipped his wings, he could limit his liability of his own volition. I refer, in reference to this point, to two cases: *Johnson v. Midland Rail. Co.* (1) in which there is a dictum of PARKE, B., and *M'Manus v. Lancashire and Yorkshire Rail. Co.* (2), where there is a statement of the law by ERLE, C.J. In *Johnson v. Midland Rail. Co.* (1), PARKE, B., says, in reference to a common carrier (4 Exch. at p. 372): B C

"At common law a carrier is not bound to carry for every person tendering goods of any description, but his obligation is to carry according to his public profession . . . So also in the case of a carrier; and [his obligation] arises from the public profession which he has made. A person may profess to carry a particular description of goods only, for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from the intermediate places. Still, until he retracts, every individual (provided he tenders the money at the time, and there is room in the conveyance) has a right to call upon him to receive and carry the goods according to his public profession." D E

In *M'Manus v. Lancashire and Yorkshire Rail. Co.* (2) ERLE, C.J.—who was the dissenting judge, and, therefore, it is not his conclusion that I refer to, but some of his statements of the law—says (4 H. & N. at p. 336): F

"In my opinion, the defendants are right; and in support of that opinion I propose to distinguish the duties of carriers arising by mutual consent of carrier and customer, expressed in contracts defining the work to be done, the terms, and the responsibility; from the duties of carriers arising by law from the profession of carrier and from a bailment to carry. These latter are duties which may attach where there is no express contract, or be superinduced beyond the terms of any contract, and as they do not originate without the will of the person making the profession or taking the bailment, so by that will, without the will of the customer, they may be qualified and regulated in many respects. . . . This right to qualify the duty of receiving, according to terms and conditions fixed by the carrier alone, comprises the right to qualify the common law duty of insuring safety, a duty which has given rise to much discussion, and is now for our consideration . . . the law was that a carrier had some power of imposing conditions on his common law liability, by special acceptance, without the assent of the customer to those conditions; and that the carrier had, besides, the same free capacity to make any lawful contracts as other subjects possess." G H I

Assuming, therefore, that the law is clear that a common carrier may (a) confine his profession of acting as common carrier to certain specified articles, and (b) may, within certain limits, define and limit his obligations with regard to the articles which he professes to carry, how do the authorities stand with regard to his position if he attempts to do the latter? Counsel for the defendants have referred to a number of cases which they rely on to establish the proposition that the making of a special contract of carriage by a common carrier ousts his common law

A position as common carrier with all its advantages and liabilities: see *Latham v. Rutley* (3); *Shaw v. York and North Midland Rail. Co.* (4); *York, Newcastle and Berwick Rail. Co. v. Crisp* (5); and *Hughes v. Great Western Rail. Co.* (6). I am not able to accept the argument founded on these cases. They all appear to me to turn on technical questions of pleading. On the other hand, the elaborate review of the law by BLACKBURN, J., in his advice to the House of Lords in *Peck v. North Staffordshire Rail. Co.* (7), supporting the view of PARKE, B., in *Wyld v. Pickford* (8), and of MAULE, J., in *Crouch v. London and North Western Rail. Co.* (9), decided in 1854, seems to me to indicate plainly that a common carrier can limit his liability by contract while still retaining his common law character of common carrier. PARKE, B., said, in *Wyld v. Pickford* (8) (8 M. & W. at p. 458), that if the price be not paid the carrier may

C “refuse to carry upon the terms imposed by the common law, and insist upon his own; and if the proprietor of the goods still chooses that they should be carried, it must be on those terms; and probably the effect of such a contract would be only to exclude certain losses, leaving the carrier liable as upon the custom of England for the remainder.”

D MAULE, J., in *Crouch v. London and North Western Rail. Co.* (9), said (14 C.B. at p. 293):

“A common carrier who gives no notice limiting his responsibility, is an insurer; but if he gives notice that he will contract only to a limited extent, and with respect to articles, of a given value, he ceases to be an insurer beyond that, though in all other respects he remains a common carrier.”

E If, therefore, a common carrier may lawfully make a contract defining or limiting his responsibility, in every case where such a contract is made the question must be whether the contract so made is one qualifying the common law obligation, or one substituting a purely contractual obligation for the common law obligation. KELLY, C.B., puts the point exactly in *Bazendale v. Great Eastern Rail. Co.* (10). F That was a bill of lading case, and the Chief Baron said (L.R. 4 Q.B. at p. 255):

G “The last and chief objection that is made is, that when we look at this contract by the bill of lading, it is clear that this is not a contract at all with the defendants in their capacity of common carriers; that the terms of the contract are such as to obliterate and destroy their character of common carriers, and to show it is upon the particular contract contained in the bill of lading alone that the goods are carried, in which their capacity of common carriers could form no part, and in which that character could be no element in the consideration and construction of the contract.”

When one comes to apply the test to the present case, it becomes apparent what an unusual case it is. If there was no evidence in the case but the special contract, and the railway company were protesting that they were not common carriers, it would be impossible, in my opinion, upon those materials alone, to hold that the railway company were common carriers of the felt hats.

H Although I do not agree with the view expressed by ROCHE, J., in *Smith & Sons v. London and North Western Railway* (11) that the notice in that case amounted to a notice that the railway company would not accept the goods as common carriers as was done in *Sutcliffe v. Great Western Rail. Co.* (12), in the present case the railway company are protesting that they propose to carry these goods as common carriers, and that there is nothing in the special contract which, to use KELLY, C.B.'s, language, “obliterates and destroys their character as such.” The form of the notice contained at the foot of the special conditions needs to be referred to, for it calls attention to certain classes of goods which the railway company does not profess to carry as common carriers. The fact that felt hats are not included in these classes supports the evidence of the witness who was called to say that the railway company profess to carry them as common carriers. With regard

to the conditions themselves, the one chiefly relied upon by the defendants was No. 9, relating to the general lien and the power of sale. Given the fact that the railway company hold themselves out as common carriers of this class of goods, and accept the full responsibility of common carriers in respect of them, there is nothing in these provisions which, in my opinion, having regard to the special character of a railway company's business, is so inconsistent with the relationship of common carrier and customer as to compel the court to hold that the profession of the company that they do carry as common carriers is an empty phrase and that in the eye of the law they have obliterated the common law relationship entirely and substituted for it a merely contractual one. For these reasons I am unable to agree with this part of the judgment of HORRIDGE, J., and I think that the railway company were under a legal liability to the consignee of the felt hats to pay damages for the injury they sustained.

There remains the question of the cross-appeal, in which the defendants are contending that there was no implied warranty on their part that, to use the language of the statement of claim, "the goods were fit to be carried by the railway and were not dangerous." HORRIDGE, J., has found, and the defendants do not dispute, that the goods were, in fact, dangerous. But they say they were only forwarding agents, and had no knowledge or means of knowledge of that fact. The defendants admit that, if the railway company were common carriers of these carboys, there would be an implied warranty on their part that the carboys were fit to be carried, and did not contain a dangerous liquid. But their case is, first of all, that the railway company were not common carriers of the carboys, and, not being common carriers, there was no implied warranty on their part in reference to the character of the goods. I agree with the contention that the railway company were not common carriers of the carboys, and I do so for this reason. The railway company, by their notice which was attached to the special conditions, do not profess to carry dangerous goods as common carriers, and these being dangerous goods in fact, there is no profession by the railway company that they carry such goods as common carriers. We start, therefore, with this, that the railway company were not common carriers of these carboys of liquid. But the argument for the defendants, that there is no implied warranty because the railway company were not carrying as common carriers, rests upon this. They say that the warranty is only to be implied in the case of common carriers, the reason being that a common carrier is not, at common law, entitled to inquire as to the contents of a package entrusted to him to carry, and it is because of that provision of the common law that the warranty is implied. In support of that contention, they rely mainly on *Bamfield v. Goole and Sheffield Transport Co., Ltd.* (13). With submission to that argument, I do not agree with it, and I do not think the cases upon which the respondents rely support the argument.

Bamfield v. Goole and Sheffield Transport Co., Ltd. (13) was a case in which there was no dispute as to the relationship of common carrier and customer, and the passages in the judgments of the majority of the court, upon which the defendants rely, were passages which accepted that fact, and commented on it. But I do not think that either the judgments themselves, or the cases upon which the judgments rested, warrant the contention that the implied warranty only attaches in cases where the relationship is that of common carrier and customer. First of all, the case, which was relied on by both the learned lords justices who formed the majority of the court, was *Brass v. Maitland* (14), and that was a case of a general ship. I do not think it can be contended that, in its essentials, the case of a person putting up a ship as a general ship, and a person professing to carry as a common carrier, are identical, or, indeed, in their nature, the same. It was a case of a general ship, and what the court had to decide was whether there was any implied warranty in a case where a person, taking advantage of the invitation which follows from the putting up of a ship as a general ship, sent goods

A on board without disclosing their nature, they being, in fact, dangerous goods, LORD CAMPBELL, C.J., says in his judgment that the casks contained chloride of lime, and appeared outwardly sufficient to keep in their contents during the voyage, and to be sufficiently packed. He goes on to say (6 E. & B. at p. 481):

B "I agree with the contention of the defendants' counsel that this count does not charge any fraud, or show any deceitful act or concealment which can be considered the foundation of an action purely ex delicto. But I think that it states facts which show that ex contractu a duty was cast on the defendants, that they have violated this duty, and that, the violation of this duty having caused loss to the plaintiffs, a good cause of action is disclosed. Where the owners of a general ship undertake that they will receive goods and safely carry them and deliver them at the destined port, I am of opinion that the shippers undertake that they will not deliver, to be carried on the voyage, packages of goods of a dangerous nature, which those employed on behalf of the shipowner may not on inspection be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a dangerous nature. . . . Although those employed on behalf of the shipowner have no reasonable means during the loading of a general ship to ascertain the quality of the goods offered for shipment, or narrowly to examine the sufficiency of the packing of the goods, the shippers have such means; and it seems much more just and expedient that, although they were ignorant of the dangerous quality of the goods or the insufficiency of the packing, the loss occasioned by the dangerous quality of the goods and the insufficient packing should be cast upon the shippers than upon the shipowners."

E The other learned judges agree, and the decision was that there was an implied undertaking on the part of the shippers of goods on board a general ship that they would not deliver to be carried on the voyage packages of a dangerous nature, which those employed on behalf of the shipowner might not on inspection be reasonably expected to know to be of a dangerous nature, without giving notice.

F In *Blamfield v. Goole and Sheffield Transport Co., Ltd.* (13), the court was divided in opinion. VAUGHAN WILLIAMS, L.J., held that

G "it was, on the shipment of such an article as ferro-silicon, the duty of the defendants to communicate to the plaintiff's husband such information as they had as to the nature of the article which they were shipping on his keel, and, therefore to describe it, not as general cargo, but by the name of ferro-silicon, and by reason of neglect of that duty they were liable."

FLETCHER MOULTON and FARWELL, L.JJ., were of opinion that

H "where a consignor who delivers goods to a common carrier, for carriage by him in performance of his common law obligation to carry, does not give notice to the carrier that the goods are dangerous, he must, unless the carrier knows, or ought to know, the dangerous character of the goods, be taken impliedly to warrant that the goods are fit for carriage in the ordinary way, and not dangerous."

I As I have already pointed out, this was a case of a common carrier, but I do not think that the judgments, for the reasons which were given to support them, were confined to the question of common carrier. For instance, FLETCHER MOULTON, L.J., after referring to *Sheffield Corpn. v. Barclay* (15), says ([1910] 2 K.B. at p. 108):

"By analogy it is, in my opinion, good law that, where a man calls upon a common carrier to carry general cargo, thus relying simply on the common law duty of the carrier so to do, and without informing the carrier of the nature of those goods so as to enable him to judge of their fitness, there is implied by law a contract by the person making the request to keep indemnified the

person having the duty against damages arising from the fact that the goods are not such that he had the right thus to call upon the common carrier to carry." A

Later on he quotes CROMPTON, J.'s, judgment in *Brass v. Maitland* (14), and FARWELL, L.J., in giving his judgment, refers to *Brass v. Maitland* (14), and says ([1910] 2 K.B. at p. 113):

"In my opinion every consignor who tenders goods to a common carrier, to be carried by him in performance of his common law obligation to carry, thereby impliedly warrants to the carrier that the goods so tendered are fit to be carried in the ordinary way and are not dangerous. This principle is not confined to carriers, but extends mutatis mutandis to all cases where anyone is entitled to call on another to perform a public duty at his instance." B C

Then he refers to *Sheffield Corpn. v. Barclay* (15) and to LORD HOLT's language in *Lane v. Cotton* (16). In my opinion, the foundation of those judgments is that where a person requests another to perform a statutory duty there is an implied promise to indemnify him, if he suffers damage in the performance of it.

In the present case, as it seems to me, the material facts are these. The defendants described these goods as oxigine water, a description which, as I find upon the evidence, is a description of something which is regarded in this country as non-dangerous. Further, I think that they tendered these goods, which, by the description they apply to them, they appear to have represented as being of a non-dangerous class, in what was apparently a safely packed condition, because, as I understand the evidence, these carboys had wooden plugs or stoppers in them. At some time there had been vents, but the vents had been closed up by the action of the contents upon the wood, and the stoppers themselves were covered with a wicker cover, so that it was impossible for anybody, by a mere examination of the outside of the carboys, to ascertain whether they were properly stoppered or not. These were the goods which were tendered. It appears to me that there must follow from the tendering of such goods to a railway company—who, even if they were not common carriers were, in respect of the goods so tendered to them under that description, under the statutory duty of offering reasonable facilities for carrying them, or, in other words, were under a statutory duty to carry them—an implied warranty to the same extent as there would be if the goods were being carried by them as common carriers. On the particular facts of this case, and having regard to the description of the goods, and the way in which they were packed when tendered, in my opinion, the implied warranty does attach, and HORRIDGE, J., was right in that view of the case. In all those circumstances, I think the result is that the appeal must be allowed with costs, and the cross appeal dismissed with costs. D E F G

SCRUTTON, L.J.—When the railway van of the Great Northern Rail. Co. arrived at Luton, it was found to contain certain bales of felt hats and certain carboys of stuff described as oxigine water, and that leakage from the carboys had done serious damage to the hats. The owners of the hats claimed on the Great Northern Rail. Co. for the damage and the railway company paid them. The railway company then claimed on the forwarding agents, who had consigned the carboys to them, for the damage done by the contents of the carboys to the hats. A great deal of evidence was taken as to whether oxigine water was or was not dangerous and whether this particular consignment was properly packed. The learned judge held that there was a warranty by the persons who shipped the carboys that they were not dangerous, that that warranty was broken, and that, therefore, the shippers of the carboys were liable for the damage sustained by the railway company. But he held that as the railway company were not common carriers of the hats they were only liable as bailees for reward for negligence, that they had not the ordinary liability of common carriers whereby they H I

A were insurers with limited exceptions, that in consequence they had no legal duty to pay the owners of the hats, and that, therefore, they could not recover the sum they had paid as damages.

Each side appealed. The shippers of the carboys contended that, whatever warranty they were under, they had not broken it, and they objected to the warranty which the learned judge had put upon them. The railway company contended,
B a contention which in this case would entitle them to recover the sum they had paid, but which in most other cases would put upon them an enormously increased liability, that they were in fact common carriers, and were, therefore, bound to pay. I personally have been extremely puzzled to know what on earth the railway company are after. There are some people who decline to admit that two and two make four, until they know what use is going to be made of the admission.
C I have been tempted not to hold that the railway company are common carriers until I know what use they are going to make of it in the future, because, as at present advised, I do not see what use they can make of it in their general business. But after all, my speculation as to what railway companies are after is futile, because their intelligence is far beyond me, and one can only decide the case as one finds it, and wait and see what happens.

D I will take what seems to me to come first logically in order, and that seems to me to be the liability of a consignor of goods in fact dangerous, when he sends them to a carrier. That has always been the subject of a difference of judicial opinion, but, in my view, we are bound by the decision of this court to take our stand on one side of the controversy, and if the controversy is to be finally settled,
E it must be done by a superior tribunal. In *Brass v. Maitland* (14), which, in my view, was not a case of a common carrier at all, but of a shipper of goods on a general ship, the shipper put on board the ship casks of stuff described as bleaching powder. In fact, the bleaching powder they contained was of a highly corrosive character, so corrosive that the casks were insufficient to hold it, and the contents ate their way through the casks and damaged other cargo, whereupon the question
F arose as to what was the obligation of a shipper, and the court was divided, as it was in the case that binds us. LORD CAMPBELL, C.J., and WIGHTMAN, J., took the view that the undertaking of the shipper was that he would not deliver packages of goods of a dangerous nature, which those employed on behalf of the shipowner may not on inspection be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a dangerous nature. Warranty
G was independent of the knowledge of the shipper. If he in fact delivered goods of a dangerous character, of such a description that when looked at they did not show that they were dangerous, and under a name which did not tell the shipowner that the goods were dangerous, there was an absolute warranty that the goods were fit to be carried, and, if damage was done because they were not fit to be carried, the consignor or shipper must pay. CROMPTON, J., dissented. I
H respectfully agree with the comments which have always been made on his judgment. Although he dissented very vigorously, he did not make it quite clear what he agreed to. But so far as one can gather from his dissent, CROMPTON, J., was of opinion that the warranty was only that if you knew the goods were dangerous you must give notice; consequently the forwarding agent, who might not know that the goods were dangerous, was not under liability. That was not
I a case of a common carrier at all. It was stated on the general obligation of a man who asks somebody else to carry goods for him which, by the nature of them, cannot be openly inspected when they are brought alongside the ship—business could never be carried on if you had to open every parcel to see what was contained in it—and if that was the position there was liability.

I should say that the subsequent case of *Acatos v. Burns* (17), in my view, was not at all inconsistent with what was decided by the majority of the court in *Brass v. Maitland* (14). It merely decided that where you tell the shipowner

what the goods are, and he has just as much chance of looking at them as you have, you do not warrant anything about them. In that particular case, maize was the consignment, and, everybody knowing that maize may sproute, the ship-owner, seeing the maize coming on board, and taking it, could not claim on the shipper on a warranty that maize would not sprout during the voyage. A

That class of question came before this court in *Bamfield v. Goole and Sheffield Transport Co., Ltd.* (13), which HORRIDGE, J., has followed. That was a case of a common carrier. The plaintiff was a keel man on the Hull River, and the defendants delivered to him a series of casks which they described as general cargo, and which in fact was ferro-silicon. From what one knows of the character of the keel man on the Hull River, if the defendants had told the plaintiff that it was ferro-silicon, he would not have been any the wiser. But as a matter of fact ferro-silicon was an extremely dangerous cargo, and one which let off very poisonous gases. The keel man and his wife were on board the keel, and the keel man died, and his wife was made very seriously ill, and she brought an action, both in her own right, and as administratrix of her husband. Again the court was divided. FLETCHER MOULTON and FARWELL, L.JJ., took the same view as the majority of the court in *Brass v. Maitland* (14), that there was an absolute warranty that the goods were safe to carry. VAUGHAN WILLIAMS, L.J., took the same view as CROMPTON, J., that the warranty was to disclose what you knew, that the defendants in this case did know that the name of the thing was ferro-silicon, and that they ought to have told the carrier that it was not general cargo, but ferro-silicon. For quite different reasons, therefore, they got at the same result—that there was liability. But the difference between the members of the court was the same difference as existed in *Brass v. Maitland* (14). In those circumstances, in my view, we are bound by the majority of the court in *Bamfield v. Goole and Sheffield Transport Co., Ltd.* (13), to hold that the forwarding agents who deliver goods in fact dangerous to the carrier, without informing him of their danger, are liable for consequent damages sustained through that danger. B C D E

It is said for the forwarding agent here: "Supposing that is so, still we are all right, because we told the railway company that this was oxigine water, which they classify as peroxide of hydrogen, and it was that, and consequently we have given warning to the railway company, and are not under any liability." That turns on a question of evidence. It appears in evidence that the ordinary peroxide of hydrogen, which is put in the same class as oxigine water, gives off ten to twenty volumes of oxygen, and, giving off such a comparatively small amount of oxygen, it is not dangerous. One knows that oxigine water is used for all sorts of purposes without any danger to the person using it, and I am satisfied on the evidence that that is the meaning which the name ordinarily conveys in England to English carriers and English shippers. But it appears that, probably for the convenience of transport, a variety of peroxide of hydrogen, known as oxygenated water, is made, which instead of giving off twenty volumes of oxygen, gives off 100 volumes of oxygen, and, in consequence of that large increase in its oxygen producing capacity, it contains sulphuric acid to the extent of about one per cent., which combination is extremely dangerous to vessels in which it is contained, and if it escapes is extremely dangerous to substances with which it comes in contact. In those circumstances it seems to me that merely saying the thing has a name which in England means a particular variety is not to give notice of its dangerous character, when, in fact, it is a particular species of an article which is very uncommon in England, and far more dangerous than is ordinarily known as that article and does not comply with the warranty. That only tells the railway company that it is a safe thing. In fact, it is a variety of the named article which is a very dangerous thing. Therefore, you do not comply with the warranty, and are liable for any damages which are sustained by the breach, and that is the F G H I

A view which the learned judge has taken on the cross-appeal, and, in my opinion, he is quite right.

Then comes the subject of the appeal—whether, in those circumstances, the railway company could or could not recover the sum which they paid the owners of the hats, which has been argued before us as turning on the question whether the railway company were common carriers of the hats or not. There is a point which has not been argued before us, and, therefore, I merely state it incidentally to show that I have not overlooked it. I am not at all sure that the question arises at all—but I had always been under the impression that a bailee of goods could recover for damage done to goods in his possession although he was not liable over to his bailor, and I thought that this court had decided that in *The Winkfield* (18). If that is the right view, the very able discussion on common carriers from the era of the Flood to which we have been treated by learned counsel, appears to me to be somewhat irrelevant. But assuming that it does become necessary to be decided, the industry of counsel has favoured us with a very large number of cases of which only a small selection are on the bench before us now, and the researches of the court during the argument have produced some more. The only comment I make on that is that it is a little hard on the judge in the court below, because if he had been favoured with the industry with which we have been favoured, I think he would have decided the case in the way in which we are going to decide it. The cases which were cited to us in this court were not cited in the court below at all.

I do not propose to go into the history of common carriers; anyone who desires to follow out the extremely complicated history of the law of England will find it in BLACKBURN, J.'s, advice to the House of Lords in *Peck v. North Staffordshire Rail. Co.* (7), and WRIGHT, J.'s, equally valuable summary in *Shaw v. Great Western Rail Co.* (19). As I understand, we begin with this. A common carrier is a person who professes himself ready to carry for everybody—he is a common carrier. The liability of a person who makes a public profession of that sort is fixed by the custom of the realm as being that he is the insurer of those goods, with certain limited exceptions. Carriers very soon began to endeavour to add limitations to their liability as insurers under the custom of the realm. One of the most common limitations that they endeavoured to introduce was the one that for packages of large value and small bulk, they should only be liable if certain conditions were fulfilled. Sometimes they tried to impose limitations by a general notice. Sometimes they tried to impose the limitation by a special contract, and their limitations got to such a stage—and particularly in the case of railway companies—that in 1854, by the Railway and Canal Traffic Act of that year, Parliament said: "All railway companies must carry; they may limit their liability by special contracts if they are signed by the consignor and if they are just and reasonable, but no terms which free the company from liability for negligence of its servants shall be taken to be just and reasonable." Continually during that process of carriers' attempting to limit their liabilities and the imposing of liabilities by Parliament, this sort of question arose: You have made a special contract limiting your liability in a particular respect—what is the rest of your liability? Is the common carrier's liability still left, except in so far as you have limited it by the contract, or is the position that as you have not accepted the full common carrier's liability, you are merely a bailee carrying for reward, and are only liable for negligence?

That class of question, in my view, arose in the most pointed form in *Baxendale v. Great Eastern Rail. Co.* (10). The Great Eastern Rail. Co. were carrying pictures from Antwerp to London, and they had a bill of lading which contained considerably larger exceptions to liability than that of common carriers under the custom of the realm. But they also wanted the protection of the Carriers Act, 1830, which only applied to common carriers. So they said: "We are common

carriers, and consequently claim the protection of s. 1 of the Carriers Act, 1830," A
to which the answer was: "You are not common carriers, because you have
entered into a special contract, and the fact that you have made a contract which
varies a common carrier's liability prevents you from being common carriers at all."
The case coming before a court of seven judges, the court, I understand, took the
view that it depends in all cases upon the special contract made, but that the mere B
fact that in one respect you have freed yourself from liability as a common carrier,
which you began with, does not necessarily or naturally involve that you cease
to be common carriers as to other matters. *Primâ facie* you remain a common
carrier, except in the respect to which you have varied your liability by special
contract. That seems to me to be the principle which we are bound to apply in
this case. There are cases where, from the nature of the special contract, the court
has inferred that all the common carrier's liability is gone. In *Scaife v. Farrant* C
(20) the phrase used was that the carrier undertook the risk of breakages (if any)
not exceeding £5 on any one article. At the present time, if you make a contract,
such as the one in *Sutcliffe v. Great Western Rail. Co.* (12) that you will only
carry at owner's risk you have excluded the common carrier's liability, which was
a carrier's risk. Therefore, in my view, you have to look in each case at the
terms of the contract to see whether they are such that the whole of the common D
carrier's liability is excluded, or whether it is only that in a certain particular
it is varied, and *primâ facie* varying the common carrier's liability in one respect
does not exclude the rest of the common carrier's liability which you are under
when you profess to carry as common carriers.

Going on with the cases for a moment before I come to the facts of the
present appeal, if I follow ROCHE, J.'s, judgment in *Smith & Sons v. London North* E
Western Railway (11) he took the view that the moment you found a special
contract in some respects inconsistent with a carrier's liability. the whole of the
common carrier's liability was gone. He was not acting upon the principle which
had been laid down in the Court of Exchequer Chamber in *Baxendale's Case* (10)
and is contained in a number of other dicta, to some of which my Lord has
referred. There is a striking dictum by MAULE, J., in *Crouch v. London and North* F
Western Rail. Co. (9) as well. You do not exclude, by mere proof of a contract
varying in some respects the carrier's liability, the rest of the carrier's liability not
touched by the contract, and if ROCHE, J.'s, judgment proceeded merely on that
one assumption, then, respectfully, I think it was an erroneous view. That is
one of the cases which the learned judge in the court below had cited to him, and
which he followed. Another case was the decision of this court in *Sutcliffe v.* G
Great Western Rail. Co. (12). In that case there was a term: "The company
will not be liable for any loss of, or damage to, or delay of goods resulting from
their not being properly protected by packing." Also it is worth while noticing
in connection with the present case that *Sutcliffe's Case* (12) started by a notice
on the part of the Great Western Railway Co. that they would not carry as common H
carriers. At any rate the first point in *Sutcliffe's Case* (12) was whether that
condition was or was not reasonable under s. 2 of the Railway and Canal Traffic
Act, 1854. The point, of course, has nothing whatever to do with the point in
this case, but incidentally, it being an appeal from the county court, the question
did come up: Are these people, who have said that they are not going to carry
as common carriers, in fact under the liability of common carriers? I
BUCKLEY, L.J., in his judgment, took the view that the point had been raised in the county
court, and it was, therefore, open for him to decide it, and he held that the com-
pany was not carrying as a common carrier, but under the obligation imposed by
the Act of 1854. KENNEDY, L.J., did not think it was open to him to consider that
point, and, therefore, did not decide it, because he did not think it was raised in
the county court. That is a case of a company not professing to act as common
carriers.

A If the principle which we are bound to apply is the principle laid down in *Baxendale v. Great Eastern Rail. Co.* (10), where are we in this case? In the first place, the chief goods manager of the Great Northern Railway Co. went into the box and said that he professed to carry hats as a common carrier. It is quite true that when he was asked about carboys, he got into such a state of oblivion that it was not clear whether he had understood what he had said before, but in quite plain terms he said he was professing to carry as a common carrier. Then a special contract was produced which, it is suggested, ousts the liability of common carriers. I, personally, attach great importance to that. It begins by saying: "To be carried at carrier's risk." It is quite true that you may say that that is opposed to owner's risk, and means that it is not on the terms of owner's risk note; but, when considering whether you have excluded the liability of common carrier, when a company produces a contract which says that they are carrying at carrier's risk, it is a very apt description of common carrier's liability, and it appears to me impossible to overlook it. Then I find that it distinguishes, in the note, between certain things which it does not undertake to carry, and I do not find anything in the general conditions—and I have read them very carefully right through—which is inconsistent with its retaining the obligation under the custom of the realm to insure, except in so far as it is modified by the sixteen conditions which are set out. If that is the true view, then there is no condition excluding the liability of the carrier for damage done to the things carried by other goods which the company would be liable for, if a common carrier, and which it has not excluded by any express, general, or special condition.

E For those reasons I think the learned judge came to a wrong conclusion, because he had not before him all the authorities which we have had before us, and which, in my view, lay down the proper principle upon which we are to approach this question, namely, whether an ordinary liability of a person who carries as a common carrier has in a particular respect been excluded by the terms of a special contract. I think that the railway company succeed in establishing that they are common carriers. What good it will do them is a matter for them. I should have thought it was a very bad thing for them to have that decision, but no doubt they have their own reasons. The appeal should be allowed, and the cross-appeal should be dismissed.

G **ATKIN, L.J.**—This case presents the refreshing aspect of a railway company appealing in order to establish its contention as to what its duty towards the public is, which contention a member of the public is stoutly contesting, and which the learned judge below has negatived. While I, like the other members of the court, feel a distrust of railway companies when they seek to do things of this sort, I feel rather disposed to assist them in the benevolent enterprise in which at present they appear to be engaged, and I am prepared to suppose that there is no dark purpose hidden behind their legal contention.

H The question is a simple one, namely, whether the railway company, professing to carry as common carriers, but who have imposed admittedly some restriction on what would be the complete common law liability of common carriers, have thereby ceased altogether to occupy the position of a common carrier, so that they have assumed the character of bailees for reward, with a liability only in case of their negligence, or whether they do not remain subject to the liability of common carriers, save in so far as it has been expressly varied by the contract. I think, to begin with, there can be no question that in this country railway companies have been, and are, in respect of a large number of goods—in respect of most goods—common carriers, and I refer to a work which certainly expresses the ordinary view of the profession in respect of that matter, namely *BULLEN AND LEAKE ON PRECEDENTS OF PLEADINGS* (3rd Edn.). On p. 122, in the notes on Carriers of Goods by Land (see (7th Edn.) p. 108), the learned authors say:

"The duties of a common carrier of goods imposed by law in the absence of special agreement are: To receive for carriage all goods offered, provided he has convenience to carry them, and the goods are of a proper kind, and the employer is ready and willing to pay the proper and reasonable hire . . . ; to carry for a reasonable reward, and deliver them within a reasonable time . . . ; and to ensure their safety during the carriage and until delivery, the acts of God and the Queen's enemies only excepted."

I think to that should be added "damage arising from inherent vice." The learned authors proceed to say: "Railway companies as common carriers are subject to the above duties . . ." The question which is debated in this case seems to have been debated for generations before the Common Law Procedure Act, and, although there are dicta which are to be found both ways, it seems to me that there is a chain of authority culminating in an authority of the Exchequer Chamber binding us which makes it quite clear that a common carrier may restrict his complete liability as an insurer without ceasing to occupy the position of a common carrier; and I think the result would be expressed logically by saying that the definition of a common carrier imposes the differentia of other carriers of being common, and that is of the essence of the definition, but that there is imposed by law an incident of the subject-matter, namely, that the carrier is subject to the liabilities of an insurer, and I think it would follow that that incident may be varied without the common carrier losing his essential character.

The authorities I propose to deal with shortly, but I think it useful to refer to them. The first, in order of date, is the dictum of PARKE, B., in *Wyld v. Pickford* (8), decided in 1841. Dealing with a notice by a common carrier seeking to limit his liability, PARKE, B., in delivering the judgment of the Exchequer Chamber, said (8 M. & W. at p. 458):

"We agree that if the notice furnishes a defence, it must be either on the ground of fraud, or of a limitation of liability by contract; which limitation it is competent for a carrier to make, because being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law, and insist upon his own; and if the proprietor of the goods still chooses that they should be carried, it must be on those terms; and probably the effect of such a contract would be only to exclude certain losses, leaving the carrier liable as upon the custom of England for the remainder."

In 1850, in *Austin v. Manchester, Sheffield, and Lincolnshire Rail. Co.* (21), CRESSWELL, J., delivering the judgment of the court, refers to notices of various kinds, which, he says (10 C.B. at p. 473):

"have, from time to time, been published by common carriers, with a view to limit the responsibility cast upon them by the common law. At one period there was a disposition in our courts to hold that common carriers could not by these notices shake off that responsibility; but STORY, J., in his work on BAILMENTS (s. 549), observes:

"The right of making such qualified acceptances by common carriers, seems to have been asserted in early times. LORD COKE declared it in a note to *Southcote's Case* (22), and it was admitted in *Mors v. Slue* (23). It is now fully recognised and settled, beyond any reasonable doubt, in England."

For this assertion he cites a number of authorities; and we think that he has drawn a correct conclusion from them."

Then he proceeds to consider what was the true nature of the contract entered into between the parties in that case. I do not go into the details of that case, but it appears to me quite plain that in that decision CRESSWELL, J., was approaching the case from the point of view that there was a contract made with a man as a

A common carrier who had only limited his liability in respect of particular matters, and remained liable as common carrier in other respects. In 1854 there is a statement by MAULE, J., to my mind of very great authority, because he deals precisely with the proposition put forward here. It is in *Crouch v. London and North Western Rail. Co.* (9), MAUL, J., there says (14 C.B. at p. 293):

"I deny the truth of the position that a man who is not an insurer is therefore not a common carrier. A common carrier who gives no notice limiting his responsibility is an insurer; but, if he gives notice that he will contract only to a limited extent, and with respect to articles of a given value, he ceases to be an insurer beyond that, though in all other respects he remains a common carrier."

The whole question of the position of common carriers arose in *Peek v. North Staffordshire Rail. Co.* (7). I certainly do not propose to read the advice given to the House of Lords by BLACKBURN, J., in that case. It appears to me to be an authoritative exposition of the law, and was accepted as such by the House of Lords. BLACKBURN, J., refers to the position which was mentioned by CRESSWELL, J., in the case that I have cited, and he says (10 H.L. Cas. at p. 493):

"But many years ago a practice began by which carriers sought to restrict their liability by giving notice that they would not be answerable for loss, except on conditions limiting the extent of their common law liability as carriers. The effect of such a notice is discussed in *Gibbon v. Paynton* (24), decided in 1769. It is apparent from that case that the practice was not then new, though I cannot find when it first arose. After 1769, and before July 23, 1830, when the first Carriers Act (11 Geo. 4, and 1 Will. 4, c. 68) received the Royal Assent, the cases on carriers' notices are very numerous."

Then he cites the passage from STORY and says:

"The cases decided in our courts between 1832 and 1854 established that this was not law, and that a carrier might by special notice make a contract limiting his responsibility, even in the cases here mentioned, of gross negligence, misconduct, or fraud on the part of his servants."

I think that the phrase that he "might . . . make a contract" means that he might make it, still retaining his character as a carrier, otherwise there would clearly be no restriction upon his power to make any contract he pleased. When the case came to the House of Lords, LORD WESTBURY, L.C., dealing with the Act of 1854, says this (10 H.L. Cas. at p. 566):

"I think that the true construction of that section [s. 7 of the Railway and Canal Traffic Act, 1854] may be expressed in a few words. I take it to be equivalent to a simple enactment that no general notice given by a railway company shall be valid in law for the purpose of limiting the common law liability of the companies as carriers. Such common law liability may be limited by such conditions as the court or judge shall determine to be just and reasonable; but with this proviso, that any such condition so limiting the liability of the company shall be embodied in a special contract in writing between the company and the owner or person delivering the goods to the company, and which contract in writing shall be signed by such owner or person."

It will be observed that the Lord Chancellor is not referring to the suggestion that the company may cease altogether to be liable as common carriers, may put off the character of common carriers and assume some other liability, but he is talking about a contract limiting the common law liability, which, to my mind, is only possible if the carrier remains liable as a common carrier, subject to the restrictions that he imposes.

Those being some of the authorities dealing with the matter—authorities of great weight—the matter seems to me to be finally determined so far as this court is concerned, by *Baxendale v. Great Eastern Rail. Co.* (10). In that case the goods had been received by the Great Eastern Railway Co. to be carried from Rotterdam to London via Harwich, and they had been shipped at Rotterdam on the terms of the bill of lading—a through bill of lading—which covered not only the sea transit, but the railway transit also. The terms of the contract excepted the

“act of God, the Queen’s enemies, pirates, . . . and all accidents, loss, and damage whatsoever from machinery, boilers, and steam, and steam navigation, or from perils of the seas and rivers, or from any act, neglect, or default whatsoever of the pilot, master, or mariners, in navigating the ship, as also railway accidents being excepted.”

It also provided :

“Weights, contents, measure, quantity, and value unknown, and not answerable for leakage, lighterage, breakage, . . . and the wrong delivery of goods caused by error or by insufficiency in marks or numbers.”

It also provided that the goods were

“to be taken from the ship or railway by the consignees immediately after arrival, or the same will be transhipped into lighters, landed on the quays, or warehouses at the expense or risk of the owners of such goods.”

The point was definitely raised there that in those circumstances, as the goods were carried by the railway company subject to those terms, they could not be common carriers, and, therefore, could not avail themselves of the terms of the Carriers Act. The Chief Baron, in delivering the judgment of the Exchequer Chamber, says (L.R. 4 Q.B. at p. 255) :

“Therefore the plaintiffs say, inasmuch as the defendants, as common carriers, are undoubtedly liable for loss by railway accidents, whereas by this contract they are exempted from any such loss, the very contract itself shows that the goods were not delivered to them in their capacity of common carriers.”

The learned Chief Baron goes on to negative that, and he says later on :

“Under these circumstances it appears to us all that the true effect of this contract by means of the bill of lading is that these goods were delivered, as far as relates to the conveyance of them from Harwich to London, to the defendants in their character of common carriers; and they were to have all the liabilities of common carriers except only those which are excepted in the bill of lading; and they are also entitled, as common carriers, to the protection from liability which was conferred upon them by the Act of Parliament.”

It appears to me that that is, at any rate, an authoritative negation of the proposition which was put forward by counsel for the plaintiffs in this case—that, once you have any limitation upon the completion common law liability of a common carrier, the carrier had necessarily ceased to be a common carrier at all.

There are a number of cases of this nature which, to my mind, are purely pleading cases; the plaintiff had averred that the goods had been received by the defendants as common carriers, or to be carried upon the terms of the liability of a common carrier. What was proved was that the defendants had received the goods, and had imposed a term limiting the complete liability at common law; and what was decided by the court—and, to my mind, the only thing that was decided by the court—was that, inasmuch as the defendant had declared upon one contract to carry as insurers and had proved a contract to carry otherwise than as insurers, there was a variance, and in accordance with the strict rules of law, which were applied, the defendant, having failed to establish the contract averred in his declaration, failed. But I do not think that the cases go any further than that. The case that was alleged at one time by the present plaintiffs as being conclusively

A binding was *Sutcliffe v. Great Western Rail. Co.* (12) which was decided in this court. To my mind, that case has no bearing on the matter before us at all for this reason. It is common ground that, whereas a person is a common carrier because he professes to carry commonly—that is to say, for all members of the public upon equal terms—he may at any time renounce that character in respect of any goods that he pleases. It was established in *Dickson v. Great Northern Rail. Co.* (25) that the railway company who had announced that they would not be common carriers of dogs, could not be made liable as insurers of dogs. In *Sutcliffe's Case* (12) the railway company had given notice that they would not be common carriers of goods not properly packed, including cisterns, and the goods in question were cisterns which were not properly packed. In those circumstances, it seems to me that it would have been impossible to have decided that the railway company were common carriers of cisterns, but ceased to be because they restricted their liability in respect of the particular risks that they incurred. That was the case where VAUGHAN WILLIAMS, L.J., held that the condition was not a reasonable condition. BUCKLEY, L.J., held, among other things, that the railway company were not common carriers, and KENNEDY, L.J., held that the question whether they were common carriers or not did not arise, because it had not been raised in the county court, and inasmuch as it clearly was not necessary for the decision of the case to raise the question whether they had abandoned the character of common carriers merely by restricting their liability, it appears to me that the case is no authority on the point with which we are dealing. I think, therefore, that the first proposition contended for by the plaintiffs fails.

E Then it is contended that though the larger proposition might not be supported, still it is plain from *Baxendale's Case* (10), that a common carrier may make a special contract of such a nature as to be entirely inconsistent with his relation of a common carrier to the owner of the goods so as to show that the contractual terms, as KELLY, C.B., said, obliterated the relationship of common carrier to members of the public. He said that you would find such terms in this case, and, among others, he referred to the term giving the railway company a general lien against the owner of the goods. I have referred to the contract in *Baxendale's Case* (10), and to the terms of it, and I can see no condition in this contract which so differs from the terms in the *Baxendale* contract as to lead us to say that, while the terms of the bill of lading were consistent with the position of common carrier, these terms are not; and I personally cannot see anything in the provision of a general lien which is inconsistent with the duty of a common carrier to be a common carrier and to be an insurer, so far as he limits his risks. That seems to me to dispose of the case as to the question of common carrier.

G There is another way in which the case can be put—and I think it was supported by the railway company—and that is in reference to the class of case represented by *Johnson v. Midland Rail. Co.* (1). It is said that, if a common carrier does make a contract limiting his liability in some particular respects, even granted that he thereupon ceases to be a common carrier and the liability is not imposed upon him by the custom of the realm, yet, on the proper construction of the contract, the courts will assume that he has contracted in this case as a bailee, and not as a common carrier, upon the terms that he will assume towards the bailor all the liabilities of a common carrier, except in so far as they have been varied by the contract. That is the kind of suggestion which was made in several cases by BRETT, L.J., in respect of shipowners—that they were not common carriers, but that they were liable for all liabilities of a common carrier. As I said in the course of the argument in this case, it is said by some people that the *Iliad* was not written by HOMER, but was written by another person of the same name. It is a distinction which, to my mind, does not make any practical difference. In this particular case it appears to me that the true view of the contract is that the railway company did assume towards the bailor of the goods the full liability of a common carrier,

except in as far as it was expressly stipulated that the liability should be limited. I think that would follow from the terms "to be carried at company's risk" alone. I think it would also follow from the fact that the railway company are, and have been for generations, known to be common carriers, and that if they do wish to exclude the risks of a common carrier it should be made plain to the person consigning goods to them that, when they do limit their liability, they are limiting it altogether and are assuming an entirely different character; and I should certainly infer from a contract such as was made in this case that the railway company did intend to assume all the risks of a common carrier, except in so far as they were expressly altered.

The other and remaining question is the question that arises upon the cross-appeal, which, I quite agree, would come logically first, but which I have dealt with last. In respect of that I have nothing to add to what has been said by the other members of the court. I agree with the judgment of the learned judge below, and the judgments which have just been delivered. I would merely add that, in respect of goods not known by carriers to be dangerous, I think there is a warranty that the goods are such as may be safely carried and are not dangerous. That is the warranty; and I think it applies in the case of carriers who are under duty to carry, whether the duty is a duty imposed on them by the common law by virtue of their profession as common carriers or by statute, as it is in this case by s. 2 of the Railway and Canal Traffic Act, 1854. It appears to me that the obligation imposed by the statutory duty is at least as large as the duty, if any, imposed, upon a person who puts goods on a general ship, which was the foundation of the warranty in *Brass v. Maitland* (14). I think that the warranty should be held to exist. A number of cases have been cited before us. I have already, I think, had before me thirty-five cases, every one of which I have looked into and examined, but I have not thought it necessary in the course of this judgment to intersperse it with references to all the thirty-five cases. I only want to have it taken for granted that the cases brought before us by the diligence of counsel have, at any rate, been considered. After consideration, I am satisfied that the true order to be made in this case is that the appeal should be allowed, and that the cross-appeal should be dismissed.

Appeal allowed. Cross-appeal dismissed.

Solicitors: *R. Hill Dawe; Nash, Field & Co.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

DALE v. HATFIELD CHASE CORPORATION

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), November 2, December 19, 1921, July 26, 1922]

[Reported [1922] 2 K.B. 282; 92 L.J.K.B. 237; 128 L.T. 194; 87 J.P. 11; 20 L.G.R. 765]

Agriculture—Agricultural holding—Compensation for disturbance—Reasonable opportunity to landlord to make valuation—Question of fact—Payment of compensation by purchasers of farm—Commencement of “proceedings taken under” Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), ss. 11, 48—Agricultural Holdings Act, 1914 (4 & 5 Geo. 5, c. 7), s. 1.

On Jan. 27, 1919, a landlord, with a view to the sale of a farm, gave notice to the tenant of the farm to quit on Feb. 2, 1920. On Mar. 17, 1919, the tenant gave to the landlord notice of his intention to claim compensation for disturbance in terms of s. 11 of the Act of 1908. In July and August, 1919, the farm was sold by auction. In November, 1919, the tenant removed his household furniture to another farm, and at a later date sold or removed his stock. In November and December, 1919, and January, 1920, the farm was conveyed to the purchaser. In October, 1920, an arbitrator was appointed to determine the tenant's claim for compensation.

Held: (i) it was a question of fact for the arbitrator, depending upon the particular circumstances of each case, whether a reasonable opportunity had been given to the landlord of making a valuation and, therefore, the arbitrator had no power to state a Case for the opinion of the county court judge on that matter; (ii) a claim for compensation did not necessarily lie against the person to whom notice of claim was given, and in the present case the purchasers of the farm, and not the original landlord, were the persons from whom the tenant should have sought to obtain payment of any compensation due to him (iii) proceedings within the meaning of s. 48 (2) of the Agricultural Holdings Act, 1908, [now Agricultural Holdings Act, 1948, s. 94 (5)] are begun when the arbitrator is appointed.

Notes. The Agricultural Holdings Acts, 1908 and 1914, have been repealed. The provisions for compensation to a tenant for disturbance are now to be found in s. 34 of the Agricultural Holdings Act, 1948 (28 HALSBURY'S STATUTES (2nd Edn.) 25) sub-s. 1 (b) of which provides that a landlord shall have a reasonable opportunity of making a valuation of implements, stock, etc. As to notice of a claim for compensation and the determination of a dispute by arbitration, see s. 70 (1) and (2) of the Act of 1948.

Considered: *Tombs v. Turvey* (1923), 93 L.J.K.B. 785. Referred to: *Richards v. Pryse*, [1927] 2 K.B. 76; *Smith v. Metropolitan Properties Co.*, [1932] 1 K.B. 314; *Preston v. Norfolk County Council*, [1947] 2 All E.R. 124; *Nuthall* (1917), *Ltd. v. Entertainments and General Investment Corp'n., Ltd.*, [1947] 2 All E.R. 384.

As to compensation for disturbance see 1 HALSBURY'S LAWS (3rd Edn.) 320 et seq., and for cases see 2 DIGEST (Repl.) 69 et seq.

I Cases referred to:

- (1) *Barbour v. M'Douall*, 1914 S.C. 844; 2 Digest (Repl.) 73, *350.
- (2) *Bradshaw v. Baird*, [1920] 3 K.B. 144; 90 L.J.K.B. 221; 123 L.T. 703, C.A.; 2 Digest (Repl.) 77, 429.
- (3) *Lysaght v. Edwards* (1876), 2 Ch.D. 499; 45 L.J.Ch. 554; 34 L.T. 787; 24 W.R. 778; 40 Digest (Repl.) 195, 1579.
- (4) *Flight v. Bentley* (1835), 7 Sim. 149; 4 L.J.Ch. 262; 58 E.R. 793; 31 Digest (Repl.) 258, 3939.

- (5) *Re Earl of Derby and Fergusson's Contract*, [1912] 1 Ch. 479; 81 L.J.Ch. 567; 105 L.T. 943; 56 Sol. Jo. 71; 2 Digest (Repl.) 69, 396. A
- (6) *Harmer v. Bean* (1853), 3 Car. & Kir. 307; 31 Digest (Repl.) 293, 4308.

Appeal by the respondent corporation, the landlords, from a decision of Thorne County Court on a Special Case stated by an arbitrator, under the Agricultural Holdings Acts, 1908 and 1914, on a claim by a tenant for compensation for disturbance. B

J. B. Matthews, K.C. and *Foà* for the corporation.

Schiller, K.C. and *Bramley* for the claimant, the tenant.

Cur. adv. vult.

Dec. 19, 1921. The following judgments were read.

BANKES, L.J.—This is an appeal direct to this court from a decision of a county court judge as provided by s. 13 (3), of the Agricultural Holdings Act, 1908. The matter came before the county court judge upon a Special Case stated by an arbitrator in reference to a claim by a tenant against landlords for compensation for disturbance. The county court judge decided in favour of the tenant. The landlords appealed and the grounds of appeal are thus stated in the notice of appeal:—
 “(i) That the judge was wrong in holding that on the true construction of s. 11 of the Act of 1908 the claimant had given to the respondents a reasonable opportunity of making a valuation of the goods and stock in respect of which the claim was made and that (so far as the question was one of fact) there was no evidence upon which he could so find. (ii) That the judge was wrong in holding that on the true construction of s. 11 of the said Act the respondents were liable to pay compensation under that section, they not being the legal owners of the reversion expectant on the determination of the tenancy held by the claimant when the said tenancy was determined. (iii) That the judge was wrong in holding that s. 48 (2), of the said Act had any application to the present proceedings.” D

In the year 1919 the tenant held a large farm from the landlords. No information is given in the case as to the dates at which the rent was payable. In view of a sale of the farm the landlords, on Jan. 27, 1919, gave the tenant notice to quit on Feb. 2, 1920. As a result of that notice the tenant became entitled under the Agricultural Holdings Act, 1914, to recover compensation for disturbance “in terms of and subject to the provisions of s. 11 of the Agricultural Holdings Act, 1908,” except that the notice by the tenant of his intention to claim compensation required by that section might be served at any time not less than two months before the determination of the tenancy. The tenant, therefore, need not have served any notice of intention before Dec. 1 or 2, 1919. He did in fact, serve his notice on Mar. 17, 1919. The proviso to s. 11 of the Act of 1908 declares that no compensation under the section is payable unless (inter alia) the tenant has given to the landlord a reasonable opportunity of making a valuation of the goods, implements, produce and stock in reference to which the claim for compensation is made. E F

The arbitrator was invited to treat the question whether a reasonable opportunity had been given to the landlord of making a valuation as a matter of law, and to state a Case for the opinion of the county court judge upon the point. In my opinion, the question is not a question of law at all. It is a question of fact depending on the particular circumstances of each case, and the question is one to which an arbitrator must apply his own common sense having regard to the facts in evidence before him. The Scottish case, *Barbour v. M'Douall* (1) was referred to. In that case the arbitrator found as a fact that a reasonable opportunity had been given to the landlord of making a valuation and he asked the court whether as a matter of law he was entitled to so find. In support of the contention that he was not entitled the respondents urged that it was for the tenant under the Act to make the first move in giving the opportunity and that a mere notice of intention to claim compensation, given months before any dealing with the stock or goods, G H I

A was not sufficient. In giving judgment LORD MACKENZIE says in reference to this contention (1914 S.C. at p. 851):

"It appears to me that under sub-s. (a) there is no duty on the part of the tenant to do anything. There is no provision that he is to give intimation. What is said is that he is to give the landlord reasonable opportunity, and what reasonable opportunity is must depend on the circumstances of each case."

B I do not think that the county court judge took the right course in coming to a decision on this point. The decision must be that of the arbitrator. The case on this point should have been sent back to him with a direction that it was entirely for him to decide whether a reasonable opportunity had been given the landlords of making a valuation, and, incidentally, of course, to consider whether in all the circumstances of this case, in order to afford the landlord that opportunity, sufficient notice had or had not been given to the landlord. The case is a peculiar one in that no claim is made for any loss on the sale of stock or goods, and this is a matter which the arbitrator may take into consideration in arriving at his decision.

C The other question raised by the appeal is a difficult one. It involves a decision upon the point whether the Act imposes the obligation to pay compensation for disturbance upon the landlord only, and whether in the circumstances of this case the tenant had claimed payment of compensation from the right person. Section 1 of the Agricultural Holdings Act, 1908, provides in terms that the tenant's right to obtain compensation for improvements is from the landlord. There is no such provision in s. 11 which gives the right to compensation for disturbance. Section 6 (2), which requires notice of intention to make a claim for compensation for improvements, does not in terms require that notice to be served upon the landlord, whereas the similar provision of s. 11 providing for service of notice of intention to claim compensation for disturbance does require service of notice upon the landlord. It is curious that this distinction should have been made in the language used in reference to the two classes of compensation, but I cannot see any sufficient reason for supposing that the legislature intended to draw a real distinction between the two cases. I think that, when the legislature provided in s. 11 that the tenant should be entitled to compensation for disturbance in addition to the compensation (if any) to which he might be entitled in respect of improvements, it must have intended that both classes of compensation should be recoverable from the landlord whoever he might be. As was pointed out by this court in *Bradshaw v. Bird* (2), the person who was the landlord within the meaning of the Agricultural Holdings Act at the time when a tenant made a claim for compensation under the Act is not necessarily the landlord when the tenant becomes entitled to compensation. This is due to the fact that the Act defines "landlord" as "any person for the time being entitled to receive the rents and profits of any land." At the time the tenant in the present case served his notice of intention to claim compensation upon the corporation they were, within the meaning of the Act, undoubtedly his landlords. Such a service, being entire compliance with the Act, would enure for the tenant's benefit against any one who subsequently became his landlord before the claim for compensation could be made or sustained. In the present case it is contended that the corporation ceased to be the tenant's landlords before the claim for compensation was, or could be, made; and that they are consequently not liable to pay the compensation claimed.

I I do not think that the facts are sufficiently found by the arbitrator to allow of this question being satisfactorily determined. So far as the facts are stated, they are as follows. The tenant served his notice of intention to claim arbitration on Mar. 17, 1919. In July, 1919, the corporation offered the tenant's farm for sale by public auction. The farm was put up in three lots, Nos. 10, 11, 12. The farm comprised the whole of lot 11, but part only of lots 10 and 12. The two latter were sold at the auction. Lot 11 was disposed of privately after the sale. No information

is given as to the particulars of sale, or as to the date fixed for completion, but it appears that the conveyances to the purchasers were made as follows: Lot 12, Nov. 25, 1919; lot 10, Dec. 24, 1919; lot 11, Jan. 24, 1920. No information is given whether the corporation ever suggested until the hearing before the arbitrator on Dec. 15, 1920, that they were not the proper persons to pay any compensation which might be payable to the tenant, nor is the appointment of the arbitrator, which was made on Oct. 13, 1920, before the court. Upon these facts it is clear that before the determination of the tenancy the reversion was not only assigned by the corporation to the purchasers of lots 10, 11, and 12, but was severed as a result of those sales. Certainly as from the date of the respective conveyances the corporation ceased to be entitled to any rents and profits of the farm which had not already accrued due, and the purchasers had become entitled to them and were therefore the landlords at the termination of the tenancy within the meaning of the Act. *Primâ facie*, therefore, the purchasers were the persons and the only persons from whom compensation could be claimed, because it is only on "quitting the holding" that the tenant becomes entitled to compensation, and the tenant in the present case did not quit until May, 1920. The position of the corporation as vendors of the farm is plain. JESSEL, M.R., states it thus in *Lysaght v. Edwards* (3):

"It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of LORD HARDWICKE, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession."

It is, however, also quite clear that the assignee of the reversion is not entitled to sue for rent due before the assignment: *Flight v. Bentley* (1). No information is forthcoming in the present case as to the terms of the tenancy. If rent was payable quarterly on the usual quarter days it is possible that in spite of the sale of the farm the corporation remained entitled to the rents which accrued due at Mid-summer, Michaelmas, or Christmas, 1919, and that they were so entitled when the tenant quitted the holding. I express no opinion at present as to what the effect may be if they were so entitled. During the argument below the question was raised whether the corporation were not estopped from relying on the point that they were not the persons liable to pay compensation. No facts are stated upon which a decision upon this point can be come to. Having regard to the fact that if the contentions of the corporation are correct the tenant has lost his right to recover compensation from any one, I think that the facts should receive the fullest investigation. I think, therefore, that the case must be remitted to the arbitrator in order that he may: (i) decide whether a reasonable opportunity had been given to the landlord for making a valuation; (ii) find the facts as to the dates fixed for completion of the purchases, and as to dates under his agreement of tenancy the tenant's rent was payable; and (iii) find also the facts in relation to the appointment of arbitrator and what the dispute between the parties was in reference to which the appointment was made, and whether the corporation had ever, and if so when, first set up the case that they were not the persons liable to pay compensation. The arbitrator must report his findings on these points to this court, and the appeal meanwhile must stand adjourned.

With reference to the judgment of the county court judge, I desire to say that I do not think that the giving of the notice of intention to claim compensation can be treated as a commencement of "taking proceedings" within the meaning of s. 48

- A (2) of the Act of 1908, or that the liability to pay compensation necessarily attaches to a person to whom a notice of intention to claim compensation is given, unless that person continues at all material times to be the landlord within the meaning of the definition in the Act. It seems to me that the legislature should make some provision for a possible change of landlords between the time when a tenant serves his notice of intention to claim compensation and the time when the compensation becomes payable. A tenant may be quite unaware that any change has taken place. On the other hand, if a change does take place the landlord can always protect himself by providing who, as between himself and his assignee, shall pay the compensation. With regard to my judgment in *Bradshaw v. Bird* (2), it has been pointed out that I there said that as from the date of the agreement of purchase the purchaser became entitled to the rents and profits of the land. I intended to say, and should have said, that he became so entitled as from the date fixed in the agreement for completion of the purchase.
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SCRUTTON, L.J.—I am desired by **ATKIN, L.J.**, to state that he concurs in the judgment I am about to read.

- D This appeal raises at least one question of general importance, namely, by whom the compensation, due under the Agricultural Holdings Act, 1914 to a tenant, is payable, when his tenancy is terminated, because his original landlord sells the holding. The question arises on appeal from the decision of the county court judge on a Special Case stated by an arbitrator. The material dates are: Jan. 27, 1919, notice to quit on Feb. 2, 1920, Mar. 17, 1919, notice to landlord of tenant's intention to claim compensation under the Acts of 1908 and 1914; July 26, 1919, auction of tenant's holding in three lots—10, 11, and 12; lot 10 sold to Cundell; lot 12 sold to Allen; Aug. 18, 1919, lot 11 sold to Hurst; November, 1919, tenant removes part of his furniture; Nov. 25, 1919, lot 12 conveyed to Allen; Dec. 24, 1919, lot 10 conveyed to Cundell; Jan. 24, 1920, lot 11 conveyed to Hurst; Feb. 2, 1920, part of the land vacated; April, 1920, sale by tenant of part of stock, removal of other part; May 1, 1920, tenancy determined; Oct. 13, 1920, appointment of arbitrator by tenant and original landlord, the vendor; Dec. 15, 1920, arbitration held. The purchasers did not demand, nor were they paid rent at the end of the tenancy; apparently the tenant has paid no rent for the last year of his tenancy. The tenant has thus claimed compensation from the original landlord, the vendor, though he was apparently not the landlord or owner of the reversion at the end of the tenancy. The vendor denies his liability. The arbitrator has stated a Special Case as to the vendor's liability, and the county court judge has held the vendor liable. He appeals.
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- H Compensation under the Act of 1914 is to be paid "in terms of and subject to the provisions" of s. 11 of the Agricultural Holdings Act, 1908. Compensation under this s. 11 is to be paid "in addition to the compensation . . . for improvements" provided by s. 11 of the Act of 1908. The tenant is entitled to compensation under s. 1 "at the determination of a tenancy quitting his holding" from the "landlord." The "landlord" is defined by s. 48, unless the context otherwise requires, as "any person for the time being entitled to receive the rents and profits of any land." The compensation is the value of the improvement to an incoming tenant. So far it seems clear that the person who is the landlord when the tenancy determines and the tenant quits his holding is the person to pay compensation for improvements.
- I Certain notices have to be given to, and agreements may be made by, the "landlord" at the time of making the improvement. This is obviously the landlord at that time, and may be a different person from the landlord at the end of the tenancy. The improvements is in the land, and enures for the benefit of its owner from time to time. As compensation is not due till the end of the tenancy, it seems impossible, if the point is insisted on, to have an arbitration till the sum is due, and then the other party to the arbitration will be the landlord from whom the sum is due, not the previous landlord to whom notice was given. Section 11 of the Act of 1908

then provides that "in addition to the compensation . . . for improvements" under s. 1 the tenant shall in three cases be entitled to further compensation for loss or expense directly attributable to his quitting the holding on the sale or removal of his furniture and stock. The first case is where the landlord without good cause terminates the tenancy by notice to quit; the second, where the landlord, being asked at least one year before the termination of the tenancy, refuses to renew; and the third where the landlord demands an increase of rent in certain matters as a condition of renewal of the tenancy and in consequence the tenant quits the holding. The tenant must give notice of his intention to claim compensation within two months of notice to quit or refusal to renew, and make his claim for compensation within three months after he quits the holding, and he must give the landlord a reasonable opportunity of valuing the things sold or removed. This section does not expressly say that compensation is to be paid by the landlord, but as the acts give rise to compensation are all landlord's acts, he must be the person. Further, the section does not expressly say when the compensation is payable, but it seems obvious that it cannot be till the tenancy terminates and the tenant quits the holding. It is the sale or removal of the farmstock, etc., which causes the loss compensated for. If so, the landlord who gets vacant possession at the end of the tenancy, and so gains by the tenant's leaving, is the person to pay compensation, though the earlier notices may be given to the landlord at the time when they have to be given, and are valid against his successor in title at the end of the term. It appears from *Re Earl of Derby and Fergusson's Contract* (5), that the purchaser is to be taken to have notice of the tenant's claim for compensation. Lastly, the Act of 1914 extends the compensation to cases where the tenancy is terminated in view of or because of a sale of the reversion, the notice of intention to claim to be given not less than two months before the determination of the tenancy. This compensation is to be given "in terms of and subject to the provisions of s. 11" of the Act of 1908. In my view, here also the person to pay is the landlord at the end of the tenancy, and the time when the payment is due is also the end of the tenancy.

It follows that unless there are special circumstances in the present case, the original landlord, who was not at the determination of the tenancy entitled to the rents and profits, is not the person liable to pay compensation, and his defence to the arbitration succeeds. It appears to be clear law that where a reversioner has assigned his reversion he cannot claim any rent accruing due after completion of the assignment: *Harmer v. Bean* (6), per PARKE, B., but that in the absence of special agreement he can claim rent which accrued due before the assignment: *Flight v. Bentley* (4). As in the present case the vendor was not entitled to any rent which accrued due at the end of the tenancy, he does not appear to me on the facts at present before us to be, within the meaning of the Act, the landlord at the determination of the tenancy when the claim for compensation accrued. I will deal, however, with this point hereafter. We have not before us the three purchasers, and it is not, therefore, profitable to say anything about their liability to any one, or its extent; but as at present advised, the authorities as to apportionment of rent on severance of a revision will enable these questions to be answered. The views above expressed seem to be in harmony with those expressed by this court similarly constituted in *Bradshaw v. Bird* (2), where the purchaser, being landlord at the end of the tenancy, was held liable. The county court judge's carefully reasoned judgment appears to proceed on his view of the application of s. 48 (2), of the Act of 1908 to this case. Though the sub-section in terms only applies to compensation for improvements or claims under agreements, my present impression is that the effect of s. 11 and the Act of 1914 is also to bring the sub-section in to claims for disturbance. I am also inclined to think that if proceedings are properly commenced against the then landlord, the sub-section keeps him liable, though he had ceased to be landlord before their termination. But, in my view, the pro-

A proceedings commence when the arbitrator is appointed, and in this case the arbitrator was not appointed till the original landlord had ceased to be landlord, nor was the original landlord the landlord at the determination of the tenancy. Consequently there may be no liability of his for the sub-section to continue. The county court judge has made it continue by treating the notice of intention to claim as the commencement of proceedings. This seems to me inaccurate. In cases
B of compensation for improvements certain notices have to be given (see s. 3 (1), and s. 6 (2)), but I am of opinion that the claim does not lie against the person to whom notice is given, but against the person who is landlord at the determination of the tenancy. The notice runs against the reversion to the tenancy, in whosoever hands it may be at the time. This, if correct, explains all the difficulties which the county court judge has pointed out, which follow from the assumption that the notices must be given to the person liable to pay compensation. It seems clear that the notice under s. 3 (1), need not be so given; and, I think, if the landlord has received a notice and then sells, the notice is good against the purchaser.

A further point was raised in the arbitration that the tenant had not given the landlord a reasonable opportunity of making a valuation of the goods sold, because
D after giving notice of intention to claim he had not given written notice of intention to sell. It seems to have been argued on one side that such a notice was always necessary; on the other side on the authority of the Scottish case of *Barbour v. M'Douall* (1), that it was never necessary. Both contentions seem to me erroneous. In my view, whether the tenant has given the landlord a reasonable opportunity of valuation is a question of fact in each case. All that was held in the Scottish case
E was that on the facts found by the sheriff he was justified in that case in finding that the tenant had given a reasonable opportunity. There may be cases where no express notice of sale is given and yet a reasonable opportunity for valuation is given. There may be cases where, in the absence of notice of sale, it can be held as a fact that reasonable notice has not been given. Stock on a farm constantly changes;
F the stock at the time of the notice to claim may be changed at the time when the sale takes place, and the sale may be some time before the end of the tenancy. The landlord may live close by and know all about local transactions; he may live a long way off, and know nothing. Whether the tenant has given reasonable notice is, in my opinion, a question of fact in every case, unfettered by any rigid rule that he must give any particular form of notice. The court, therefore, gives no decision whether the landlord was given by the tenant a reasonable opportunity for valuation,
G this being a matter of fact for the arbitrator. The mere absence of notice of sale does not prevent a reasonable opportunity from being given; nor is the mere notice of intention to claim necessarily the giving of a reasonable opportunity.

It was suggested to us that even if the corporation were not "landlords" liable to pay compensation, they may be estopped by their conduct with reference to the
H claim from saying they were not landlords. It was not necessary, in the view of the county court judge, to decide this matter, but as he properly said, he would want more facts before he could decide it. We have no facts on which we can decide it. I cannot say that it is impossible that facts should exist amounting to estoppel, though as the appointment of an arbitrator took place when the time had elapsed for making a claim on the purchasers, there may be great difficulties in proving the
I case, as wrong construction of a statute is hardly a fact. I think, therefore, the case should be remitted to the arbitrator to report direct to this court: (i) His findings of fact as to reasonable opportunity, but not the evidence on which he bases it. (ii) The facts on which reliance is placed in support of a defence of estoppel, which should include all correspondence between the tenant and his advisers on the one hand and the corporation and their advisers on the other hand, as to the claim, the appointment of the arbitrator, and the arbitration, and also a finding of fact as to when the corporation first contended that they were not the persons liable to

pay compensation, if any. (iii) In view of the extreme obscurity of the position about rent, I think the arbitrator should also report to us the terms of the tenancy. and up to what date rent has been paid, when and to whom; the terms of the purchase, and to what extent rent has been included in the settlement between vendor and purchasers; and what claims, if any, have been made on the tenant for unpaid rent by the corporation. On receipt of this information the court can finally decide the rights of the parties. The costs of this hearing must stand over. A B

July 26, 1922. **BANKES, L.J.**—In this case judgment was given by this court on Dec. 19 last upon the questions raised upon the Special Case and decided by the county court judge. As, however, our decision appeared to deprive the tenant of any right to compensation, we requested the arbitrator to report to us his finding upon the question of reasonable notice, and to supplement his statement of the facts so that the question of estoppel could be considered, as well as any possible question of the corporation continuing to be entitled to the rents and profits of the holding at the time when the claimant quitted it in spite of the fact that the farm had been sold and the purchases completed at the dates mentioned in the Special Case. The arbitrator has given the court the information for which it asked in a very clear and full report, from which it appears that no grounds exist upon which it can be said that the corporation are estopped from setting up that they were not the claimant's landlords at the material date, namely, when he quitted the holding, and further that the rent was payable half-yearly, and that the claimant had paid the half-year's rent, due in August, 1919, in November of that year. In these circumstances the further facts stated by the arbitrator do not assist the claimant, and the court is compelled to come to the conclusion that, in the events which happened, and in the present state of the law, the purchasers of the claimant's farm, and not the corporation, are the persons from whom the claimant should have sought to obtain payment of any compensation due to him for disturbance. I repeat what I said on a former occasion, namely, that this case discloses what appears to me to be a defect in the existing law which requires consideration at the hands of the legislature. In view of what I have already said, it is unnecessary to refer to the finding of the arbitrator as to notice. The appeal succeeds and must be allowed with costs here and below, and the question asked in the Special Case answered in the negative. C D E F

SCRUTTON, L.J.—I agree.

ATKIN, L.J.—I agree.

Appeal allowed. G

Solicitors: *J. B. Somerville, for Baxter, Loxley & Somerville, Doncaster; Speechly, Mumford & Craig, for F. Allen, Doncaster.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

A

CZARNIKOW & CO., LTD. v. ROTH, SCHMIDT & CO.

[COURT OF APPEAL (Bankes, Scrutton and Atkins, L.J.J.), June 28, 29, July 7, 1922]

[Reported [1922] 2 K.B. 478; 92 L.J.K.B. 81; 127 L.T. 824;

38 T.L.R. 797; 28 Com. Cas. 29]

B

Arbitration—Ouster of jurisdiction of court—Agreement to submit questions of law—Arbitrators not to be required to state Special Case—Invalidity—Need to control commercial arbitrations.

The rules of a commercial association provided for the reference to arbitration of disputes "including any question of law arising in the course of the proceedings," and, further: "Neither buyer, seller . . . nor any other person . . . shall require, nor shall they apply to the court to require . . . any arbitrators to state in the form of a Special Case for the opinion of the court any question of law arising in the course of the reference, but such question of law shall be determined by arbitration in manner herein directed." In an arbitration between buyers and sellers the arbitrators refused an application by the buyers that they should state their award in the form of a Special Case for the opinion of the court on questions of law raised by the buyers, and proceeded to make and publish their award.

D

Held: the latter provisions were against public policy and void as ousting the jurisdiction of the courts, and the award would be set aside on the ground of misconduct by the arbitrators.

E

Scott v. Avery (1) (1856), 5 H.L. Cas. 811, distinguished.

Per Curiam: The law must retain sufficient hold over commercial arbitrations to prevent and redress any injustice on the part of the arbitrator and to secure that the law that is administered by an arbitrator is in substance the law of the land and not some home-made law of the particular arbitrator or the particular association concerned. To release real and effective control over commercial arbitrations is to allow the arbitrator or the arbitration tribunal to be a law unto himself or themselves, to give him or them a free hand to decide according to law or not according to law as he or they think fit—in other words to be outside the law. To put a commercial association in such a position would be against public policy. Unlimited power does not conduce to reasonableness of view or conduct. The agreement of private parties cannot be allowed to oust the jurisdiction of the King's Courts.

F

G

Notes. The Arbitration Act, 1889, has been replaced by the Arbitration Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.)) 89, s. 21 of which provides for an arbitrator stating any question of law arising in the course of the reference, or any award, in the form of a Special Case for the decision of the High Court.

H

As to ouster of the court's jurisdiction and stating a Special Case see 2 HALSBURY'S LAWS (3rd Edn.) 18-21, 38-41, and for cases see 2 DIGEST (Repl.) 465-470, 579 et seq.

Cases referred to :

I

(1) *Scott v. Avery* (1856), 5 H.L. Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 2 Jur. N.S. 815; 4 W.R. 746; 10 E.R. 1121, H.L.; 2 Digest (Repl.) 465, 290.

(2) *Re Hansloh and Reinhold, Pinner & Co.* (1895), 1 Com. Cas. 215; 2 Digest (Repl.) 580, 1115.

(8) *Montgomery, Jones & Co. v. Liebenenthal & Co.* (1898) 78 L.T. 406, C.A.; 2 Digest (Repl.) 580, 1116.

(4) *Dreyfus & Co. v. Atlantic Shipping and Trading* (1921), 37 T.L.R. 417, C.A.; varied sub nom. *Atlantic Shipping and Trading Co. v. Louis Dreyfus & Co.*, [1922] 2 A.C. 250; 91 L.J.K.B. 513; 127 L.T. 411; 38 T.L.R. 534; 66

- Sol. Jo. 437; 15 Asp. M.L.C. 566; 27 Com. Cas. 311, H.L.; 2 Digest (Repl.) 450, 185. A
- (5) *Re Palmer & Co. and Hosken & Co.*, [1898] 1 Q.B. 131; 67 L.J.Q.B. 1; 77 L.T. 350; 46 W.R. 49; 14 T.L.R. 28; 42 Sol. Jo. 32, C.A.; 2 Digest (Repl.) 580, 1118.
- (6) *Doleman & Sons v. Ossett Corpn.*, [1912] 3 K.B. 257; 81 L.J.K.B. 1092; 107 L.T. 581; 76 J.P. 457; 10 L.G.R. 915, C.A.; 2 Digest (Repl.) 468, 306. B
- (7) *Tullis v. Jacson*, [1892] 3 Ch. 441; 61 L.J.Ch. 655; 67 L.T. 340; 41 W.R. 11; 8 T.L.R. 691; 36 Sol. Jo. 646; 2 Digest (Repl.) 463, 282.

Also referred to in argument :

Re Fischel & Co. and Mann and Cook, [1919] 2 K.B. 431; 88 L.J.K.B. 1173; 121 L.T. 275; 2 Digest (Repl.) 680, 1950. C

Appeal from an order of a Divisional Court of the King's Bench Division on a motion to set aside an award.

By a contract made on a form issued by the Refined Sugar Association, and dated Aug. 6, 1921 *Czarnikow & Co., Ltd.*, sold to *Roth, Schmidt & Co.* D

"about twenty thousand (20,000) cases Belgian cubes refined sugar at 27s. per cwt. f.o.b. Antwerp, packed in cases of about 1 cwt., net cash for delivery during October, 1921." E

The contract contained these terms :

"This contract is subject to the rules of the Refined Sugar Association as fully as if the same had been expressly inscribed therein, and even though one of the parties to it be not a member of the association." E

By r. 17 of the association it was provided :

"All disputes from time to time arising out of any such contract, including any question of law arising in the course of the proceedings, whether arising between the parties thereto, or between one of the parties thereto, and the trustee in bankruptcy or personal representative of the other party, shall be referred to arbitration in accordance with these rules. Such submission or reference shall be to the council of the Refined Sugar Association, London, and the word arbitrators in this book shall signify the said council." F

By r. 19 :

"Neither buyer, seller, trustee in bankruptcy, nor any other person as aforesaid, shall require, nor shall they apply to the court to require . . . any arbitrators to state in the form of a Special Case for the opinion of the court any question of law arising in the course of the reference, but such question of law shall be determined by arbitration in manner herein directed." G

A dispute arose between the parties as to the fulfilment of the contract, the buyers claiming that they were entitled to refuse to accept delivery of 7,574 cases. This the sellers disputed, and, in accordance with the submission contained in the contract, the dispute went to arbitration before the council of the Refined Sugar Association. In the contentions in writing put before the arbitrators on behalf of the buyers, the arbitrators were asked to state a Case for the opinion of the court under s. 19 of the Arbitration Act, 1889, or alternatively, under s. 7 of the said Act on a number of points of law set out seriatim. The contentions concluded with the request : H I

"If the council refuse to state a Case as requested above, kindly ask them to defer further consideration of the matter in order to give us an opportunity of applying to the court for an order directing them so to state a Case."

On the hearing of the arbitration on Nov. 21, 1921, the buyers' representative, verbally and in writing, by putting in the contentions, requested the arbitrators to

- A state their award in the form of a Special Case, or, alternatively, to state a Case for the opinion of the court upon the questions of law raised by the buyers. The arbitrators refused to state their award in the form of a Special Case or to state a Case for the opinion of the court, and, further refused to delay the issue of their award to enable the buyers to make an application to the court for an order directing them to state a Case for the opinion of the court on these questions of law, and
- B before the buyers had any opportunity of applying to the court for such an order the arbitrators issued their award. The buyers thereupon moved the court for an order that the award be set aside upon the following, among other, grounds:— That the said council, as arbitrators, misconducted themselves by refusing the reasonable and proper request of the buyers to state a Special Case under s. 7, or, alternatively, under s. 19 of the Arbitration Act, 1889, and also by declining to
- C give the buyers any or any reasonable opportunity of applying to the High Court for an order directing them to state a Special Case for the opinion of the court upon questions of law arising in the course of the reference.

- In giving the judgment of the Divisional Court SWIFT, J., said: The arbitrators took the view that r. 19 precluded the possibility of the buyers' making a successful application to this court. It has never been suggested that in arriving at that view they were actuated by any but the motive of desiring to adjudicate fairly and properly upon the difference between the parties. They may have been right in that view. We express no opinion on this point, but, having regard to the fact that in *Re Hansloh and Reinhold, Pinner & Co.* (2), MATHEW, J., ordered a Case to be stated when an almost similar rule was incorporated in the submission, and that in *Montgomery, Jones & Co. v. Liebethal & Co.* (3), a rule almost identical in terms
- E was discussed in this court, we cannot say that the matter was so clear as to make the buyers' application for an opportunity to come here frivolous or unreasonable. In our opinion, that application should have been acceded to and we think that in refusing to accede to it the arbitrators were in error, and in committing that error they mishandled the arbitration to such an extent as to amount to misconduct on
- F their part. The award will, therefore, be set aside, and the parties remitted to their original rights. The sellers appealed.

Jowitt, K.C. and Van Breda for the sellers.

Neilson, K.C. and Cloughton Scott for the buyers.

Cur. adv. vult.

- G July 7. The following judgments were read.

BANKES, L.J.—The parties to this appeal entered into a contract for the sale and purchase of a quantity of sugar f.o.b., Antwerp. The contract contained a clause in the following terms:

- H “This contract is subject to the rules of the Refined Sugar Association, as fully as if the same had been expressly inserted therein, and even though one of the parties to it be not a member of the association.”

The contract is made on the contract form of the association. Rule 7 of the rules of the association relating to the constitution provides that:

- I “It shall be an express condition of these rules that all members making contracts subject to them or on contract forms of this association shall be bound to refer any dispute arising to the arbitration of the council.”

Rule 17 provides that:

“All disputes from time to time arising out of any such contract including any question of law arising in the course of the proceedings whether arising between the parties thereto, or between one of the parties thereto and the trustee in bankruptcy or personal representative of the other party shall be referred to arbitration in accordance with the rules.”

Rule 19 (inter alia) provides that

"it is expressly agreed that the obtaining an award from the tribunal shall be a condition precedent to the right of either party to sue the other in respect of any claim arising out of any such contract. Neither buyer, seller, trustee in bankruptcy, nor any other person as aforesaid, shall require, nor shall they apply to the court to require any arbitrators to state in the form of a Special Case for the opinion of the court any question of law arising in the reference, but such question of law shall be determined in the arbitration in manner herein directed."

A dispute arose between the parties in reference to the sugar and was referred in accordance with the rules to the council of the association. The buyers applied to the arbitration tribunal to state their award in the form of a Special Case, or to state a Special Case, or to postpone making their award until the respondents had had the opportunity of applying to the court for an order requiring them to state a Special Case. The arbitration tribunal refused the application and proceeded to make their award. The buyers thereupon applied to the Divisional Court to set the award aside upon the ground of misconduct. No suggestion was made, on the one side, that the buyers the respondents were seeking to raise a frivolous point of law, or, on the other, that the arbitration tribunal was not acting in good faith and in accordance with what it believed to be the binding agreement of the parties. The Divisional Court set the award aside on a somewhat narrow ground. They declined to decide whether r. 19 was against public policy, and, therefore, not binding, but they held that, inasmuch as that question was obviously a serious and important one, the arbitration tribunal should have acceded to the buyers' application in order that the question might be decided. The effect of this decision would be to involve the parties in further litigation in order to obtain the decision of some other court upon the point. This does not appear to me to be a satisfactory way of disposing of the matter, and as all the materials are before this court it should, I think, give a decision as to the validity of the rule.

The ground of objection to the rule is that as an agreement it ousts the jurisdiction of courts of law and is consequently against public policy and void. The importance of maintaining in its integrity the rule of law in reference to public policy is, in my opinion, a matter of considerable importance at the present time. Powerful trade organisations are encouraging, if not compelling, their members and persons who enter into contracts with their members to agree, as far as they lawfully can do so, to abstain from submitting their disputes to the decision of a court of law. The present case is a case in point. There have been others before the courts. Among commercial men what are commonly called commercial arbitration are undoubtedly and deservedly popular. That they will continue their present popularity I entertain no doubt, so long as the law retains sufficient hold over them to prevent and redress any injustice on the part of the arbitrator and to secure that the law that is administered by an arbitrator is in substance the law of the land, and not some home-made law of the particular arbitrator or the particular association. To release real and effective control over commercial arbitration is to allow the arbitrator or the arbitration tribunal to be a law unto himself or themselves, to give him or them a free hand to decide according to law, or not according to law as he or they think fit; in other words, to be outside the law. At present no individual or association is, as far as I am aware, outside the law except a trade union. To put such associations as the Refined Sugar Association in a similar position would, in my opinion, be against public policy. Unlimited power does not conduce to reasonableness of view or conduct.

It is however, with the purely legal question that we have to deal. No one has ever attempted a definition of what constitutes an ouster of jurisdiction. Each case must depend upon its own circumstances. Each agreement needs to be separately considered. To what an extent opinion may differ in respect of a particular

A agreement is well indicated by the difference of opinion which existed among the judges who advised the House of Lords in *Scott v. Avery* (1), CROMPTON, J. (5 H.L. Cas. at p. 836), saying that he considered the agreement which was under consideration in that case a mere attempt to evade the law, while COLERIDGE, J. (ibid. at p. 843), entertained the view, which was upheld by the House, that the judgment of the Court of Exchequer stood on a safe distinction between an agreement which

B would close entirely the access to the courts of law, and that which only imposed a condition precedent to the appeal to them, that the parties shall have first settled by an agreed mode the precise amount to be recovered there. The recent case of *Atlantic Shipping and Trading Co. v. Louis Dreyfus & Co.* (4), is another illustration of the same kind of difference of opinion, the House of Lords putting

C an entirely different construction upon the agreement between the parties from that which was put upon it in this court. In the present case the agreement is expressed in perfectly plain terms. By r. 19 it is provided as a first step that the obtaining of an award is a condition precedent to the existence of any liability. The effect of this is that either party can obtain an order staying an action if any action is brought in lieu of proceedings for arbitration. To a substantial extent, this is an ouster of the jurisdiction of the courts, but it has been said in *Scott v.*

D *Avery* (1) to be legitimate and not contrary to public policy. In the present case the parties have expressly agreed by r. 17 that questions of law as well as questions of fact must be submitted to arbitration. If, therefore, the agreement that neither party shall apply to the court to state a Special Case is to stand, the only hold which the court can have over the proceedings is (i) if the arbitration tribunal itself states

E a Case for the opinion of the court, or states its award in the form of a Special Case; or (ii) if either party applies to set aside the award for misconduct on the part of the arbitration tribunal or upon the ground of error on the face of the award. To hold that in these circumstances the agreement not to apply for a Special Case is not to oust the jurisdiction of the court within the meaning of the rule of law as I interpret it is in effect to decide that the appeal tribunal is entitled to be a law

F unto itself and free to administer any law, or no law, as it pleases. I cannot but think that this is against public policy. I therefore hold that so much of r. 19 as provides that neither party shall apply for a Special Case when incorporated into an agreement is unenforceable and void. The arbitration tribunal should, therefore, in my opinion, have acceded to the buyers' application, and, having refused to do so, they have brought themselves within the decision in *Re Palmer & Co. and Hosken & Co.* (5). I agree, therefore, in the result with the decision of the Divisional Court,

G though not on the same grounds. The appeal must be dismissed with costs here and below, and the award will be set aside.

SCRUTTON, L.J.—The Refined Sugar Association require all their members to incorporate in their contracts the rules of the association. Rule 17 provides that all disputes on such contracts shall be referred to the arbitration of the council.

H Rule 19 provides that the obtaining of an award from the tribunal shall be a condition precedent to the right of either contracting party to sue the other, and the rule continues :

I “Neither buyer, seller, trustee in bankruptcy, nor any other person as aforesaid, shall require, nor shall they apply to the court to require any arbitrators to state in the form of a Special Case for the opinion of the court any question of law arising in the course of the reference, but such question of law shall be determined by arbitration in manner herein directed.”

An arbitration took place before the council between C. Czarnikow & Co., Ltd., and Roth, Schmidt & Co. It is not necessary to say more of the merits than that some views as to the meaning of an f.o.b. contract which were distinctly unusual were put forward by the parties. During the arbitration the buyers asked the arbitrators to state a Special Case for the opinion of the court or to adjourn to



allow the buyers to apply for such a Case. The tribunal declined to take either course and at once made their award. The tribunal acted thus because in their view the rules of the association embodied in the contract in question prevented the parties from making such a request. The buyers thereupon applied to the court to set aside the award on the ground of the misconduct of the arbitrators in not affording an opportunity for an application to the court: *Re Palmer & Co. and Hosken & Co.* (5). The sellers replied that in view of r. 19 there was no misconduct of the arbitrators; to which the buyers rejoined that the rule was contrary to public policy as ousting the jurisdiction of the courts. The Divisional Court did not decide this question, but did decide that under *Re Palmer & Co., and Hosken & Co.* (5), is was "misconduct" of the tribunal not to give an opportunity of application to the court for a Special Case. They, therefore, set the award aside. As, however, under the rules, an award must be obtained before an action is brought, this merely postponed the day when it must be decided whether the rules of the Refined Sugar Association purporting to prevent the parties from applying for a Special Case in matters of law are rules to which the King's Courts will pay any attention.

I am of opinion that r. 19 of the rules of the Refined Sugar Association, in so far as it purports to prevent a party to an arbitration before the association, from exercising his right under the Arbitration Act to ask for a Special Case for the opinion of the court on a question of law is contrary to public policy and so unenforceable. In countless cases parties agree to submit their disputes to arbitrators whose decision shall be final and conclusive. But the courts, if one of these parties brings an action, never treat this agreement as conclusively preventing the courts from hearing the dispute. They consider the merits of the case including the fact of the agreement of the parties, and either stay the action or allow it to proceed according to the view they form of the best method of procedure; and they have always, in my experience, declined to fetter their discretion by laying down any fixed rules on which they will exercise it. If they allow the action to proceed they pay no further attention, and give no legal effect, to any further proceedings in the arbitration: *Doleman & Sons v. Ossett Corpn.* (6), ([1912] 3 K.B. at p. 269). They do not allow the agreement of private parties to oust the jurisdiction of the King's Courts.

Arbitrators, unless expressly otherwise authorised, have to apply the laws of England. When they are persons untrained in law, and especially when, as in this case, they decline to allow persons trained in law to address them on legal points, there is every probability of their going wrong, and for that reason Parliament has provided in the Arbitration Act that not only may they ask the courts for guidance and the solution of their legal problems in Special Cases stated at their own instance, but that the courts may require them, even if unwilling, to state Cases for the opinion of the court on the application of a party to the arbitration if the courts think it proper. This is done that the courts may ensure the proper administration of the law by inferior tribunals. In my view, to allow English citizens to agree to exclude this safeguard for the administration of the law is contrary to public policy. There must be no Alsatia in England where the King's writ does not run. It seems quite clear that no British court would recognise or enforce an agreement of British citizens not to raise a defence of illegality by British law. But for the decision of *Tullis v. Jacson* (7), I should have thought it equally clear that no agreement not to raise a defence of fraud was enforceable. Fraud usually involves a criminal offence, and, if there were in fact fraud, an agreement not to bring it before the King's Courts was, I should have thought, clearly contrary to public policy. I reserve my right to consider *Tullis v. Jacson* (7), if a similar clause should come before me. Without attempting precisely to define the limits within which an agreement not to take proceedings in the King's Courts is unenforceable, I think an agreement to shut out the power of the King's Courts to guide the

A proceedings of inferior tribunals without legal training in matters of law before them is calculated to lead to erroneous administration of law, and, therefore, injustice, and should, therefore, not be recognised by the courts. I am ready to go very far in ignoring technicalities and irregularities on the part of arbitrators unless there is some real substance of error behind them; but I think commercial men will be making a great mistake if they ignore the importance of administering settled

B principles of law in commercial disputes, and trust to the judgment of business men, however experienced in business, based only on the facts of each particular case, and with no knowledge of or guidance in the principles of law which must control the facts and which arbitrators must administer.

I think it is necessary to add a word about the effect of *Scott v. Avery* (1). I have always understood it to be a decision that while parties cannot agree to oust the jurisdiction of the King's Courts, they can agree that no action shall be brought in those courts till the amount of liability has been settled by arbitration.

C ALDERSON, B. (5 H.L. Cas. at p. 844) states this as agreed by all parties, and LORD CRANWORTH (ibid. at p. 846) begins his judgment in the same way. I do not think the language of LORD DUNEDIN in commencing his judgment in *Atlantic Shipping and Trading Co. v. Louis Dreyfus & Co.* (4), can have been meant to impugn the

D first part of this proposition. The courts always decline to recognise an agreement to refer all disputes to arbitration as compelling them to stay an action, and do so because such an agreement would oust the jurisdiction of the King's Courts. I prefer the language of LORD SUMNER, concurred in by LORD BUCKMASTER and LORD ATKINSON, to the effect that so long as a clause does not exclude the claimant from such

E recourse to the courts as is always open by virtue of the provisions of the Arbitration Act, 1889, but only requires certain conditions as precedent to a valid claim, it does not oust the jurisdiction. I think LORD SUMNER would have regarded a clause depriving the claimant of the protection of the Arbitration Acts as an ousting of the jurisdiction and unenforceable. And I can conceive some conditions precedent to enforcing a claim which English courts would decline to enforce. I am of opinion

F that the view of the Divisional Court was correct in regarding the action of the tribunal as wrong in refusing an opportunity to apply for a Special Case. Arbitrators must understand that parties before them have a right to take the opinion of the court on whether the arbitrators should be given the guidance of the court in matters of law, and that they must not attempt to stop the action of the courts by interfering with or hindering such a right of parties. For that reason I think the decision must be affirmed, setting aside the award. I am also of opinion that the latter part of

G r. 19 is unenforceable and that parties are entitled in spite of it to apply to the court, and in a proper case obtain from it a Special Case on matters of law. I do not decide that the present case is a proper case; the matter has not been argued before us. The parties, however, should consider their position; they must obtain an award as a condition precedent to recovering anything, and, therefore, must go

H to some arbitrators. I see no reason to assume that the present tribunal will not, if ordered to do so, state a proper Special Case, and it may be that the best course to take is to remit the matters to the arbitrators in the existing arbitration, when an application to order them to state a Special Case can be made in the usual way. This appeal, however, must be dismissed with costs.

I **ATKIN, L.J.**—I agree with the judgments that have been delivered, and desire to add but little on my own account. I should not be prepared to decide this case in favour of the buyers on what I venture to think was the narrow ground adopted by the Divisional Court. If, in fact, the buyers were bound by a valid agreement not to apply to the court for a direction to the arbitrators to state an advisory Case, I should hardly consider it misconduct of the arbitrators to refuse to adjourn for the purpose of enabling the buyers to make an application upon which they were bound to fail. I think that this court ought to determine the question whether the suggested agreement is valid. In my opinion it is not. I think that it is still a

principle of English law that an agreement to oust the jurisdiction of the courts is invalid. It is so stated or assumed in all the judgments of the judges who advised the House of Lords in *Scott v. Avery* (1), and the principle is affirmed by LORD CHELMSFORD. The effect of the decision is to establish that an agreement that the rights of the parties shall be determined by arbitration as a condition precedent to an action is not an agreement ousting the jurisdiction of the court. There is no cause of action, and, therefore, no jurisdiction until an award is made, and when made the courts have complete jurisdiction. The jurisdiction that is ousted in this case is not the common law jurisdiction of the courts to give a remedy for breaches of contract, but the special statutory jurisdiction of the court to intervene to compel arbitrators to submit a point of law for determination by the courts. This appears to me to be a provision of paramount importance in the interests of the public. If it did not exist, arbitration clauses making an award a condition precedent would leave lay arbitrators at liberty to adopt any principles of law they pleased. In the case of powerful associations such as the present, able to impose their own arbitration clauses upon their members, and, by their uniform contract, conditions upon all non-members contracting with members, the result might be that in time codes of law would come to be administered in various trades differing substantially from the English mercantile law. The policy of the law has given to the High Court large powers over inferior courts for the very purpose of maintaining a uniform standard of justice and one uniform system of law. Analogous powers have been possessed by the court over arbitrators and have been extended by the provisions of s. 19 of the Arbitration Act, 1889. If an agreement to oust the common law jurisdiction of the courts is invalid every reason for such a principle appears to me to exist for holding that an agreement to oust the court of this statutory jurisdiction is invalid. I have anxiously considered *Atlantic Shipping and Trading Co. v. Louis Dreyfus & Co.* (4), which reversed a judgment of the Court of Appeal to which I was a party, lest I should be departing from the decision of the House of Lords in that case. But it appears to me plain that the majority of the House differed from the Court of Appeal only in the construction of the contract, holding that the agreement did not oust the jurisdiction of the court, but merely made an award a condition precedent, and threw no doubt on the general proposition affirmed in *Scott v. Avery* (1). I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Richards & Butler; William A. Crump & Son.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

A

AMALGAMATED SOCIETY OF CARPENTERS, CABINET
MAKERS AND JOINERS AND OTHERS v. BRAITHWAITE
AND OTHERS

GENERAL UNION OF OPERATIVE CARPENTERS AND
JOINERS v. ASHLEY

B

[HOUSE OF LORDS (Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Wrenbury and Lord Carson), June 30, July 3, 28, 1922]

[Reported [1922] 2 A.C. 440; 91 L.J.Ch. 688; 128 L.J. 65; 38 T.L.R. 879;
66 Sol. Jo. 707]

C

Trade Union—Action by member against union—Interpretation of rules—Competency—Penal rule—Need to be in definite language—Strict construction—Trade Union Act, 1871 (34 & 35 Vict., c. 31), s. 4 (1), (3) (a).

By the rules of the appellant trade unions a member might be fined or expelled from his union if, in the one case, he "worked on a co-partnership system," and if, in the other case, he "worked on the premium bonus system." The respondents, members of the one or the other union, were threatened with expulsion on the ground that they were in breach of the applicable rule of the two mentioned, and they sought injunctions restraining the unions from expelling them, contending that the rules of the union did not apply to what they had done.

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E

Held: to construe the relevant rules of the unions was not directly to enforce any agreement between the members of the unions concerning the conditions on which those members should be employed, nor directly to enforce any agreement for the application of the funds of the unions to provide benefits to members, within s. 4 (1) and (3) (a) of the Trade Union Act, 1871, and, therefore, there was nothing to prevent the court entertaining the actions brought by the respondents; on the true construction of the rules they did not cover the acts of the respondents of which the unions complained; and, therefore, the respondents were entitled to the injunctions which they sought.

F

Decision of Court of Appeal, [1921] 2 Ch. 399, affirmed.

Observations of SIR GEORGE JESSEL, M.R., in *Rigby v. Connol* (1) (1880), 14 Ch.D. 482, criticised.

G

Per LORD SUMNER: One does not demand the precision of an Act of Parliament in the rules of a trade union, but not to require that a penal rule should be definite in its language and should be strictly construed would be unfair to the members. Each member ought to be able to tell from the rule what acts on his part may bring expulsion [or a fine] upon him.

H

Notes. Distinguished: *Miller v. Amalgamated Engineering Union*, [1938] 2 All E.R. 517. Considered: *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175; *Bonsor v. Musicians' Union*, [1954] 1 All E.R. 822. Referred to: *National Union of General and Municipal Workers v. Gillian*, [1945] 2 All E.R. 593; *Bonsor v. Musicians' Union*, [1955] 3 All E.R. 518.

As to "direct enforcement" of a trade union agreement see 33 HALSBURY'S LAWS (3rd Edn.) 481, 482, and for cases see 43 DIGEST 98-101, 125-128. For Trade Union Act, 1871, see 25 HALSBURY'S STATUTES (2nd Edn.) 1244.

I

Cases referred to:

- (1) *Rigby v. Connol* (1880), 14 Ch.D. 482; 49 L.J.Ch. 328; 42 L.T. 139; 28 W.R. 650; 43 Digest 98, 1035.
- (2) *Yorkshire Miners' Association v. Howden*, [1905] A.C. 256; 74 L.J.K.B. 511; 92 L.T. 701; 53 W.R. 667; 21 T.L.R. 431, H.L.; 43 Digest 107, 1127.
- (3) *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540; 80 L.J.Ch. 315; 104 L.T. 267; 27 T.L.R. 289, C.A.; 43 Digest 93, 972.

- (4) *Chamberlain's Wharf, Ltd. v. Smith*, [1900] 2 Ch. 605; 69 L.J.Ch. 783; 83 L.T. 238; 49 W.R. 91; 16 T.L.R. 514; 44 Sol. Jo. 643, C.A.; 43 Digest 99, 1036. A
- (5) *Wolfe v. Matthews* (1882), 21 Ch.D. 194; 51 L.J.Ch. 833; 47 L.T. 158; 30 W.R. 838; 43 Digest 107, 1123.
- (6) *M'Laren v. Miller (or Amalgamated Society of Railway Servants for Scotland v. Motherwell Branch of the Society)* (1880), 7 R. (Ct. of Sess.) 867; 43 Digest 107, 1123 ii. B

Also referred to in argument :

Aitken v. Associated Carpenters and Joiners of Scotland (1885), 12 R. (Ct. of Sess.) 1206; 22 Sc.L.R. 796; 43 Digest 97, f.

Kelly v. National Society of Operative Printers' Assistants (1915), 84 L.J.K.B. 2236; 113 L.T. 1055; 31 T.L.R. 632; 59 Sol. Jo. 716, C.A.; 43 Digest 99, 1038. C

Smith v. Scottish Typographical Association, 1919 S.C. 43; 56 Sc.L.R. 46; [1918] 2 S.L.T. 250; 43 Digest 97, n.

Appeals by the trade unions from an order of the Court of Appeal (LORD STERNDAL, M.R., WARRINGTON and YOUNGER, L.JJ.), reversing a judgment of EVE, J. D

The rules brought in question by the respondents' actions were r. 32 (1) of the first appellant union and r. 31 of the second appellant union. Rule 32 (1) was as follows :

"It shall be competent for any managing committee, district council, branch committee, or branch at a special or quarterly meeting to fine (not exceeding £5) or expel any member from the society upon satisfactory proof being given that such member has refused to comply with their decision or by his conduct brought the society into discredit, wilfully violated the recognised trade rules in the district in which he is working, or working on a co-partnership system, when such system makes provision for the operatives' holding only a minority of the shares in the concern." E F

The second defendant union relied upon their rule, No. 31, which provided :

"Any member proved to the satisfaction of the executive committee, district committee, or lodge to be working against the interests of the society by working on the premium bonus system, or taking piece work, or sub-contracting (sub-contracting and piece work being defined as taking the labour of a job and not supplying the material), or working for either class of employer, or fixing or using work which has been made under unfair conditions or contrary to the recognised trade rules of the district in which it has been made, may be fined or expelled as the executive council, district committee, or lodge, may determine." G

By s. 4 of the Trade Union Act, 1871 :

"Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely, (1) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed . . . (3) Any agreement for the application of the funds of a trade union,—(a) To provide benefits to members . . ." H I

EVE, J., held that the actions came within s. 4, and that he had, therefore, no alternative but to dismiss them. The Court of Appeal held the actions were not to enforce agreements within the meaning of s. 4, the only agreements between the respective plaintiffs and defendant being the agreements for membership, and that

A the court had jurisdiction to try them. They held, further, that the plaintiffs in the actions had not brought themselves within the rules, and that injunctions must be granted to restrain the defendants from expelling the plaintiffs. The defendant unions appealed.

Jenkins, K.C. and Brocklehurst for the appellants.

B *Clauson, K.C., Cunliffe, K.C., and C. W. Turner*, for the respondents.

The House took time for consideration.

July 28. The following opinions were read.

LORD BUCKMASTER.—In this case—the first of the two appeals which are before us—the Court of Appeal have granted an injunction restraining the appellants, who are a registered trade union and its officials, from expelling the respondents from the union on the ground of their participation in the co-partnership scheme of Lever Bros., Ltd. These are not the actual words of the injunction, but they contain its substance, and the question upon this appeal is whether such an order can be supported or no. The appellants contend that it cannot, upon the ground (i) that the action out of which this appeal has arisen was one which the respondents were unable to bring, and (ii) because r. 32 of the society justifies the expulsion.

E The respondents are two workmen each of whom has been in the service of Lever Brothers, Ltd., for upwards of twenty-eight years. They are members of the appellant union, and they are employed at trades union rates of wages on trade union conditions of work. By a trust deed, dated May 1, 1909 (amended by sundry supplementary deeds), made between William Hesketh Lever, of the first part, Lever Bros., Ltd., of the second part, and certain directors called the trustees, of the third part, an arrangement was made to which none of the operatives was a party, by which it was provided that certain certificates of £1 each, or in multiples of £1, called “partnership certificates,” should be issued to such persons in the employment of the company as might be determined by the trustees upon application made in writing. The application form required the applicant to agree that, among other things, he would “loyally and faithfully further the interest of Lever Bros., Ltd., its associate companies, and my co-partners,” and the conditions of the certificate provided that the certificate should be cancelled for breach of this obligation. The certificates carried with them certain rights to dividends, and these the employee was at liberty either to take in cash or to invest in shares of the company. The extent to which the interest of the employee became by this means involved in the fortunes of the business may be seen by looking at the table showing the advantages which the respondent, Frederick Braithwaite, received under this scheme. From 1909–1920 he had allotted to him partnership certificates to the extent of £255; the dividends which he received in respect thereof he, to a considerable extent, invested in shares of the company, so that in 1920 he held 854 shares of 5s. each; and in 1919 the amount allotted to him for dividends in respect of partnership certificates and the share amounted respectively to £47 8s. and £25 12s. In other words, he received £73 in addition to his trades union rate of wages. Rule 32 of the appellant society provides that it shall be competent for a managing committee, a district council, or a branch committee at a special or central meeting to fine, to an extent not exceeding £5, or to expel any member from the society upon satisfactory proof being given that such member is “working on a co-partnership system when such system makes provision for the operatives” holding only a minority of shares in the concern.” I omit reference to the loose, ungrammatical construction of the sentence; the words as quoted give, I think, its fair interpretation. Acting under this rule, the secretary of the joint committee of the appellant union gave instructions that any member in the employment of Lever Bros., Ltd., who was participating in the co-partnership scheme, must be excluded from the union in accordance with the general rules. The respondents

became liable to such notice, and, accordingly, issued a writ against the union, claiming an injunction to restrain such expulsion. A

The first question which arises is whether such action can be maintained. It is alleged that it cannot, upon the ground that it is expressly prohibited by s. 4 of the Trade Union Act, 1871. The relevant part of that section is in the following terms :

"Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely, (1) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed . . . (3) Any agreement for the application of the funds of a trade union,—(a) to provide benefits to members . . . But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful." B C

It is said that this proceeding offends against that section for two reasons: the first, that it is instituted with the object of directly enforcing an agreement between members of a trades union concerning the conditions on which they shall or shall not be employed; and, secondly, because it directly enforces an agreement for the application of the funds of trades unions to provide benefits to members. I am of opinion that it does neither one thing nor the other. Looking at the words of the section alone, unaided and unembarrassed by previous decisions, I should have thought it plain that an action which in fact asks for nothing but a declaration as to the construction of a rule as to membership, and, as incident thereto, an injunction, was not an attempt to enforce directly any such agreement as that referred to in the statute. It is, of course, true that no such claim could lie unless there were some right of property possessed by the member by virtue of his membership, and one of the most obvious instances of such right is his right to share in the benefits provided for members. But in this action there is no direct attempt to interfere with the application of the funds at all. It is nothing but a declaration as to membership with an injunction in its support. It appears to me that it is a totally different proposition to say that a man claims rights and that he seeks to enforce the obligations which they create. The latter may be prevented by the statute; the former is not. Nor is he seeking to enforce an agreement with regard to the terms upon which workmen care to be employed. He says that the conditions imposed do not apply to the conditions of his labour, which is the exact opposite of any attempt to enforce such conditions. Had the matter been free from authority these circumstances would, in my opinion, have disposed of the appeal, but authorities on the section are numerous, and, unfortunately, difficult to reconcile. D E F G

One of the earliest is *Rigby v. Connol* (1)—a decision the authority of which can only be maintained as against subsequent cases by regarding the actual words of the claim as those which support the decision. In that case a claim brought by a workman to prevent expulsion based on a breach of a rule with regard to the apprenticeship of his son asked that the plaintiff might be declared entitled to participate in the enjoyment of the property of the union and an injunction restraining the union from excluding him from such participation, a claim which appears to have been framed in direct opposition to the words of the statute; and it was on these words that SIR GEORGE JESSEL, M.R., based his judgment, for he said (14 Ch. D. at p. 490): H I

"If I decide in favour of the plaintiff . . . I declare him entitled to participate in the property of the union . . . and I restrain the society from preventing that participation."

It is, however, impossible not to see that the learned judge might, if he had thought fit, have moulded the injunction so that it merely followed a declaration as to membership, and I cannot resist the impression that he thought that such a claim

A was also barred. It may be out of respect to the great authority of SIR GEORGE JESSEL that this decision has never been definitely overruled. Technically it is true that the judgment may be supported, but in substance it cannot be.

B In *Yorkshire Miners' Association v. Howden* (2), in a judgment which binds this House, it was decided that an application to prevent by injunction the application of the funds of a trades union for a purpose for which they were not authorised was an action which it was competent for any member of the union to maintain, and I find it impossible, by any refinement of language or argument, to accede to the present appellants' contention without disregarding the opinion of LORD MACNAGHTEN, in which he states his reasons for maintaining the action in these words ([1905] A.C. at p. 265):

C "Then I come to the question, what was the 'object' of the present litigation? Was it to enforce an agreement for the application of the funds of the unions to provide benefits to members? I should say certainly not. The object of the litigation was to obtain an authoritative decision that the action of the union which was challenged by the plaintiff was not authorised by the rules of the union. The decision might take the form of a declaration or the form of an injunction, or both combined. But the decision, whatever form it might take, would be the end of the litigation. No administration or application of the funds of the union was sought or desired. The object of the litigation was simply to prevent misapplication of the funds of the union, not to administer those funds, or to apply them for the purpose of providing benefits to members."

E To make the matter more plain the learned Lord adds that he is aware that in expressing this view he is dissenting from the opinion of SIR GEORGE JESSEL in *Rigby v. Connol* (1), contained in the words on which reliance must be placed, if *Rigby v. Connol* (1) be regarded as establishing a general proposition. This opinion was dissented from by LORD DAVEY and by LORD JAMES OF HEREFORD, but, notwithstanding the penetrating criticism of LORD DAVEY, it is one which must be accepted, and in substance governs the present case.

F Again, in *Osborne v. Amalgamated Society of Railway Servants* (3) a decision was reached which actually covers the present dispute, except so far as it relates to the conditions of labour; for there an expelled member was held entitled to maintain an action asking for a declaration that the rule under which he was expelled was ultra vires, and an ancillary injunction. It is, however, true that, in the judgment of BUCKLEY, L.J., there are sentences which suggest that an action in which the relief was based upon the construction of the rules would be one that it would not be possible for the court to entertain, and he relies on *Chamberlain's Wharf, Ltd. v. Smith* (4) as an illustration of this principle. The words to which I refer are as follows ([1911] 1 Ch. at p. 569):

H "The point in *Chamberlain's Wharf, Ltd. v. Smith* (4) was as follows: There was a rule in that case which fell within the words of s. 4, 'agreement concerning the conditions on which any members . . . shall sell their goods.' For a breach of the rule the plaintiffs were expelled in exercise of a power of expulsion in the rules. They asked for an injunction to restrain the defendants from acting on the resolution, alleging that they had not had a fair opportunity of being heard in their own defence. Their case, therefore, was that they had not broken the rule. To adjudicate in the action would have involved an investigation whether they had broken it or not. This the court could not entertain."

I I differ, with the greatest hesitation and reluctance, from any statement of the noble and learned Lord, but I cannot accept this view of the statute and the authorities. *Chamberlain's Wharf, Ltd. v. Smith* (4) was clearly based on the wider view of *Rigby v. Connol* (1); see per LORD ALVERSTONE, C.J. ([1900] 2 Ch.

at p. 612), and per COLLINS, L.J. (ibid. at p. 615), and this view cannot, after the decision in *Yorkshire Miners' Association v. Howden* (2) be any longer accepted. To construe a rule is not directly to enforce any agreement between the members, and I am unable to see any reason why the words of the statute should be so extended so as to exclude a trade union itself, or any of its members, from obtaining the advantage of having obscure words construed by a wholly independent and impartial tribunal. I have not referred to *Wolfe v. Matthews* (5) for that depends upon considering whether relief by way of injunction is a method of directly enforcing an agreement, and that question does not admit of a complete and comprehensive reply. It depends upon the circumstances, but for reasons which I have already given, such an injunction as is here sought is not a direct enforcement of any of the forbidden provisions.

Turning now to the words of the relevant rule of the first appellant union, r. 32 (1) (see p. 54 ante), I find it difficult to construe them as the appellants desire. It seems to me that the meaning of the words is that there must be a system which includes as part of its terms the allotment of shares, and also makes no provision for the workmen holding more than a minority. I cannot, on any other reading, give any intelligible meaning to the words "when such system makes provision for the operatives' holding only a minority of shares in the concern," for these words seem to me to involve the proposition that the system itself provides for the allotment of some shares; and if this be right, the matter ends, because the present system makes no provision for the allotment of shares at all. I think also that there is difficulty in showing that a workman is working on a system of co-partnership at all, when the terms of his employment, as here, create neither an obligation nor a right to obtain any partnership interest, although I appreciate the value of the argument that when once he has accepted the certificate, he is then working on a system of which the certificate forms part. I do not, however, think it necessary to decide this point.

Finally, it was urged that this scheme was obviously within the object against which the rule was aimed, and I think that this would be true. The right to give and to withhold labour has, on certain occasions, unfortunately proved to be the only means of obtaining the redress of grievances, and it is plain that the exercise of such a right is impeded by the interest of the workmen becoming entangled with that of the owners of the works. It is out of place to discuss here the wisdom of the plan which seeks to keep those interests apart. The trades unions, looking to the care of their members, think that they are best preserved by regarding the two interests of employer and employed as distinct, and they try to prevent them from merging into one. But this rule, although doubtful words may be illuminated by considering the purpose for which they are used, cannot be stretched so as to make it reach far enough to cover all the purposes which may have prompted its introduction. It must be construed as it is found, and, so regarded, it does not support the appellant's contention.

In the second appeal the circumstances are the same, except that the rule relied on is different. So far as material it runs in these words :

"Rule 31. Piecework and Premium Bonus.—Any member proved to the satisfaction of the executive committee, district committee or lodge to be working against the interests of the society by working on the premium bonus system . . . may be fined or expelled as the executive committee, district committee or lodge may determine."

The only definition offered of "premium bonus system" includes the idea that the bonus is a reward bearing direct relation to work done, and I see no other possible explanation of the phrase. The system in this case has no such provision, and the rule, therefore, cannot apply.

LORD ATKINSON.—The first appellant is a trade union duly registered under the Trade Union Act, 1871, and the other appellants are officials connected with

A it. The respondents are three workmen who have long been members of that trade union. Their cases are practically identical on the facts, and that of Frederick Braithwaite has, therefore, been taken as a specimen of all the three.

I assume that the trade union is an illegal association, being in restraint of trade. Although the purposes of the union may be in restraint of trade, that fact does not, under the Trade Union Act, 1871, make them unlawful so as to
 B render void or voidable any of their agreements or trusts. The fourth section of this statute provides that nothing shall enable any court to entertain any legal proceedings instituted with the object of directly enforcing, or the recovery of damages for the breach of, any of the agreements mentioned in the five sub-sections of this section. The section further provides that although these agree-
 C ments are unenforceable in the manner mentioned, nothing in the section is to be deemed to make them unlawful. The agreements mentioned in sub-s. (1) are those made between members of a trade union as such concerning the conditions on which members for the time being of such trade union shall or shall not (among other things) employ or be employed. The agreements mentioned in sub-s. (3) (a)
 D are those for the application of the funds of a trade union to provide benefits to members. The appellants have appealed from a judgment and order of the Court of Appeal, by the latter of which it was merely ordered that the appellants should be perpetually restrained from expelling the respondents, or any one of them, from the appellant society on the ground that their participation in the co-partnership scheme of Lever Bros., Ltd.—the employers of the respondents—justified their expulsion under r. 32 of the rules of the appellant society, and
 E from taking and continuing, directing or permitting or suffering to be taken or continued, any step with a view to effect such expulsion. This is the only relief given to the respondents, and it is this relief which the appellants contend that the respondents are, by s. 4 of this Act, debarred from seeking in a court of law.

The respondents never were in fact expelled from the society. Their expulsion
 F was threatened, but not carried out. The effect, therefore, of this order is not to restore the respondents to a position which they occupied, but were deprived of, but rather to quiet them in the enjoyment of the position which they occupied before the threat was made and still continue to occupy with, in all cases, all their previously existing rights, privileges and disabilities. Any legal proceedings which any of them could have instituted before the threat they can still institute. Any
 G legal proceedings which they were disabled from bringing before the threat they are still disabled from bringing; and yet it is contended that a legal proceeding, instituted by a person which secures for that person continuance in a position in which he is disabled from enforcing a particular contract, is a proceeding directly enforcing that very contract. That appears to me to be, and I hope will always appear to me to be, a most illogical conclusion. In one sense the inflicting a
 H pecuniary or other penalty upon a man for not doing something which he is by contract or duty bound to do amounts to enforcing that contract or duty, because he will probably keep the contract or discharge the duty to avoid being mulcted in damages, but that is obviously not the sense in which the words "directly enforcing" are used in s. 4 of the Act of 1871, since the indirect enforcement of an agreement by recovering damages for its breach is treated as a separate
 I matter uncovered by the words "directly enforcing." I do not think that LORD MACNAUGHTON, in the statement made in his judgment in *Yorkshire Miners' Association v. Howden* (2) ([1905] A.C. at p. 264), ever meant to suggest that the word "directly" was to have no force given to it, or that the words "directly enforcing" include kinds of direct enforcement of a contract other than a suit to recover damages for the breach of it.

Of course, when a workman becomes a member of a trade union, he contracts to be bound by the rules of that union, and the contract into which he enters with

the union, or with each of his fellow workmen, are to be found, if found at all, in those rules. I accordingly asked counsel for the appellants what was the agreement under s. 4 (1) which he contended was directly enforced by this proceeding to obtain the injunction granted, and he replied that it was a contract covered by r. 32 to the effect that the respondents would respectively not be entitled, while continuing to be members of the union, to work under such a system of co-partnership as is mentioned in r. 32. That answer necessitates the enquiry: (i) whether the scheme of co-partnership established by Lever Bros., Ltd., is substantially identical in its nature with the system mentioned in this rule; and (ii) whether the employees of Lever Bros., Ltd., can be said to work on such a system. In my view, to satisfy the words of this rule, it would be necessary that the employee should, by his contract of service, be bound to work on the system mentioned. If the employee, while continuing in his employment, entitled to receive his wages and all the other benefits which his contract of employment secures to him, be left quite free to adopt—or not to adopt—a co-partnership scheme which the generosity of his employer offers for his adoption with the consent of the trustees of the scheme, he does not, I think, work on a co-partnership system within the meaning of r. 32. Again, the system of co-partnership which offends against this r. 32 must be one which provides, i.e., requires, that every workman employed in the concern should acquire shares in it, but not enough shares to secure that the operatives as a body shall hold more than a minority of those shares. The rule is obviously directed against a system of co-partnership which would prevent by its very terms the operatives becoming shareholders in a concern to such an extent as to acquire control of it. Although the scheme established by Lever Bros. does not make the workers partners in the concern in the strict sense of the word (art. 16 of the scheme prevents that), yet, as those workmen who adopt the scheme share in the profits of the company, and as the scheme is styled by its authors a co-partnership scheme, one may well assume that it truly answers that description. It does not require, however, that any employee shall acquire or hold a single share in the company. It does provide that if he be not less than twenty-two years of age, he may, if so disposed, apply to the trustees that a partnership certificate may be issued to him under the trust, which application the trustees may in their discretion grant or refuse. Should he obtain this certificate, he will be entitled to receive out of the profits of the concern interest on the amount for which the certificate is given. When he has got this certificate, he may in any year take a preferred ordinary share in the company in lieu of this interest, or he may take the interest in cash, and he may take it in shares one year and the next year in cash, if so disposed. The amount of the partnership certificates which an employee may receive is regulated by his wages, and according to the classes to which the member belongs. In the staff class—to which the respondents would belong, their wages being, we have been informed, about £4 a week—if the salary be £200 or upwards, the amount of the certificates would be £800. If less than £200, and not less than £100, then £400. If less than £100, then £200. A partnership certificate may be cancelled in the manner prescribed for misconduct of the kind mentioned on the part of the holder. But the application for a grant of such certificate is not made in any way a condition of an operative's employment. It is wholly apart from, and does not affect his contract of, employment, or the wages or other conditions with which that contract deals. Clause 3 of the scheme provides that the partnership certificates issued from time to time and outstanding shall in no case exceed in nominal amount £1,000,000, but it further provides that this limit may be extended with the consent of the holders of the majority of the shares of the company. Having regard to the large capital of Lever Bros., Ltd., it would, I think, be impossible for the operatives of the concern ever to hold more than a minority of the shares of the company. Having regard to the above-mentioned reasons, I am clearly

A of opinion that the co-partnership scheme established by Lever Bros. does not come within the provision of r. 32, and that the agreement mentioned by counsel, which he says that the injunction granted in this case directly enforces, is not shown ever to have existed. The appeal, therefore, in my opinion, fails so far as it is based upon s. 4 (1) of the Trade Union Act, 1871, and r. 32.

Now as to sub-s. (3) (a) of that section. It is stated in the third of the rules of the appellant society that the object of the society is to raise funds for the advancement, protection and organisation of trade, for the political purposes to which the Trades Union Act, 1913, applies, and then for, among other things, the mutual support of its members in cases of sickness, accident and superannuation, for the burial or cremation of members and their wives, for loss of tools, and for assistance to members out of work. By r. 8 it is provided that the contribution of members to the funds of the society shall be of the amounts named. The succeeding rules provide that the several benefits mentioned shall be paid a sum in certain events. The source from which money must be drawn to make these payments must, in the nature of things, be the funds raised by these contributions in addition to fines. Counsel's argument on this part consisted to some extent of a strong and repeated appeal to your Lordships not only to approve of the decision pronounced by SIR GEORGE JESSELL, in *Rigby v. Connol* (1), but to adopt and apply the principles laid down in his judgment in language which has by no means escaped criticism. If one turns to the pleadings in that case one finds that the plaintiff was expelled from his trade union for having refused to pay a fine of £5, inflicted upon him by them for having, as they alleged, in breach of their r. 73, bound his son as an apprentice in a "foul" shop, i.e., a shop where non-unionists were employed. The plaintiff denied that this shop was a foul shop, refused to remove his son, and refused to pay the fine. Rule 73 ran thus:

"Any journeyman binding his son in a foul shop shall be fined £5, and not be entitled to any benefit until he has paid his fine and contributed twenty-six weeks according to rule."

F In his statement of claim he prayed that a declaration might be made that as long as he conformed to the rules of the society, which he thereby offered to do, he was entitled to participate in its rights, privileges and benefits, that the pretended expulsion of him was invalid, and that the defendants might be restrained by injunction from excluding him from this participation; and he then claimed to recover damages for his alleged improper expulsion. The main point relied upon by the defendants in their defence was that the fine imposed by them was properly imposed, and that, if the plaintiff was dissatisfied with them respecting it and their action in expelling him for not having paid it, he should have appealed to a general meeting of the society, that he had no right to the relief which he sought from the court, and that the court had no jurisdiction to entertain the action. This means that the infliction of this fine, and the expulsion for the non-payment of it, was a matter of internal domestic management of the affairs of the union. The declaration asked for was of a very peculiar character, and, of course, the claim for damages was prohibited by s. 4 (1) of the Act of 1871, so that, having regard to the relief sought for by the plaintiff in the action and to the grounds upon which it was sought, there is nothing inconsistent in one approving of the dismissal of the action, while disapproving of the course adopted by the learned Master of the Rolls on the grounds stated by him, on which he justified it. Several of his critics, I think, took that course. He said (14 Ch.D. at p. 488):

"The present plaintiff certainly does not state in his statement of claim that there is any property here at all, and I think that that is a fatal objection to the statement of claim altogether, and I might, if I thought fit, dismiss the action simply on that ground. He states nothing but that there is an association which he calls a 'trades union'—the 'Journeyman Hatters' Fair Trade Union'—as governed by rules. He says that he has been a member, and

that he has been unfairly and improperly expelled, but he does not allege there is any property of any kind or description belonging to the union, or that he is entitled to any share of it. That is, however, a very technical ground, and I intend to base my judgment on the larger ground that if he had fully stated the position and rules of this trades union to which he belonged, the result would be the same, for the reasons I am about to state."

After dealing with the history and objects of the statute of 1871, the learned Master of the Rolls says (*ibid.* at p. 490):

"I am satisfied that the agreement contained in the rules is an agreement to provide benefit for members, and that, if I decide in favour of the plaintiff, I directly enforce that agreement, because I declare him to be entitled to participate in the property of the union, and the only property they have is their subscriptions and fines, and I restrain the society from preventing that participation. It seems to me that is directly enforcing that agreement, in fact it is in substance directing and enforcing the specific performance of it, nothing more or less."

Well might LORD HALSBURY, L.C., say of this judgment as he did say in *Yorkshire Miners' Association v. Howden* (2) ([1905] A.C. at p. 261):

"I am bound, however, to say if that case ever came up for review I think it would have to be considered whether it does not strike the word 'direct' out of the statute."

In *Wolfe v. Matthews* (5) certain members of a trade union claimed an injunction to restrain other members of the union from carrying out a scheme for the amalgamation of their union with another trade union. A preliminary objection was taken by the defendants that the action was an attempt to enforce an agreement for the application of the funds of the plaintiffs' union intended to provide benefits for its members. They cited and relied upon *Rigby v. Connol* (1). FRY, J., in giving judgment, said:

"Now it is plain that this is not an action to recover damages for the breach of an agreement, neither is it, in my judgment, an action to directly enforce an agreement, which proceedings are alone mentioned in the 4th section. An order that the defendant should pay money to the plaintiffs would be a direct enforcement of an agreement for the application of the funds, but all that is sought here is to prevent the payment of the moneys to somebody else. Either that is no enforcement of an agreement at all or it is an indirect enforcement."

He overruled the preliminary objection. The learned judge then took a case as an example of the principle which he had applied in his judgment. He said:

"To take a simple case, if there is a contract by A to pay £100 to B, that contract is directly enforced by a judgment of the court directing A to pay B. And the contract is only indirectly enforced or not at all by a judgment restraining A from paying the money to someone else. It is only by a stretch of language that such an order can be said to enforce A's contract; the utmost that can be said is, that it is then more likely that A will pay B."

LORD DAVEY, in a dissenting judgment in *Yorkshire Miners' Association v. Howden* (2), criticises this illustration adversely. He says ([1905] A.C. at p. 273), that, if the learned judge meant by £100 an earmarked bag of sovereigns which A had contracted to deliver to B, and no one else, an action to restrain A from delivering it to a third person would clearly be one directly enforcing that agreement. That criticism may be sound or unsound, but on the other side LORD HALSBURY, in the same case (*ibid.* at p. 241), states distinctly that in his opinion the decision of FRY, J., was right; he extracts from it the passage which I have already extracted

A from FRY, J.'s judgment, and approves of it. LORD LINDLEY, dealing with *Wolfe v. Matthews* (5), says (*ibid.* at p. 282) :

"It came before FRY, J., in 1882 in *Wolfe v. Matthews* (5), and was decided in accordance with the above view, and, so far as I know, this case has never been questioned and has always been considered right. A similar view was taken of the Act in Scotland in *M'Laren v. Miller* (6)."

B I think that *Wolfe v. Matthews* (5) will survive LORD DAVEY's criticism, and is entitled to be treated as a safe authority to rely upon and be guided by, notwithstanding that the principle on which it is based is considered to be in conflict with that upon which the decision was vested in *Rigby v. Connol* (1). LORD MACNAGHTEN, after quoting the passage from SIR GEORGE JESSEL's judgment which

C I have already quoted, says (*ibid.* at p. 266) :

"There I think the learned judge departs rather widely from the language of the enactment. If the Act had said that no court should enforce an agreement to provide benefits for members there would have been an end of the matter. But the Act does not say that, or, I think, anything like it. It is not every trade union agreement that the court is forbidden to enforce. The effect of SIR GEORGE JESSEL's observations, in conjunction with the cases of unenforceable contracts specified in the Act, makes trade union agreements one and all alike unenforceable. There is really nothing left. The Act, however, proposes only to strike at certain agreements, leaving, at least apparently, the jurisdiction of the court untouched as to everything else."

E He then adds, quite consistently, as I have already sought to show :

"In making these remarks I do not wish to be understood as expressing doubt as to the correctness of the actual decision in *Rigby v. Connol* (1)."

But the actual decision was merely a dismissal of the action. LORD LINDLEY (*ibid.* at p. 283) said :

F "The cases in which the court has refused to restore expelled members, namely, *Rigby v. Connol* (1) and *Chamberlain's Wharf, Ltd. v. Smith* (4) are also distinguishable (from *Wolfe v. Matthews* (5)). The object of the action in each of those cases was directly to establish and enforce the plaintiff's rights as a member of the trade union to the benefits conferred by the rules of the members."

G Such are the direct criticisms, expressed in words in *Yorkshire Miners' Association v. Howden* (2), on *Rigby v. Connol* (1) by the noble Lords, but the most effective and destructive criticism of it is, in reality, the judgment of this House in the *Yorkshire Case* (2). In that case the trade union was established for certain objects, including payment out of their funds to members locked out or on strike. The entire amount of their funds was to be applied in carrying out the specified object according to the rules. The union misapplied part of the funds by making payments of strike money in cases not authorised by the rules. A miner named Howden, a member of the association, brought an action against the association and some of the officials, claiming an injunction to restrain them from misapplying the funds of the association by payment of strike money contrary, as was

H alleged, to the rules : and the decision of the House was that the action was not instituted with the object of "directly enforcing" an agreement for the application of the funds to provide benefits to members within the meaning of the fourth section of the Act of 1871, the object being not to apply but to prevent a misapplication of the funds, and was, therefore, maintainable. The judgment of the

I Court of Appeal was affirmed.

The last case to which I think it necessary to refer is that of *Osborne v. Amalgamated Society of Railway Servants* (3). In that case the plaintiff, who had been

expelled by an order of the defendant union of which he was a member, brought an action for the purpose of obtaining the rescission of the resolution expelling him, and an order restoring him to membership of it, and his right to benefits as such member. The defendants in their defence took a preliminary objection founded, first, on the grounds that the contract relied upon, which was constituted by the rules of the society, was an illegal one and incapable of being enforced at common law, and, secondly, that the action was a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of the trade union to provide benefits to members within the meaning of s. 4 (3) of the Trade Union Act, 1871. COZENS-HARDY, M.R., in giving judgment, said ([1911] 1 Ch. at p. 551):

"The contention of the defendants involves two propositions—(a) that the society is at common law an unlawful association; and (b) that this action is a legal proceeding which no court can entertain, having regard to s. 4 of the Act of 1871. If either of these proposition is not well-founded the defendants fail, and the action must proceed to trial in the usual way. WARRINGTON, J., held that both propositions were established, and dismissed the action with costs. It is necessary to consider these propositions separately."

The first proposition mentioned by the learned judge which was held not to have been established does not affect the present case. The Master of the Rolls then deals with the second proposition, criticises the decision in *Rigby v. Connol* (1) and *Chamberlain's Wharf, Ltd. v. Smith* (4), the main, if not the only, authorities relied upon by the appellants in this case, and in reference to the first, says (*ibid.* at p. 555):

"I feel no doubt that the decision of SIR GEORGE JESSEL, dismissing the action, was perfectly correct. But there are observations in the judgment of SIR GEORGE JESSEL which seem to greatly enlarge the operation of s. 4, and in effect to exclude the intervention of the court in any question arising upon the agreement constituted by the rules."

He further said that in the second case, which arose upon s. 4 (1), the Court of Appeal substantially followed *Rigby v. Connol* (1), but they did not discuss the general observations of SIR GEORGE JESSEL, and ultimately held that the second of the above-mentioned propositions as well as the first could not be maintained. MOULTON, L.J., also deals with these two cases, and as to *Ribby v. Connol* (1) said (*ibid.* at p. 561):

"I think that the explanation of this decision is to be found in the nature of the relief asked. Had the claim of the plaintiff been limited to his restoration to membership the result of the case might have been different. But it is clear that the learned judge considered the claim in substance to go far beyond this and to be an attempt to obtain an order of the court giving him a share in the assets of the union."

He then quotes the passage from SIR GEORGE JESSEL's judgment which I have already quoted, and says (*ibid.* at p. 563):

"If the learned judge is to be understood to have decided that the mere declaration that the plaintiff in that case was entitled to membership would amount to decreeing specific performance of the whole contract of membership, as some of the expressions in his judgment would seem to imply, I respectfully differ from that decision."

The learned lord justice then refers to *Chamberlain's Wharf, Ltd. v. Smith* (4), and points out that the plaintiff company had been a member of a voluntary association, the members of which were dock companies and tea warehousekeepers, that its object was to compel its members to charge certain scheduled rates on

A teas and no other, and that the whole of the rules were directed to securing this. He then said (*ibid.* at p. 563) :

B "It would not be too much to say that the whole agreement of membership might be aptly described in the words of s. 4 (1) as an 'agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trades union shall or shall not sell their goods or transact business.' "

C The committee had found that the plaintiff departed from these rules, and expelled him. The defendants claimed that the Act of 1871 had not given the court any power to entertain the claim [for an injunction restraining the defendants from acting on the resolution of expulsion], founding themselves solely on s. 4 (1), of the Act of 1871. The Court of Appeal held that the contention of the defendants was well founded. BUCKLEY, L.J., in his judgment, deals with this point on s. 4 (1) (a), tersely but with great lucidity, and with convincing logic. He said (*ibid.* at p. 567) :

D "The jurisdiction of the court is therefore not excluded by any absence of rights of property. But it is said that an order to declare his expulsion *ultra vires*, and a proper consequential injunction, will be an enforcement of the agreement in the rules to apply the funds to provide him with benefits. I cannot follow that contention. The plaintiff was a member of a society with (among others) rights as regards those benefits which were unenforceable. How can an order to restore him to membership do more than make him what he was before, namely, a member with the same unenforceable rights? How does such an order enforce those rights? What benefit in the application of the funds is it that the order compels the society to give him? Obviously none. If he succeeds in the action he merely resumes the position in which he stood before. His rights by way of benefit are neither greater nor less than before his expulsion. The whole answer to the contention on this part of the case may be summarised in a sentence. An order to restore the membership with unenforceable rights is no order to enforce those rights."

F I think that answer is thoroughly sound and absolutely sufficient. It is founded on good sense and good reason and is supported by every authority to which I have referred. On the whole, therefore, I am clearly of opinion that the decision of the Court of Appeal which has been appealed from was right on principle and authority and should be affirmed, and this appeal dismissed with costs.

G **LORD SUMNER.**—I agree that there is jurisdiction to entertain this action. To hold otherwise would strike the word "directly" out of the statute. One does not demand the precision of an Act of Parliament in the rules of a trade union, but not to require that a penal rule should be definite in its language and should be strictly construed would be unfair to the members. Each member ought to be able to tell from the rule what acts on his part may bring expulsion upon him. I am not satisfied that the benefit scheme in question is properly described either as a co-partnership scheme or as a premium bonus scheme [see r. 32 (1) in the first appeal (p. 54 ante) and r. 31 in the second appeal (p. 54 ante)]. It is said to be both, and the possibility of such a double description is strong ground for saying that both descriptions are too indefinite for it to be either. Co-partnership here does not, of course, mean that the workman and the employer are legally partners, but, in the absence of evidence showing that the word has become a definite term of art, I think that it implies sharing losses as well as profits, and, therefore, does not apply to the scheme in question. Still less can the scheme be called a premium bonus scheme. The money paid is not an addition to the wages as part of the earnings of the wage-earner under his contract of employment. He does not work on the system; he shares and invests under it. The payment arises out of a voluntary gift; out of a participation in profits earned

by the company, which is dependent on the donee's prior good character and his present engagement to do his best in future for the company, and is given by the donor. Quoad ultra the workman becomes a shareholder. Neither, in my opinion, does the scheme provide that workmen shall hold only a minority of the shares. It provides nothing about it. I dare say that under the scheme they never will hold a majority, although that is hardly a mathematical certainty, but the result of the working of a scheme is one thing, and the provisions of the scheme, or the absence of them, another. The rule refers to providing, and I think must be construed as it stands.

LORD WRENBURY.—In these cases there are two questions. The appellants say that the actions will not lie—that the court has no jurisdiction to entertain them. The first question is whether that is so. This turns upon the provisions of the Trade Union Act, 1871. The effect of that Act is that while a trade union is left an illegal association at common law, nevertheless, by s. 3, its agreements shall not, by reason merely that they are in restraint of trade, be unlawful. But this is subject always to the operation of s. 4, which provides that nothing in the Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of certain defined agreements. The result is that agreements which would have been unlawful are by s. 3 rendered lawful, but that, nevertheless, certain of these lawful agreements are unenforceable in some ways, leaving others enforceable in every way in legal proceedings.

In 1911, in delivering judgment in *Osborne's Case* (3), I discussed and expressed my opinion upon all the decisions which existed down to 1911 upon the question of the effect of the above enactments. I need not recapitulate that which I then said, but I desire to be taken as repeating in this House all that I have said in the Court of Appeal, as if I now repeated it in the House. But this is subject to the following observations. In the course of that judgment I was discussing *Rigby v. Connol* (1) and *Chamberlain's Wharf, Ltd. v. Smith* (4). The former was an action in which the plaintiff was—or SIR GEORGE JESSEL held that he was—enforcing an agreement to participate in the funds of the trade union. It was an action within s. 4 (3) of the Act of 1871. The latter was an action in which the plaintiff was resisting his expulsion from the union in an action which fell within s. 4 (1). With these in my mind I used language not sufficiently guarded—for I used words capable of being understood in a general sense, where in fact they were used in a limited sense. At the same time I should have thought that anyone would have understood them in the limited sense, for if they were of universal application I must have decided *Osborne's Case* (3) the other way. I suggest ([1911] 1 Ch. at p. 569), that a second reason why *Rigby v. Connol* (1) could be upheld was that

“to have restored the plaintiff to membership in that case would have involved an investigation of the ground for his expulsion, and that would have involved the question of the validity of the rule for breach of which he suffered.”

I did not intend to infer that such an investigation would be precluded in every case, but only that “in that case,” i.e., in an action seeking relief by way of enforcement, such an investigation could not be made. Again (*ibid.* at p. 570), my words ought, on the like grounds, to be qualified as follows: The passage should run:

“To adjudicate in the action would have involved an investigation in an action of enforcement, whether they [the plaintiffs] had broken it [the rule] or not. This the court could not entertain for the purpose of enforcing the rule.”

Again, a few lines below:

“Had the breach been established in the action the court would have been called upon to decide that the expulsion was valid because the members had

A broken a rule which could be enforced against them. This the court could not do with a view to enforcing the agreement."

I ought to have made it plain that while the court has, as in *Yorkshire Miners' Association v. Howden* (2), jurisdiction to maintain unimpaired the integrity of the agreement, and may, and indeed must, for the exercise of that limited jurisdiction, construe the agreement, it cannot, whether by declaration or injunction, B enforce the agreement, and for that purpose accept the duty of construing it.

The second observation is this. I desire to add something upon some words of LORD MACNAGHTEN in *Yorkshire Miners' Association v. Howden* (2) ([1905] A.C. at p. 264) with which I did not, I think, deal adequately in *Osborne's Case* (3). Section 4 of the Act speaks of legal proceedings "instituted with the object of directly enforcing or recovering damages for the breach of" certain agreements. C There are two ways of dealing with the non-observance of an agreement: the one is to compel the contracting party to perform it, the other is to make him pay damages for not performing it. There are two things contrasted in the Act, and LORD MACNAGHTEN is intending, I think, to point out that the use of the word "directly" does not infer or imply that a court may indirectly enforce, in the D sense that it may make an order which by indirect means will have the effect of enforcing in fact—but means that neither by way of damages for not performing nor by order compelling performance may the court interfere. But there is nothing in the Act to preclude the jurisdiction of the court to uphold the integrity of the contract—to maintain unimpaired the contract as it stands—notwithstanding that it cannot enforce the contract as so maintained—so that, for instance, as in *Wolfe v. Matthews* (5) and *Yorkshire Miners' Association v. Howden* (2) it may restrain by injunction the improper application of funds, notwithstanding that it cannot E compel their proper application. Adopting the language of LORD MACNAGHTEN in *Yorkshire Miners' Association v. Howden* (2) ([1905] A.C. at p. 265), and adapting it to the present case—the object of this litigation is to obtain an authoritative decision that the action of the union challenged by the plaintiff is not F authorised by the rules—the object of the litigation is simply to prevent exclusion from sharing in the funds of the union, not to administer or apply them in any way. The matter may be stated tersely, I think, by saying that it is not enforcing an agreement against a party to grant an injunction to restrain him from tearing it up. When the injunction is granted and obeyed, the result is simply to leave the relations between the parties in statu quo ante, without enforcing them at G all. It is plain that under the Act of 1871 a trade union is not outside the jurisdiction of the court altogether. It is within the jurisdiction as regards contractual obligations other than those specified in s. 4 of the Act of 1871, and is within the jurisdiction as regards the contractual obligations specified in s. 4, if the jurisdiction is invoked with an object which is not that of directly enforcing or recovering damages for breach of the agreement.

H With these observations, I turn to consider what is the matter of which the respondents have complained, and what is the remedy which they ask the court to apply. The respondents' case is that they, being members of an association in which they had rights of property, have suffered from an alleged expulsion from membership on grounds which are not to be found in the contract of membership as grounds for expulsion. They seek, and seek only, to establish that their membership is unimpaired. They do not seek in any way to enforce their rights as I members. They contend that the enforcement—whether direct or indirect—of an agreement must be the enforcement of some term of the agreement, and that their whole case is that there is nothing in the agreement which justifies the action taken against them. They rely, not upon anything contained in the agreement, but upon the silence of the agreement in the matter in dispute. In acceding to the respondents' application and granting the injunction, the court, they say, is simply affirming that there is nothing in the agreement to justify expulsion; it is

not enforcing any portion of the agreement, but is acting on the footing that something is not in the agreement. In my opinion, the respondents are right in this contention. A declaration that an agreement is such that a man is a member, and an injunction in support of the declaration, are not enforcing an agreement to make him a member, or enforcing any rights which he has as a member. The appellants' counsel, on being asked the question, answered plainly that his contention was that no member of a trade union can restrain by injunction his expulsion from the union. I think it well to say plainly that, in my opinion, this contention is absolutely untenable. If this action is confined to maintaining the contract unimpaired without enforcing it, there is nothing in the Act to stay the court from upholding it.

This being so, the second question arises, and it is this: Does this contract contain a power to expel which in the facts is exercisable against the plaintiffs? This turns upon r. 32 in Braithwaite's case and r. 31 in Ashley's case. Rule 32 in Braithwaite's case is not complete or grammatical as it stands. It can be made complete by inserting the words "that he is" before "working," so that it will read that it shall be competent to expel any member upon proof "that he is working," &c., or by stopping at the word "member" in the third line, and continuing at the word "working" in the last line but two, so that it will run "expel any member working," &c. At any rate, that is obviously what is meant. In a popular sense, I daresay it may be said that the Lever Co-partnership Trust and Scheme may be called a "co-partnership system," and, at any rate, I will assume that it is such. But I cannot find that any employee of Lever Bros., is "working on" that system. He works, I conceive, "on" the terms on which he is employed. It is no part of those terms that he shall have any interest in the scheme. The fact is that if he satisfies certain conditions and makes a certain application, and if the trustees decide that he is entitled to the issue of a partnership certificate, he will obtain one. He is a person who, in certain circumstances, is entitled to a certain gratuity. That does not fall within the words, "working on" the system. Further, the system which falls within the rule is one which "makes provision for the operatives' holding only a minority" of the shares in the concern. This obviously means that the system referred to must not be one in which the operatives can never be in a majority. There is no such provision in the scheme. In r. 31 in Ashley's case, the question turns upon the words "premium bonus system." This indicates a system under which a bonus in addition to wages, in proportion to work done or time saved, is paid to the workman. There is nothing of that kind in this scheme. The injunctions granted in these cases have, I think, been rightly granted, and these appeals should be dismissed with costs.

LORD CARSON.—I concur.

Appeals dismissed.

Solicitors: *Kinch & Richardson*, for *C. Howard, Laycock & Co.*, Manchester; *Pritchard, Englefield & Co.*, for *Simpson, North, Harley & Co.*, Liverpool.

[Reported by W. C. SANDFORD, Esq., Barrister-at-Law.]

ATTORNEY-GENERAL FOR MANITOBA v. KELLY AND OTHERS (AND CROSS-APPEAL)

[PRIVY COUNCIL (Lord Atkinson, Lord Sumner, Lord Parmoor, Lord Wrenbury and Lord Phillimore), November 15, 17, 18, 21, 1921, January 22, 1922]

[Reported [1922] 1 A.C. 268; 91 L.J.P.C. 101; 126 L.T. 711; 38 T.L.R. 281; [1922] 1 W.W.R. 576; 62 D.L.R. 370]

Arbitration—Submission—Ascertainment of “all loss to plaintiff by reason of defective workmanship and materials”—“Loss”—Not confined to out-of-pocket disbursements—Inclusion of estimated cost of repairing defective work—Arbitrator entitled to form opinion from “own knowledge, inspection, or examination, or from such other source as [he deems] proper”—Arbitrator judge of both materiality and weight of evidence—Admissibility of extrinsic evidence to prove error.

By a submission to arbitration it was provided: “(2) That the plaintiff do recover from the defendants . . . (b) All loss to the plaintiff by reason of defective workmanship and materials, including the reasonable costs of ascertaining and remedying such defects . . . (7) The . . . umpire [is] to be entitled to form [his] own opinion as to the fair value and proper charge or allowance hereunder to be made in respect of all matters submitted hereunder from [his] own knowledge, inspection, or examination, or from such other source as [he] may deem proper . . . (12) If on striking the balance hereunder it is found that the balance is in favour of the plaintiff, the defendants shall pay to the plaintiff the balance so found with interest at the rate of five per cent. from July 1, 1914, to date of payment.” By cl. 6 the decision of the umpire was to be final.

Held: (i) “loss” in cl. 2 (b), on the true construction of the submission, was not restricted to out-of-pocket disbursements for work done, but included the estimated cost of repairing defective work, the provision for the payment of interest in cl. 12 being applicable to the amount of an ascertainable as well as of an ascertained loss; (ii) in the absence of any misconduct on the part of the umpire, the effect of cl. 7 was to constitute the umpire judge both of the materiality and of the weight of all evidence which he deemed it proper to admit; it was not incumbent on him to state how he had acted, and it was impossible for the court to ascertain what considerations affected his judgment; and all extrinsic evidence that other experts would have proceeded in a different manner, or reached a different conclusion, was inadmissible on a motion to set aside the award.

Arbitration—Setting aside award—Error on face of award—Error on face of document part of award—Admission of error by arbitrator—Competency of inquiry into merits.

In the case of a submission in which the parties have agreed that the decision of the umpire or arbitrator on the matters referred shall be final, the courts will not enquire whether the conclusion of the umpire or arbitrator on the matters referred is right or wrong unless an error appears on the face of the award or on some document so closely connected with it that it must be regarded as part of the award, or unless the umpire or arbitrator himself states that he has made a mistake of law or fact, leaving it to the court to review his decision. This principle has been approved on the ground that although, possibly, injustice may be done in particular cases, it is better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open a door for enquiry into the merits, as this might lead to such an inquiry in almost every case.

Arbitration—Jurisdiction—Question for the court—Proof of dispute referred—
No contradiction of written submission.

The jurisdiction of an arbitrator or umpire is derived solely from the agreement of the parties contained in the submission. Whenever there is a difference of opinion between the parties as to the authority conferred on an umpire or arbitrator under an agreed submission, the decision rests ultimately with the court and not with the umpire or arbitrator, for it would be impossible to allow an umpire or arbitrator to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. He cannot widen the area of his jurisdiction by holding, contrary to the fact, that a matter which he affects to decide is within the submission of the parties. If there is any doubt as to the subject-matter over which the umpire or arbitrator was purporting to exercise jurisdiction, evidence may be given showing what was the subject-matter into which he was inquiring in order to enable the court to determine whether he has exceeded the limits of his jurisdiction. Such evidence may be given by the umpire or arbitrator himself or by any other competent witness, but it should be limited to the issue of fact and is not admissible to explain, much less to contradict, what is to be found on the face of the written instrument.

Notes. Considered: *Kelantan Government v. Duff Development Co.*, [1923] All E.R. Rep. 349. Applied: *Re Portnoy*, [1949] 3 D.L.R. 449; *Re Bailey and Etobicoke*, [1949] O.R. 352. Referred to: *Hirji Mulji v. Cheong Yue Steamship Co., Ltd.*, [1926] All E.R. Rep. 51; *Absalom, Ltd. v. Great Western (London) Garden Village Society, Ltd.* (1933), 149 L.T. 193; *Getreide-Import-Gesellschaft m.b.H. v. Contimar S.A. Compania Industrial Commercial Y.-Maritima*, [1953] 2 All E.R. 223.

As to submissions of arbitration, the powers of arbitrators, and setting aside awards, see 2 HALSBURY'S LAWS (3rd Edn.) 3-21, 31, 32, 57-61. For cases see 2 DIGEST (Repl.) 421 et seq., 550-553, 676 et seq.

Cases referred to:

- (1) *Produce Brokers Co., Ltd. v. Olympia Oil and Cake Co., Ltd.*, [1916] 1 A.C. 314; 85 L.J.K.B. 160; 114 L.T. 94; 32 T.L.R. 115; 60 Sol. Jo. 74; 21 Com. Cas. 320, H.L.; 2 Digest (Repl.) 602, 1289.
- (2) *Duke of Buccleuch v. Metropolitan Board of Works* (1872), L.R. 5 H.L. 418; 41 L.J.Ex. 137; 27 L.T. 1; 36 J.P. 724, H.L.; 2 Digest (Repl.) 663, 1817.
- (3) *Holgate (Holdgate) v. Killick* (1861), 7 H. & N. 418; 31 L.J.Ex. 7; 5 L.T. 358; 10 W.R. 19; 158 E.R. 536; 2 Digest (Repl.) 692, 2064.
- (4) *Fuller v. Fenwick* (1846), 3 C.B. 705; 16 L.J.C.P. 79; 8 L.T.O.S. 162; 10 Jur. 1057; 136 E.R. 282; 2 Digest (Repl.) 656, 1759.
- (5) *McRae v. Lemay* (1889), 18 S.C.R. 280; 16 A.R. 348; 2 Digest (Repl.) 659, *1316.
- (6) *Adams v. Great North of Scotland Rail. Co.*, [1891] A.C. 31; 2 Digest (Repl.) 678, *1467.
- (7) *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London*, [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 56 Sol. Jo. 734, H.L.; 2 Digest (Repl.) 583, 1143.
- (8) *Phillips (Phillip) v. Evans* (1843), 12 M. & W. 309; 13 L.J.Ex. 80; 2 L.T. O.S. 171; 152 E.R. 1216; 2 Digest (Repl.) 653, 1730.
- (9) *Knox v. Symmonds* (1791), 1 Ves. 369; 30 E.R. 390; 2 Digest (Repl.) 555, 905.
- (10) *Re King and Duveen*, [1913] 2 K.B. 32; 82 L.J.K.B. 733; 108 L.T. 844; 2 Digest (Repl.) 657, 1764.
- (11) *Doe d. Stimpson v. Emmerson* (1874), 2 New Pract. Cas. 283; 9 L.T.O.S. 119; 2 Digest (Repl.) 656, 1760.

- A (12) *Hodgkinson v. Fernie* (1857), 3 C.B.N.S. 189; 27 L.J.C.P. 66; 6 W.R. 181; 140 E.R. 712; 2 Digest (Repl.) 656, 1762.
- (13) *Re Knight and Tabernacle Permanent Benefit Building Society*, [1892] 2 Q.B. 613; 62 L.J.Q.B. 33; 67 L.T. 403; 57 J.P. 229; 41 W.R. 35; 8 T.L.R. 783; 4 R. 67, C.A.; 2 Digest (Repl.) 583, 1139.

Also referred to in argument :

- B *Fraser v. City of Fraserville*, [1917] A.C. 187; 86 L.J.P.C. 91; 116 L.T. 258.
- Re Green & Co. v. Balfour, Williamson & Co.* (1890), 63 L.T. 325; 6 T.L.R. 445, C.A.; 2 Digest (Repl.) 600, 1282.
- Dobson v. Groves, R. v. Dobson* (1844), 6 Q.B. 637; 1 New Pract. Cas. 101; 14 L.J.Q.B. 17; 4 L.T.O.S. 155; 9 Jur. 86; 115 E.R. 239; 2 Digest (Repl.) 570, 1042.

C **Appeal and Cross-appeal** from an order of the Court of Appeal of Manitoba reversing a decision of the Court of King's Bench of Manitoba.

Sir John Simon, K.C., J. K. Johnson, K.C. (A.-G. for Manitoba), and *Geoffrey Lawrence* for the appellant.

D *A. J. Andrews, K.C., T. Sweatman, K.C.* (of the Canadian Bar) and *Pritt* for the respondents.

Jan. 22. **LORD PARMOOR.**—The appellant, the Attorney-General of the province of Manitoba, brought an action against the respondents, asking to have set aside a certain building contract which had been entered into between the respondents and the province of Manitoba, for the erection of buildings in the city of Winnipeg; for the return of certain moneys alleged to have been improperly received; damages; and other relief incident thereto. The action came on for hearing before MATHERS, C.J., in the Court of King's Bench, and a consent judgment was entered on Mar. 22, 1917. In the said judgment certain matters were referred to two appraisers, appointed respectively by the plaintiff and the defendants, and in the event of the appraisers not being able to agree, such matters were referred to Robert Macdonald of the city of Montreal, an architect and engineer, accepted as umpire by both parties. So far, therefore, as the appraisers agreed, they occupied the position of arbitrators; but, in the event of disagreement, their functions terminated, and an independent jurisdiction was conferred upon Macdonald who, throughout this judgment is referred to as umpire. The judgment further provided that the report of the umpire should be final and conclusive between the parties, and that the judgment should be a final judgment for the amount shown in the said report. On May 25, 1917, the umpire appointed under the aforesaid order of the Court of King's Bench made his report, and on Mar. 4, 1918, the respondents, by notice of motion, moved to set aside or vary the report on the ground that the umpire had exceeded his powers and purported to decide a matter not submitted to his jurisdiction, including among the debits charged against the respondents a sum of \$615,213.00, being an "estimate of expenditure necessary to complete the repair of caisson foundations." After the hearing had begun before CURRAN, J., sitting as a judge in chambers, and also in court, a charge of misconduct against the umpire was added by amendment. On Oct. 3, 1919, CURRAN, J., dismissed the motions of the respondents. The Court of Appeal allowed the appeal of the respondents from the judgment of CURRAN, J., in so far as he refused to vary the report of the umpire by deducting therefrom the "estimate of expenditure necessary to complete the repair of caisson foundations \$615,213.00," and ordered that the report of the umpire should be varied by striking out the said item, and that the principal sum recoverable by the appellant from the respondents be reduced to the sum of \$592,138.65.

This is an appeal from so much of the judgment of the Court of Appeal as varied the judgment of CURRAN, J. The respondents further cross appeal that the report should be set aside on the ground that the appraiser for the appellant was guilty of

misconduct in forwarding a certain letter and document to the umpire and that the umpire was guilty of misconduct in withholding from the appraiser appointed by the respondents the last page of a report of Bylander, the appellant's engineer, and of not stating truthfully, honestly and accurately the contents of the last page of the said report to the appraiser appointed by the respondents, or that in the alternative an item, \$34,484.03, "one-half costs of the Royal Commission appointed to investigate all matters in connection with the Parliament Buildings, known as the Mathers Commission," should be disallowed. A
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A preliminary objection was raised before CURRAN, J., and the Court of Appeal, that the motions should be dismissed on the ground that they were misconceived and could not affect the consent judgment. It was said that the report of the umpire became, on filing, an integral part of the consent judgment, making the judgment a final judgment for the amount shown in the report, and that the judgment had not been set aside and could not be impeached except by separate action, or petition on a charge of fraud. CURRAN, J., rejected any general objection to his jurisdiction, and held that he had jurisdiction to entertain the charges of alleged misconduct by the umpire, and to hear objections based on the allegations that on certain items in his report the umpire had exceeded his jurisdiction. In the Court of Appeal CAMERON, J.A., expressed a contrary opinion, and that the motions made on behalf of the respondents to set aside or amend the report were misconceived and futile, and should on this ground or line be dismissed. On the hearing before their Lordships, the counsel for the appellant did not press this preliminary objection and asked their Lordships to entertain the appeal on its merits, in order that an end might be put to this unfortunate litigation. Their Lordships accordingly heard the appeal on its merits. It must not be inferred that their Lordships express any opinion adverse to that expressed by CAMERON, J.A. C
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The report of the board of appraisal was issued at Winnipeg on May 25, 1917. It shows on its face that on some items the appraisers agreed, and that on some items the decision was referred to the umpire. On the debits and credits, as found by the appraisal board, there is a balance in favour of the respondents of \$473,605.19, but after bringing in the sum fixed in the judgment at \$1,680,956.84, as a debit charge, against the respondents, the ultimate balance in favour of the appellant is \$1,207,351.65. F

In the Court of Appeal sixteen grounds of appeal were raised by the respondent; but in the argument before their Lordships these were reduced to three: (i) That in respect of two items debited by the umpire against the respondents, the umpire had exceeded the authority which the agreed submission conferred upon him. (ii) Misconduct on the part of one of the appraisers, Oxton, and on the part of the umpire. (iii) That the report was against law, evidence, and the weight of evidence. G

The consent judgment, which contains the terms of the agreed submission, ordered, *inter alia*: H

"(1) That all the contracts referred to in the statement of claim herein be and the same are hereby set aside.

"(2) That the plaintiff do recover from the defendants: (a) The sum of \$1,680,956.84, in which amount is included the sum of \$500,000, the amount of a certain bond dated July 31, 1913. (b) All loss to the plaintiff by reason of defective workmanship and materials, including the reasonable costs of ascertaining and remedying such defects. Provided that in ascertaining such amounts the appraisers, or in case of disagreement, the umpire, shall be the judges as to whether or not the work was defective and to what extent, and shall also be the judges as to what extent the investigations carried on for the purpose of ascertaining and remedying such defects were necessary, and what amount of money, if any, paid for that purpose shall be charged to the defendants. I

A “(3) The defendants shall be entitled to set off against the amount provided for in para. 2 hereof: (a) The fair value of the work done and materials provided by the defendants on the New Parliament Buildings in the City of Winnipeg so far as erected on the 19th day of May, A.D. 1915 on the basis of a fair contractors’ price (including reasonable contractors’ profit) for the work done and materials furnished, having due regard to the character of the same and the purposes for which same was intended; in regard to the value of the work and material consideration shall be had of prevailing prices at Winnipeg at the time the work was done, and in estimating the wages for men employed the fair wage schedule of the Government as it stood in July, 1913, shall be followed. (b) The value of the plant and materials taken over by the government as at the time they were placed on the ground. (c) The fair value of any work which had been done and which was afterwards torn down and replaced by the defendants by order of the provincial architect on account of, and made necessary by, change or changes in plan.

B “(6) In the event of the appraisers not being able to agree on any of the matters herein referred to, or in the event of one of the appraisers being dissatisfied with the diligence of the other in proceeding with any matter hereunder, such matter or matters shall be referred by either appraiser to Robert Macdonald, of the city of Montreal, architect and engineer, who is hereby by both parties agreed to as umpire, and whose decision thereon shall be final.

E “(7) The appraisers and the umpire are to be entitled to form their own opinion as to the fair value and proper charge or allowance hereunder to be made in respect of all matters submitted hereunder from their own knowledge, inspection, or examination, or from such other source as they may deem proper, and for that purpose may cause any work to be uncovered or any investigations to be made which the appraisers agree upon or the umpire desires.

F “(11) The appraisal hereunder shall not be subject to the provisions of the Manitoba Arbitration Act.

“ (12) If on striking the balance hereunder it is found that the balance is in favour of the plaintiff, the defendants shall pay to the plaintiff the balance so found with interest at the rate of five per cent. from July 1, 1914, to the date of payment.”

G It is noticeable that, under (6), the decision of the umpire, agreed to by both parties as umpire, is to be final; and that under (7) the appraisers and the umpire respectively are entitled to form their own opinion on all matters submitted to them either from their own knowledge, inspection, or examination, or from such other sources as they may deem proper, thus constituting them judges both of the materiality and of the weight of all evidence which they deemed it proper to admit.

H A voluminous mass of evidence was adduced before CURRAN, J. Only a small portion of this evidence is admissible or should have been admitted. The transcript of the proceedings, when the appraisers and the umpire met before the umpire issued his report, is not admissible unless it can be regarded as a document so closely connected with and incorporated in the report as to be considered part of the report, and to be looked at in the same way as the report itself. In the opinion of their Lordships it is not possible to accept this view. These proceedings are nothing more than informal discussions which took place before the issue of the report, and they may, or may not, have influenced the umpire in making his report. CAMERON, J.A., states that he is at a loss to know on what ground these proceedings can be considered as evidence for any purpose whatever, and their Lordships concur in this opinion. No doubt, extrinsic evidence is admissible on an issue of jurisdiction, or of misconduct; but subject to the ordinary principles which apply to the admissibility of all evidence. How far, in the present case, extrinsic evidence is admissible on these issues can be more conveniently considered at a

subsequent stage. It is not difficult to see that if evidence of this character should be held to be generally admissible, there would be a risk of undermining the principle of finality, which, subject to certain recognised exceptions, has long been established as a settled principle in arbitration proceedings, and on which their value largely depends. Evidence was further adduced before CURRAN, J., giving the opinion of experts on the method in which the inquiry was conducted, and traversing the conclusions of the umpire, as stated in the report. In effect, the court on this evidence was asked to review the decision of the umpire on questions submitted to him by the parties for his final decision. Such evidence would not be admissible in the case of an award under arbitration proceedings conducted according to ordinary practice. In the present submission, the umpire is entitled, under the terms of the submission, to form his own opinion as to the fair value and proper charge or allowance to be made in respect of all matters submitted to him from his own knowledge, inspection, or examination, or from such other source as he may deem proper. Unless, therefore, the umpire has been guilty of misconduct, it is within his discretion and authority either to act on his own knowledge, inspection, or examination, or to obtain information from any other source, which in his opinion he may deem proper. It is not incumbent on him to state how he has acted, and it is impossible for the court to ascertain what considerations have affected his judgment. The matter is one which the parties have intended to withdraw from the courts in order that the issue in the litigation may be finally determined by their chosen nominee, and all extrinsic evidence that other experts would have proceeded in a different manner, or reached a different conclusion should, in the opinion of their Lordships, have been rejected as inadmissible.

The jurisdiction of the umpire is derived solely from the agreement of the parties contained in the consent judgment. This document is a written document, which cannot be explained, and much less varied, by extrinsic evidence, of subsequent facts or events. Except so far as the pleadings in the action are of assistance in the interpretation of the document, by showing the surrounding conditions when the agreement was made, none of the evidence adduced before CURRAN, J., is admissible or should have been admitted in determining the extent or limitations of the umpire's authority. Whenever there is a difference of opinion between parties as to the authority conferred on an umpire under an agreed submission, the decision rests ultimately with the court and not with the umpire: *Produce Brokers Co., Ltd. v. Olympia Oil and Cake Co., Ltd.* (1) ([1916] A.C. pp. 327-329). It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties. In the present instance there has been a difference of opinion as to the extent of the jurisdiction which has been conferred by the submission upon the umpire. The majority of the Court of Appeal have adopted a narrower construction than CURRAN, J., and CAMERON, J.A. The crucial paragraph in the submission is para. (2) (a). The words "all loss" with which the paragraph commences would naturally cover all loss ascertained or ascertainable by reason of defective workmanship and materials, irrespective of when, or whether, the defects have been remedied, and of whether, or not, out-of-pocket expenses have been incurred, at the time when the assessment of damage is made. It is open to the party in whose favour the assessment is made either to repair the damage on which his claim is based, or to take the risk of leaving the defects as they are, and to place the money to his credit as compensation. The majority of the Court of Appeal have held that, owing to the conditions under which the agreed submission was made, to the context in which the words are found, and to the terms of the interest paragraph, the words "all loss" have a limited meaning and only include such loss as had been already ascertained and in respect of which moneys had been actually

A disbursed. PERDUE, C.J.M., says in his judgment: "The word loss in para. (2) (b), taken in the connection in which it is found, means money loss, money out of pocket." This construction was supported in an able argument by the counsel for the respondents before their Lordships on various grounds. It was said that the provision for interest in para. (12), that, if there is a balance in favour of the plaintiff, the defendants shall pay on such balance interest at five per cent. from July, 1914, to date of payment, shows that the plaintiff must be deemed to be out of pocket in respect of any balance found in his favour, and that this provision was not applicable if it was open to the umpire to estimate damage in respect of a loss that might occur, and which, if it did occur, might not be remedied. On the other hand, it was argued, on behalf of the appellant, that July, 1914, was simply a compromise date, agreed between the parties, and that there was no reason why interest should not run from this date on the balance in favour of the plaintiff, whether that balance is based solely on out-of-pocket expenditure, or includes a sum assessed by the umpire in respect of ascertainable loss, although, so far, no expenditure in respect of such loss had been made. Suggestions were made before their Lordships as to the reasons why the date of July 1, 1914, had been chosen, but their Lordships are concerned to consider the actual language employed, and it is beyond their province to enter the region of speculation. Their Lordships cannot find in para. (12) any more than a provision for interest from an agreed date, in itself not inconsistent with giving to the words "all loss" in para. (2) (b) their ordinary and normal meaning.

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E It was further argued that the words "including the reasonable cost of ascertaining and remedying such defects" excluded an estimate of loss not based on actual out-of-pocket disbursements. Their Lordships, however, cannot construe the word "including" as connoting exclusion. The words "such defects" are equally apposite, whether they refer back to a limited loss calculated on out-of-pocket expenses, or to a loss which comprehends all sources of ascertainable damage. The respondents further relied on the word "paid" which occurs at the end of the proviso, but the context shows that the word "paid" is not applied to "loss" but to expenditure on investigations carried on for the purpose of ascertaining and remedying defects. This passage authorises the umpire to estimate to what amount money, if any, paid for the purpose of investigation, shall be charged to the debit of the respondents. It is under this provision that the umpire has debited the respondents with the sum of £34,484.03, being one-half cost of the Royal Commission, known as the Mathers Commission.

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Their Lordships have considered the important matter raised prominently in the judgment of DENNISTOUN, J.A., that unless the words "all loss" are restricted to out-of-pocket disbursements for work done, to the exclusion of any estimate of expenditure necessary to complete the repair of the caisson foundations, there is a risk that the respondents would be charged twice over for their defective workmanship and materials in connection with the caisson foundations. The appellant denies that there is any proof that the umpire has made any such error in his report. No question was raised by the respondents as to the summary of the credits found in their favour, amounting in the aggregate to \$1,304,724.77, and under each head a proportion of the total amount has been agreed by the appraisers.

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I Of the total of \$1,304,724.77, no less than \$1,059,252.31 represents the value of the work done and materials provided. If the inclusion of an estimate for ascertainable damage under the word "loss" results in a double charge against the respondents for defective workmanship and materials, such double charge would only be included if, in calculating the credit amounts in favour of the respondents, the umpire had taken into account deductions for bad work or faulty material, and had in consequence of such deductions given the respondents something less than the full fair value to which they are entitled under para. (3) (a). There is, however,

no ground for any such assumption, and no evidence that the umpire has made the error attributed to him. Following the order prescribed in the submission, and adopted in the report, the umpire would consider first the debits. The suggestion is that after making a charge under the head of debits for all defective workmanship and materials, the umpire made a deduction of the same items in calculating the credits due to the respondents. It is not admissible to assume that the umpire made such a mistake, and no such mistake appears upon the face of the report. It is not immaterial that a proportion of the credits, under each item, was not determined by him, but agreed by the appraisers. CURRAN, J., and CAMERON, J.A., do not construe the terms of the submission in the limited sense adopted by the majority of the Court of Appeal. CURRAN, J., expresses his opinion with some hesitation but CAMERON, J.A., regards the terms of the consent judgment as amply wide enough to support the umpire's findings, and to include the item of estimate of expenditure necessary to complete the repair of caisson foundations. Their Lordships agree with CAMERON, J.A., and are unable to find, either in the conditions under which the agreement of submission was made, or in the context, or from the general scope of the agreement, any ground for limiting the words "all loss" to money loss, money out of pocket.

Has the umpire included in his report any items not within the terms of the agreement of reference as above construed? The report is a written document which speaks for itself and cannot be interpreted, or varied, or contradicted, by extrinsic evidence. If there is any doubt as to the subject-matter over which the umpire was purporting to exercise jurisdiction, evidence may be given showing what was the subject-matter into which he was inquiring in order to enable the court to determine whether he has exceeded the limits of his jurisdiction. Such evidence may be given by the umpire himself or by any other competent witness, but it should be limited to the issue of fact, and, in the words of LORD CAIRNS, "is not admissible to explain or to aid, much less to attempt to contradict (if any such attempt should be made), what is to be found on the face of the written instrument": *Duke of Buccleuch v. Metropolitan Board of Works* (2). In the present case the umpire sets out, in the report, separate items under the head of debits and credits. There is consequently no difficulty in determining from the language used in the award, without the aid of extrinsic evidence, the subject-matter over which the umpire was exercising jurisdiction. He finds that the physical investigation made on the new Parliament buildings did disclose the fact that caisson foundations were defective, and awards in respect thereof two items: (i) Portion of cost in repairing caissons up to Feb. 28, 1917, \$160,306.62. (ii) Estimate of expenditure necessary to complete the repair of caisson foundations, \$615,213.00. It is in respect of this latter item that the respondents have raised the issue of excess of jurisdiction. They base their objections on the allegation that the estimate is one not based on actual expenditure, and, therefore, not a "loss" to the appellant by reason of defective workmanship and materials within the meaning of para. (2), sub-s. (b) of the consent judgment. The appellant, on the other hand, argues that a loss of this character is within the meaning of para. (2), sub-s. (b) and, therefore, within the jurisdiction of the umpire. Their Lordships have already stated their opinion that the contention of the appellant as to the meaning of para. (2), sub-s. (b), is correct, and it follows that there was no excess of jurisdiction on the part of the umpire in including this item in his award. The respondents further, in the cross-appeal question the item of the half cost of the Royal Commission. It was not argued at any length before their Lordships. All the judges in the courts below, before whom the question has come are unanimously of opinion that the item comes within the authority of the later portion of the proviso to para. (2) (b). In this opinion their Lordships concur.

[HIS LORDSHIP dealt with the facts relating to two charges of misconduct by the umpire, said that those charges were not established, and continued:] It has

A been convenient to deal first with the special objections to the report based on misconduct and excess of jurisdiction. The more general objection is raised, that the report is against law, evidence, and the weight of evidence. It appears that this objection was argued at considerable length in the courts below, but it occupied less time in the argument before their Lordships. The principles applicable in arbitrations, where there are no special statutory provisions, have long been established. The submission in the consent judgment contains a special term, that the appraisal, thereunder, shall not be subject to the provisions of the Manitoba Arbitration Act. In the case of a submission in which the parties have agreed that the decision of the umpire on the matters referred to him, shall be final, the courts will not enquire whether the conclusion of the umpire on the matters referred to him is right or wrong, unless an error appears on the face of the award, or on some document so closely connected with it that it must be regarded as part of his award, or unless the umpire himself states that he has made a mistake of law or fact, leaving it to the court to review his decision: *Holdgate v. Killick* (3); *Fuller v. Fenwick* (4); *McRae v. Lemay* (5); *Adams v. Great North of Scotland Rail. Co.* (6); *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London* (7). This principle is approved by PARKE, B., in *Phillips v. Evans* (8) on the ground that although, possibly, injustice may be done in particular cases, it is better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open a door for enquiry into the merits, as this might lead to such an enquiry into the merits in almost every case. In the present case the umpire has not admitted any mistake, and there is no error on the face of the report. There is a further consideration which arises in the case of the present report owing to the special provision, as to evidence, contained in the submission. The umpire is entitled to form his own opinion in respect of all matters submitted, from his own knowledge, inspection, or examination, or from such other source as he may deem proper. The effect of this provision is that it is not possible for the court to have before it all before the material on which the umpire based his decision, and that even if the court should remit the report it could have no effective control over the ultimate decision.

The older cases are reviewed by LORD HALSBURY in *Adams v. Great North of Scotland Rail. Co.* (6). The Lord Chancellor, referring to *Knox v. Symmonds* (9) says ([1891] A.C. at p. 39):

G “This case shows that where there are real arbitrations, and where the parties have selected their judge, in such cases you have to show a great deal more than mere error on the part of the arbitrator in the conclusion at which he has arrived before the court can interfere with his award. And in the Court of Common Pleas, forty years ago, in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading, the court, having come to the conclusion that the decision of the arbitrator was, in the sense in which they understood the words, erroneous in deciding upon a question of law on demurrer, nevertheless held that the parties, having submitted that question to the arbitrator, it was for the arbitrator to determine it; in their own language the parties had agreed to accept the arbitrator’s decision upon the question of law, as well as his decision upon the facts. In the Court of Queen’s Bench, thirty years ago, that decision was adopted as being the law which would guide the court in the decision of such questions.”

In the later case of *Re King and Duveen* (10), CHANNELL, J., after referring to *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London* (7) says ([1913] 2 K.B. at p. 36):

“It is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous

does not make the award bad on its face so as to permit of its being set aside. A
 Otherwise it would be futile ever to submit a question of law to an arbitrator."

The learned judge refers to *Doe d. Stimpson v. Emmerson* (11), a case which had been referred to in *Adams v. Great North of Scotland Rail. Co.* (6) as a clear authority in favour of the view.

Where a question of law has not specifically been referred to an umpire, but is material in the decision of matters which have been referred to him, and he makes a mistake, apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award, but no such issue arises in the present appeal. In *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London* (7), it was held that where an arbitrator had made an award expressed to be made on the basis of an erroneous opinion given upon a Special Case stated by an arbitrator under the Arbitration Act, 1889, in regard to questions of law arising in the course of the reference, the award is subject to appeal, if that opinion is erroneous. C
 In the course of his judgment LORD HALDANE, L.C., says :

"It was further argued before your Lordships that the arbitrator was in reality made judge of law as well as of fact, and that the well-known case of *Hodgkinson v. Fernie* (12) was wrongly decided. I see no ground for this contention, and I am of opinion that the doctrine of *Hodgkinson v. Fernie* (12), to the effect that where an error of law appears on the face of the award the error can be reviewed, is a well-established part of the law of the land. I do not think that the Arbitration Act intended to make any modification of the existing rule in this respect, or that the decision in *Re Knight and Tabernacle Permanent Benefit Building Society* (13) is an authority for the proposition that it did. It is, therefore, competent for this House to review the law which the arbitrator, as he was bound to do, adopted from the Divisional Court and set out in his award." D E

The result is that the respondents fail to make good their objections to the report of the umpire or to any part thereof. The appeal succeeds and the cross-appeal fails. F
 Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs here and in the Court of Appeal, that the cross-appeal should be dismissed with costs, and that the judgment of CURRAN, J., should be restored.

Solicitors : *Blake & Redden; Lawrence Jones & Co.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

A Re CAMPBELL'S TRUSTS. PUBLIC TRUSTEE v. CAMPBELL

[CHANCERY DIVISION (Russell, J.), March 2, 3, 1922]

[Reported [1922] 1 Ch. 551; 91 L.J.Ch. 433; 127 L.T. 236]

B *Power of Appointment—Referential power—Accretion of new fund to fund originally settled—Separate settlements—Distinct settlors—Hotchpot clause in original settlement.*

C A testator devised and bequeathed his residuary estate upon trust after conversion for his sons for life, and after their death upon trust for their issue as they should respectively appoint and in default of appointment in manner therein mentioned. The will also contained a hotchpot clause and a provision that the gift to each son was on the express condition that on attaining twenty-one he assigned his interest in the trust funds and property subject to the testator's marriage settlement to the trustees of the will to be held "upon the like trusts and with and subject to the like powers and provisions as are therein declared and contained concerning the share therein provided" for him in the testator's residuary estate. After the death of the testator the sons

D duly assigned their interests in accordance with the above-mentioned condition. They also, by a memorandum of direction, directed the trustees to accumulate certain surplus income and to hold the fund thereby constituted as an addition to the capital of their respective shares under the will in the testator's residuary estate and so as to follow the destination thereof and be subject to the same trusts, powers, and provisions (including the provision

E for accruer) as were therein contained concerning the same, except that in lieu of the trusts contained of the income of such shares the income of their respective shares in the accumulated fund was to be paid to each of them during their respective lives. Subsequently, by a deed poll the five sons requested that the accumulations should cease and directed the trustees to hold the fund already accumulated upon the same trusts as were set out in the memorandum of direction. One son, by will, appointed that the income

F to be derived after his death from his original and accruing share or shares in the residuary trust moneys, referred to in his father's will, "before he gave me this power to appoint and in the investments thereof or so much thereof as I may have power to appoint," should be paid to his wife after his death for her life. Another son, by his will, after reciting that he had, in compliance

G with the conditions in his father's will, assigned his interest under his parents' marriage settlement upon the trusts of the share of his father's residuary estate provided for him, appointed one equal third part of the income "of my original and accruing share or shares in the residuary trust moneys for the time being subject to the trusts of my father's said will and in the investments or property representing the same including in such share or shares my share or shares so assigned by me as aforesaid in the trust funds and property"

H comprised in his parents' marriage settlement to his wife for life.

I **Held:** the three assignments, the memorandum of direction, and the deed poll constituted separate settlements of separate funds at distinct times and by distinct settlors, with the result that the appointment by the first son only carried with it the income of his share in the testator's residuary estate and not that of his share in the income of the assigned fund or the accumulated fund, and the appointment by the second son carried with it the income of his share in the testator's residuary estate, plus the income of the assigned fund; further, there was no general hotchpot, but each fund was subject to a separate hotchpot clause.

Notes. Considered: *Re Hickman's Will Trusts*, *Re Playfair*, *Palmer v. Playfair*, [1950] 2 All E.R. 285. Referred to: *Re Gooch*, *Gooch v. Gooch*, [1929] All E.R. Rep. 394; *Re Shelton's Settled Estates*, *Shelton v. Shelton*, [1945] 1 All E.R. 283.

As to referential powers see 25 HALSBURY'S LAWS (2nd Edn.) 522, 523; and A for cases see 37 DIGEST 401-403.

Cases referred to :

- (1) *Cooper v. Macdonald* (1873), L.R. 16 Eq. 258; 42 L.J.Ch. 533; 28 L.T. 693; 21 W.R. 833, L.C.; 37 Digest 405, 161.
- (2) *Trew v. Perpetual Trustee Co.*, [1895] A.C. 264; 64 L.J.P.C. 49; 72 L.T. 241; 43 W.R. 636; 11 T.L.R. 259; 11 R. 423, P.C.; 43 Digest 607, 525. B
- (3) *Re Cavendish, Grosvenor v. Butler* [1912] 1 Ch. 794; 81 L.J.Ch. 400; 106 L.T. 510; 56 Sol. Jo. 399.
- (4) *Re Beaumont, Bradshaw v. Packer*, [1913] 1 Ch. 325; 82 L.J.Ch. 183; sub nom. *Re Beaumont, Beaumont-Nesbitt v. Packer*, 108 L.T. 181; 57 Sol. Jo. 283; 40 Digest (Repl.) 558, 648.
- (5) *Re Wood, Wodehouse v. Wood*, [1913] 1 Ch. 303; 82 L.J.Ch. 203; 108 L.T. 31; affirmed [1913] 2 Ch. 574; 83 L.J.Ch. 59; 109 L.T. 347; 57 Sol. Jo. 835, C.A.; 40 Digest (Repl.) 616, 1119. C
- (6) *Re Fraser, Ind v. Fraser*, [1913] 2 Ch. 224; 82 L.J.Ch. 406; 108 L.T. 960; 57 Sol. Jo. 462; 40 Digest (Repl.) 616, 1120.
- (7) *Re Paul's Settlement Trusts, Paul v. Nelson*, [1920] 1 Ch. 99; 88 L.J.Ch. 530; 121 L.T. 544; 63 Sol. Jo. 724; 37 Digest 402, 144. D

Also referred to in argument :

Eustace v. Robinson (1880), 7 L.R. Ir. 83; 40 Digest (Repl.) 490, l.

Liddell v. Liddell (1896), 66 L.J.Ch. 62; 74 L.T. 105, H.L.; 44 Digest 525, 3422.

Adjourned Summons for the determination of a question as to the operation and effect of certain appointments contained in the wills of Eric Campbell and Claude Campbell two of the sons of Henry Alexander Campbell. The facts are fully set out in the judgment. E

Turnbull for the trustee.

J. E. Harman for the widow of Eric Campbell.

Cecil W. Turner for the widow and son of Claude Campbell.

Wilfrid M. Hunt for other children of Claude Campbell. F

RUSSELL, J.—By his will the testator, Henry Alexander Campbell, devised and bequeathed all his real and personal estate to trustees upon trust to sell and convert the same into money and stand possessed of the residue upon trust for his five sons who shall attain the age of twenty-one years equally. The testator directed his trustees to retain the share of each son upon trust for the son for life, and after his death upon trust for his issue as he should by deed or will appoint, and in default of appointment among his son's children equally who, being male, should attain the age of twenty-one, or who being female, should attain that age or marry. In the event of any son of the testator dying and leaving no son who should attain the age of twenty-one or no daughter who should attain that age or marry, the testator directed that the capital and income of that son's share should accrue to his brothers equally, the accruing share to be held on the trusts of the original share. Then there is the following proviso : G

"Provided always that no child of my same son who or whose issue shall take any part of the same trust premises under any appointment in pursuance of the power herein contained shall in default of appointment to the contrary have or be entitled to any share of the unappointed part of the same trust premises without bringing the share or shares appointed to him or her or his or her issue into hotchpot and accounting for the same accordingly." H I

After empowering his sons by deed or will to appoint all or any part (not exceeding one-third) of the income of their original or accruing shares in his residuary estate to their respective widows for life, the testator declared that these gifts to his sons

A were on the express condition that each son, on attaining the age of twenty-one, assigned his interest in the trust funds and property subject to the testator's marriage settlement to the trustees of the will to be held

“upon the like trusts and with and subject to the like powers and provisions as are therein declared and contained concerning the share therein provided for the same son”

B in the testator's residuary estate. The testator died on Jan. 17, 1906, leaving five sons, Rawdon, Claude, Gerald, Eric, and Harold. On Aug. 27, 1906, Rawdon, Claude, and Gerald, in accordance with the provisions of the testator's will, assigned to the trustees of the will their respective interests under the testator's marriage settlement to be held upon the aforesaid trusts. Eric similarly assigned C his interest on April 8, 1907, and Harold on April 20, 1909.

The sons having assented to a proposal of the trustees that, as the income was derived from commercial investments yielding fluctuating dividends, it would be advisable to pay each son £2,000 a year and accumulate the surplus until the sum of £50,000 was obtained, a memorandum of direction, dated Nov. 29, 1907, was signed by the five sons (by Harold, in 1909, on his attaining his majority) in which D they admitted that £5,500 London County 3½ per cent. consolidated stock represented the surplus income from the trust funds retained by the trustees, and directed the trustees to accumulate the income of the stock until the sum of £50,000 was attained and

“to hold the share of each of us the undersigned as an addition to the capital of E our respective shares under that said will in the testator's residuary estate and so as to follow the destination thereof and be subject to the same trusts powers and provisions (including the provision for accruer) as are therein contained concerning the same except that in lieu of the trusts therein contained of the income of such shares”

F the income of their respective shares in the accumulated fund was to be paid to each of them during their respective lives. The result was that the sons took an absolute interest in the new fund free from any of the fetters as to bankruptcy or religion that the testator had imposed with regard to his residuary estate. The memorandum also provided that in the event of the trustees realising certain investments in commercial undertakings (which they did before August, 1911) they G might at their discretion cease to accumulate, although the sum of £50,000 had not been reached. By a deed poll dated Aug. 1, 1911, the five sons admitted that the sums of stock and cash specified in the schedule thereto represented surplus income which had arisen from the trust funds held by the original trustees upon the trusts H declared by the testator concerning his residuary estate, with the addition of the accumulations of the income of the investments of such surplus income, requested that the accumulations should cease, and directed the trustees to hold the share of each of them in that fund amounting to £23,370 in London County 3½ per cent. stock, on the same trusts as are set out in the memorandum of direction. Claude died in 1916, leaving a widow, a son and two daughters. Eric died in 1920, leaving a widow, two sons and a daughter. In 1917 the Public Trustee was appointed trustee in place of an original trustee. The last original trustee died in 1919, and the I Public Trustee is now sole trustee.

Those are the relevant documents under which the various trust funds have been constituted. Eric died on April 14, 1920, and by his will he recites that his late father by his will declared that it should be lawful for each of his sons at any time, by any deed, revocable or irrevocable, or by will, to appoint that all or any part (not exceeding one-third part) of his original or accruing share of the income of his original or accruing share or shares in the residuary trust moneys thereinbefore mentioned and in the investments thereof should, after his death, be paid to his wife for her life. The first question is whether,

under that will and the appointment under the will by Eric, his wife is entitled to a life interest in Eric's share in the residuary estate of the testator only, or whether she is also entitled, in addition, to a life interest in any, and which, of the funds assigned by the three documents of assignment to which I have referred, or in the fund subject to the trusts of the memorandum of direction and the deed poll. It has been argued that she is entitled to an interest in all the funds because the effect of the documents is to make one aggregate fund, that all the funds are to be treated as being part of the testator's residuary estate, and that, therefore, when Eric appoints to his wife a life interest in the residuary estate under his father's will that carries with it an appointment of a life interest in the funds which have been added to, and which are to be treated as one fund with, the residuary estate. That really involves the proposition that there is only one fund and one power of appointment, and that if you exercise that power over the residuary estate of the testator, you exercise it also over the funds which are to be treated as an accretion to the residuary estate. A B C

In support of that proposition various authorities were cited to me. The point as a rule arises where one fund, or more than one fund, is settled by reference to the trusts of another fund, and, more often than not, in connection with the liability to bring the funds into hotchpot when the question is whether they are to be treated as subject to one common hotchpot clause, or whether each fund is to be treated as having a separate hotchpot clause. That is one form in which the point very often comes before the court. Another form is when a fund is settled by reference to the trusts of another fund and in the originally settled fund there is a power of charging and the question arises whether the referential trusts of the second fund operate so as to multiply or increase the power of charging. Those are the most usual forms in which the question comes before the court. The question which I have to decide is whether an appointment which is in terms confined to the residuary estate passing under the testator's will, operates so as to give the wife a life interest in funds settled upon similar trusts to those affecting the testator's residuary estate. D E F

Cooper v. Macdonald (1) does not really assist me in this case. The decision there was that, where two funds were settled by the same instrument and the beneficiary under the first fund had power to appoint a third of the income of that fund in favour of her husband, she had a similar power over a third of the income of the fund settled by reference. That was a case where two funds were settled by the same instrument, and the power given in respect of the first settled fund was not a power to charge a fixed amount, but an aliquot share. The learned judge came to the conclusion that there was no reason why the power to appoint an aliquot share should not equally apply to the trust funds settled by reference. G

The next case cited was *Trew v. Perpetual Trustee Co.* (2). The decision was that where there were two funds, one fund settled by reference to another in the same instrument, there was in that particular case no increase or multiplication of charge. In that case the testator gave to his widow the interest on £20,000 during widowhood, and on re-marriage the interest on £10,000 during her life, the interest on the balance of the £20,000 in that event to be for the benefit of their children; "and as to all residuary estate" he gave it upon the same trusts as were declared in regard to the £20,000. The widow married again. Until her re-marriage she was obviously entitled to the income of the £20,000 and also to the income of the residuary estate. When she re-married her interest in the £20,000 was cut down by half, but she still claimed to have an interest in the residuary estate and to be entitled either to a moiety of the residuary estate for her life, or to the income of an additional £10,000 out of the residuary estate. The case is useful because LORD HOBHOUSE, who delivered the judgment of the Board, apparently adopted the view of the learned judge in the H I

A court below as to the method of construing referential trusts. He says ([1895] A.C. at p. 267):

"Upon the literal construction the argument pressed in favour of the appellant is, to use the words of MANNING, J., that where there is a trust by reference 'the only safe course to adopt is to re-write the words declaring such trust, merely substituting the second fund or property for the first.' Then it is said that if the words 'residue of my estate' be written in where the words '£20,000' occur, that will carry to the widow the income of the sum of £10,000 on her re-marriage. But in the first place their lordships cannot accept the proposed canon of construction in any sense which would give to it the general effect of multiplying charges upon the trust estate, or trusts in the nature of charges."

Apart from that, apparently the view of MANNING, J., was approved.

Then there was cited *Re Cavendish* (3), a decision of PARKER, J., where although the two funds were settled by the same instrument, the learned judge came to the conclusion that they were to be treated as distinct funds for the purposes of hotchpot. *Re Beaumont* (4), a decision of FARWELL, L.J., sitting as a judge of first instance, was a case where the funds were settled by separate instruments. In that case he held that a power to a person to appoint to herself £2,000 of the original trust fund applied to the fund settled by reference to the trusts of the original fund: in other words, that was an instance where, there being separate instruments, the learned judge applied the terms of the referential trust strictly, although it resulted in a multiplication of charges. In that particular case the facts were such that, although the wife was able under the referential trusts of the second instrument to appoint £2,000 to herself, it was caught at once by a clause in the first instrument by which she was bound to settle it upon the trusts of the first instrument. The decision is interesting because it shows that in a case where there were two instruments the learned judge gave effect to the trusts written out at length in the second instrument, although the result was to multiply the power of charging.

In *Re Wood, Wodehouse v. Wood* (5) a decision of NEVILLE, J., there was only one instrument, and it was held that the different parts were not subject to a common hotchpot clause, but that there were independent trusts, each having its own hotchpot clause. Finally, in *Re Fraser, Ind v. Fraser* (6), SARGANT, J., was dealing with a case where the funds were settled by one instrument, but upon the construction of that document he came to the conclusion that there was a common hotchpot clause to be treated as applicable to all the funds, and, as he points out, after considering various authorities, the question depends upon whether the second set of words which settles the additional fund is a separate settlement upon the trusts of the original fund. The learned judge is dealing only with a case where the settlement of the second fund is in the same instrument as that of the first fund. He says:

"Is the second set of words which settles the additional fund really a separate settlement of the additional fund upon the like trusts as the first or original fund, the words being merely words of reference, so as to operate by way of compendious introduction of the earlier trusts, or does the second set of words operate as an amalgamation of the second fund with the first fund so as to make it an augmentation of or accretion to the first fund? In the former case *primâ facie* it would seem proper to introduce into the trusts of the second fund a hotchpot clause which was limited to that fund, just as the original hotchpot clause was limited to the original fund."

That is to say, he is going to write out the trusts at length. He goes on:

"But in the latter case it *primâ facie* seems proper to treat the whole of the trusts of the original fund, including the hotchpot clause, as being applicable

to the amalgamated or augmented fund, by virtue of the amalgamation, or augmentation, or accretion that has been directed." A

Then he points out, in regard to referential trusts in general, that where there are two instruments the case is very much stronger for writing out the clauses separately than where there is only one instrument.

Those are the authorities which have been cited, with the exception of one, a decision of P. O. LAWRENCE, J., to which I shall refer later, and it will be observed that in no instance, in the case of separate instruments, at separate dates, and with separate settlors, has the fund ever been treated as one aggregate fund, either for the purpose of hotchpot, or as regards multiplication of charges, or for any other purpose. It seems to me that is the kind of case I have to consider here. The father settled his residuary estate upon his sons in shares. He provided in his will effectively for a similar settlement by his sons of the shares which they took under the testator's marriage settlement. But although he so provided in his will effectively, the carrying out of the testator's request that his sons should settle their shares under his marriage settlement, or the fulfilment by the sons of that condition of the father, appears to me to be none the less a disposition by them of the shares which they took under that marriage settlement. The three assignments by the sons on Aug. 27, 1906, Apr. 8, 1907, and Apr. 20, 1909, are separate settlements, by separate settlors at different times, the trusts of which are declared by reference to the trusts contained in the testator's will with regard to his residuary estate. B C D

The next question is whether Eric by his will appointed a life interest in any of those funds to his wife. In my opinion, he did not. The appointment in Eric's will is confined and purports to be confined to an appointment of the share, given to him under his father's will, in his father's residuary estate : E

"Whereas my late father Henry Alexander Campbell by his will declared that it should be lawful for each of his sons at any time by any deed revocable or irrevocable or by will to appoint that all or any part (not exceeding one-third part) of the income of his original or accruing share or shares in the residuary trust moneys thereinbefore mentioned and in the investments thereof should after his death be paid to his wife for life or for any less period and upon such conditions and with such restrictions (if any) as he should think fit. Now it is my desire and intention to exercise the power so as aforesaid given to me by the will of my said late father to the full extent permitted by the terms thereof and I therefore hereby direct limit and appoint that the income to be derived after my death from my original and accruing share or shares in the said residuary trust moneys [i.e., the said residuary trust moneys referred to in his father's will before he gave him the power to appoint] and in the investments thereof or so much thereof as I may have power to appoint shall from and immediately after my death be paid to my wife for the term of her life." F G H

Eric's will only refers to the residuary estate of his father, and only purports to exercise the power of appointment given by his father's will. I am asked to read Eric's will as if it referred to funds not mentioned in his will at all, but created by other people at different times. The will cannot be so read without, in effect, making a new will, and that I am not entitled to do. All that Eric by his will purports to do is to exercise the power of appointment, given him by his father's will, over his father's residuary estate, strictly so called. The result is that no life interest is given to the widow in any of the funds comprised in the three assignments. I will refer in a moment to the deed poll and the memorandum of direction. I

As regards Claude's will the same class of question arises. His will is more elaborate. He recites that under the will of his father

A "one equal fifth share of my father's residuary estate is settled upon certain trusts for my benefit during my life and after my death for all or any of my issue born during my life, and under the trusts and directions contained in the said will a further share or shares in the said residuary moneys may in certain events accrue to the share so settled as aforesaid, and my father declared that it should be lawful for each of his sons to appoint that all or any part (not exceeding one-third part) of his original or accruing share or shares in the residuary moneys aforesaid and in the investments thereof should after his death be paid to his wife."

B

Up to this point Claude has referred to nothing except the original or accruing shares in his father's residuary estate. He then recites that by an indenture of Aug. 27, 1906, in compliance with a condition in that behalf contained in his father's will, he assigned his interest under his parents' marriage settlement to the trustees of his father's will upon the like trust and subject to the like powers and provisions as were in the same will declared and contained concerning the share of residue provided for him. So now he has brought into this document a reference to the other fund which was assigned by him under the indenture. Then he recites his own marriage settlement for the purpose of showing that under that settlement he had provided income for his wife up to £400 a year out of his share of his father's residuary estate and out of the share assigned by him by the indenture of Aug. 27, 1906. He goes on :

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"Now in exercise of the powers for this purpose given to me by the will of my father and by the said indenture of Aug. 27, 1906, and of any other power enabling me in this behalf I hereby direct and appoint that one equal third part of the income of my original and accruing share or shares in the residuary trust moneys for the time being subject to the trusts of my father's said will and in the investments or property representing the same including in such share or shares my share or shares so assigned by me as aforesaid in the trust funds and property which were comprised in or subject to the trusts of the said settlement executed on the marriage of my father and mother shall after my death be paid to my wife for life."

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Subject thereto he makes a similar appointment in favour of his children. So, when Claude appoints to his wife a life interest in one-third of the income, and when he appoints the corpus in favour of his children, he confines the appointment to his share of his father's residuary estate, and includes in that share the share in his father's marriage settlement assigned by him. In the one case he purports to exercise the power of appointment given him by his father's will, and in the other case the power of appointment referentially given him by the indenture of Aug. 27, 1906. The result is that, in my opinion, Claude's will only operates to give his widow a life interest as regards his original and accruing shares of his father's residuary estate, and the share of the marriage settlement funds assigned by him.

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The remaining question is whether, by the will of Eric or Claude, a life interest is given in the fund created under the memorandum of direction of Nov. 29, 1907, and the deed poll of Aug. 1, 1911. In my opinion, upon the true construction of these wills, neither Eric nor Claude purported to exercise a power given to them by the memorandum of direction and the deed poll, and their widows could only succeed in claiming such an interest if the argument, so put forward on behalf of the widows of Eric and Claude were right. That argument was that, by virtue of the express language used in the memorandum of direction and in the deed poll the trusts were that the funds thereby settled were to be treated as an addition to the corpus of the share of the residuary estate, and to follow its destination, and that, therefore, an effective appointment of a life interest in the residuary estate crystallises the trusts upon which, under the memorandum of direction and the deed poll, the funds, the subject of the trusts, are to be held. The effect would be that the wife

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would not take a life interest in those funds under an appointment in her favour in her husband's will, but would take it as a cestui que trust under the memorandum of direction and the deed poll, by reason of the fact that, in the events which had happened, she was a cestui que trust for life in regard to the residuary estate. That is a somewhat startling proposition. It really amounts to this, that an assignee of a cestui que trust under the trusts of the will, in regard to the residuary estate, could claim to be a cestui que trust under the memorandum of direction and the deed poll. It would also have the result that although under the memorandum of direction and the deed poll the trust funds subject to their operation are to be subject to the same trusts and powers as were contained in the will concerning the residuary estate, yet they would not be subject to a power of appointment, because the whole of this argument depends on the fact that the power of appointment given by the will, and exercised in respect of the residuary estate, crystallises the trusts upon which the trust funds are to be held under the memorandum of direction and the deed poll, and, although the memorandum of direction and the deed poll fund are settled by reference to the trusts of the residuary estate, it would not be open to one of the sons to appoint the residuary estate one way and the deed poll fund another.

That would be an extraordinary result, which I do not think I should bring about unless I am driven to do so by the terms of the memorandum of direction and the deed poll. The words no doubt, up to a point, are strong. In each document they are the same. The share is to be held

"as an addition to the capital of our respective shares under the will in the testator's residuary estate and so as to follow the destination thereof and to be subject to the same trusts, powers, and provisions (including the provisions for accruer) as are therein contained concerning the same except that"

the income of their respective shares in the fund should be paid to each during their respective lives. That is an alteration of the trusts, and, therefore, it seems to me that the document is declaring something which is not and cannot be fact, when it declares that these funds are to be amalgamated. They cannot be amalgamated because the trusts are different. It appears to me that I must treat the funds settled by the memorandum of direction and the deed poll as being separate funds, settled by different settlors, at different times, and held upon separate trusts from those contained in the father's will concerning his residuary estate, notwithstanding that the documents purport to treat them as if they were to be blended in one fund. It is said that I ought to hold that these funds have been amalgamated because of a decision of P. O. LAWRENCE, J., in *Re Paul's Settlement Trusts* (7). In that case a Mr. Paul, on Aug. 11, 1910, made a voluntary settlement of certain securities upon his daughter Ann Bridgett, who was then a widow, and after her death upon trust for her children or remoter issue as she should by deed or will appoint, and in default of appointment in favour of certain persons. The settlement also contained a power for Ann Bridgett by deed or will to appoint unto or for the benefit of any husband of hers who might survive her an interest during his widowhood. On the same day Mr. Paul made his will and by cl. 10 he bequeathed £20,000 to the persons who at his death should be the trustees of the settlement of Aug. 11, 1910, to be held

"upon the trusts and with and subject to the powers and provisions by and in such settlement declared and contained concerning the property thereby settled or such of the same trusts powers and provisions as may be then subsisting and so that such trusts powers and provisions shall take effect in relation to the said sum of £20,000 in the same manner in all respects as far as the case will admit as if such sum had formed part of the property originally settled by such indenture."

A The testator died in 1917; Ann Bridgett married a Mr. Nelson and died in 1918, without issue. By her will, which was made in 1912 after her marriage to Mr. Nelson, she recited that under the settlement she had power

B "to appoint to my said husband an interest during his widowerhood in any part of the trust fund thereby settled not exceeding one-half part thereof to commence after my decease. Now therefore in exercise of the said power of appointment and of all other powers (if any) enabling me in that behalf I hereby direct and appoint that in the event of my said husband surviving me the trustees for the time being of the said settlement shall from and after my death stand possessed of the said trust fund upon trust to pay the income of one-half part thereof to my said husband . . ."

C Mr. Paul died before his daughter, but the will she had made before he died was the effective will. The question arose whether the husband, by virtue of Mr. Paul's will, was entitled not only to one-half the income of the original settlement funds, but also to an interest during widowerhood in a moiety of the £20,000. It was held by P. O. LAWRENCE, J., that he was so entitled, and apparently on two grounds. The first ground was that under the special words of Mr. Paul's will by which he directed the £20,000 to be treated as if it were part of the fund originally settled, the legacy was to be held upon the same trusts as the funds originally settled were then being held—that is, he came to the conclusion that Mr. Paul's will was in effect a direction that the trustees were to hold the £20,000 upon whatever trusts were effective at the time as regards the original settled fund. The second ground was that by virtue of the Wills Act, 1837, s. 24, the daughter's will was to be taken as referring to the whole trust fund at that time. On one of these two grounds he decided in favour of the husband. I do not find anything like such strong words in this case so as to warrant me in coming to the conclusion that the funds subject to the memorandum of direction and the deed poll are to be treated as one with the shares of the residuary estate under the testator's will, so that the beneficiaries under the latter must necessarily be treated as the beneficiaries under the former.

F In my opinion the three assignments, the memorandum of direction, and the deed poll are really separate settlements of separate funds at distinct times and by distinct settlors, and each settlement must be treated as a separate settlement in which, by reference, are written out the referential trusts therein referred to. Consequently, the only life interest that passes to Eric's wife is one in respect of his share of his father's residuary estate, while Claude's wife take a life interest in respect of Claude's share of his father's residuary estate and the share assigned by Claude under the indenture of Aug. 27, 1906. Also the appointment in the will of Claude to his children only applies to his share of his father's residuary estate and the share assigned by him. It follows from this that there is no general hotchpot, but that each fund is subject to a separate hotchpot clause.

G

Solicitors: *Pennington & Son; McLeod, Eyre, Dowling & Co.; Walters & Co.*

[Reported by J. L. DENISON, Esq., Barrister-at-Law.]

DAWSONS, LTD. v. BONNIN AND OTHERS

[HOUSE OF LORDS (Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin and Lord Wrenbury), May 9, 11, 12, 15, July 14, 1922]

[Reported [1922] 2 A.C. 413; 91 L.J.P.C. 210; 128 L.T. 1;
38 T.L.R. 836]

Insurance—Motor insurance—Fire insurance—Proposal—Misstatement—Proposal “basis of” and incorporated in policy—Statement as to where insured vehicle to be kept—Vehicle kept elsewhere—Effect of misstatement—Avoidance of policy—Relevance of materiality of statement.

By a policy of insurance of a motor vehicle against fire and third party risks it was provided that the proposal for the insurance “shall be the basis of the contract and be held as incorporated herein.” A condition of the policy provided: “Material misstatement or concealment of any circumstance by the insured material to assessing the premium herein . . . shall render the policy void.” The proposal contained the following requirements: “State full address at which the vehicle will usually be garaged,” in compliance with which the assured stated a certain address. The vehicle was not kept at that address, and was elsewhere when, during the continuance of the policy, it was destroyed by fire.

Held: the “basis” of a thing was that on which it stood and on the failure of which it fell, and when a document consisting partly of statements of fact and partly of undertakings for the future was made the basis of a contract of insurance it was the very foundation of the contract, so that, if the statements of fact were untrue or the promissory statements were not carried out, the policy was avoided and the risk did not attach, and any question as to the materiality or otherwise of the statements made inaccurately or not carried out was irrelevant; the “basic clause” in the proposal and the condition in the policy relating to material misstatement did not cover the same ground, but were mutually independent, and so the condition did not limit the effect of the “basic clause” to material misstatements; in any case statements which the parties had themselves described as forming the basis of the contract and as incorporated therein could not be said to be immaterial to the contract; and, therefore, the assured in the present case being in breach of the statement regarding the place where the car would usually be garaged, could not recover under the policy in respect of the loss of the vehicle.

So **held** by VISCOUNT HALDANE, VISCOUNT CAVE, and LORD DUNEDIN, VISCOUNT FINLAY and LORD WRENBURY dissentiente.

Notes. Considered: *Paxman v. Union Assurance Society, Ltd.* (1923), 39 T.L.R. 424. Distinguished: *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co.*, [1925] A.C. 344. Considered: *Provincial Insurance Co., Ltd. v. Morgan*, [1932] All E.R. Rep. 899. Referred to: *MacKay v. London General Insurance Co.* (1935), 79 Sol. Jo. 271; *Beauchamp v. National Mutual Indemnity Insurance Co.*, [1937] 3 All E.R. 19; *Zurich General Accident and Liability Insurance Co. v. Morison*, [1942] 1 All E.R. 529.

As to non-disclosure and misrepresentation in a proposal for insurance see 22 HALSBURY'S LAWS (3rd Edn.) 185 et seq., and as to motor vehicle insurance see *ibid.*, p. 353 et seq. For cases see 29 DIGEST 49–52, 309, 323 et seq.

Cases referred to:

- (1) *Thomson v. Weems* (1884), 9 App. Cas. 671, H.L.; 29 Digest 36, 1.
- (2) *Redgrave v. Hurd* (1881), 20 Ch.D. 1; 51 L.J.Ch. 113; 45 L.T. 485; 30 W.R. 251, C.A.; 35 Digest 47, 417.
- (3) *A.-G. v. Ray* (1874), 9 Ch. App. 397; 43 L.J.Ch. 478; 30 L.T. 373; 22 W.R. 498, L.J.J.; 35 Digest 9, 23.

- A (4) *Anderson v. Fitzgerald* (1853), 4 H.L. Cas. 484; 21 L.T.O.S. 245; 17 Jur. 995; 10 E.R. 551, H.L.; 29 Digest 354, 2859.
- (5) *Hambrough v. Mutual Life Insurance Co. of New York* (1895), 72 L.T. 140; 11 T.L.R. 190; 39 Sol. Jo. 231, C.A.; 29 Digest 355, 2869.
- (6) *Yorkshire Insurance Co., Ltd. v. Campbell*, [1917] A.C. 218; 86 L.J.P.C. 85; 115 L.T. 644; 33 T.L.R. 18, P.C.; 29 Digest 176, 1327.
- B (7) *Wade v. Waldon*, 1909 S.C. 571; 46 Sc.L.R. 359; 1 S.L.T. 215; 12 Digest (Repl.) 474, *1752.
- (8) *London Guarantie Co. v. Fearnley* (1880), 5 App. Cas. 911; 43 L.T. 390; 45 J.P. 4; 28 W.R. 893, H.L.; 29 Digest 412, 3236.
- (9) *Bettini v. Gye* (1876), 1 Q.B.D. 183; 45 L.J.Q.B. 209; 34 L.T. 246; 40 J.P. 453; 24 W.R. 551; 12 Digest (Repl.) 482, 3590.
- C Also referred to in argument:
- Dalgety & Co., Ltd. v. Australian Mutual Provident Society*, [1908] V.L.R. 481; 29 Digest 350, 2836 i.
- Edgington v. Fitzmaurice* (1885), 29 Ch.D. 459, 476; 55 L.J.Ch. 650; 53 L.T. 369, 375; 50 J.P. 52; 33 W.R. 911; 1 T.L.R. 326, C.A.; 35 Digest 7, 14.
- D *Farr v. Motor Traders' Mutual Insurance Society*, [1920] 3 K.B. 669; 90 L.J.K.B. 215; 123 L.T. 765; 36 T.L.R. 711, C.A.; 29 Digest 394, 3141.
- Life Association of Scotland v. Forster* (1873), 11 Macph. (Ct. of Sess.) 351; 45 Sc. Jur. 240; 29 Digest 353, a.
- London Assurance v. Mansel* (1879), 11 Ch.D. 363; 48 L.J.Ch. 331; 41 L.T. 225; 43 J.P. 604; 27 W.R. 444; 29 Digest 350, 2836.
- E *Macdonald v. Law Union Insurance Co.* (1874), L.R. 9 Q.B. 328; 43 L.J.Q.B. 131; 30 L.T. 545; 38 J.P. 485; 22 W.R. 530; 29 Digest 354, 2862.
- Re Marshall and Scottish Employers Liability and General Insurance Co., Ltd.* (1901), 85 L.T. 757; 29 Digest 393, 3135.
- Union Insurance Society of Canton, Ltd. v. George Wills & Co.*, [1916] 1 A.C. 281; 85 L.J.P.C. 82; 114 L.T. 245; 32 T.L.R. 196; 13 Asp. M.L.C. 233; 21 Com. Cas. 169, P.C.; Digest Supp.
- F *Wallis, Son and Wells v. Pratt and Haynes*, [1910] 2 K.B. 1003; 79 L.J.K.B. 1013; 103 L.T. 118; 26 T.L.R. 572, C.A.; reversed [1911] A.C. 394; 80 L.J.K.B. 1058; 105 L.T. 146; 27 T.L.R. 431; 55 Sol. Jo. 496, H.L.; 12 Digest (Repl.) 471, 3509.
- Wheulton v. Hardisty* (1858), 8 E. & B. 232, 285; 27 L.J.Q.B. 241; 31 L.T.O.S. 303; 5 Jur. N.S. 14; 6 W.R. 539; 120 E.R. 106, Ex.Ch. 29; Digest 351, 2845.
- G

Appeal by the assured from an order of the Second Division of the Court of Session (the Lord Justice-Clerk (LORD SCOTT DICKSONI, LORD DUNDAS and LORD ORMDALE), who affirmed a judgment of the Lord Ordinary (LORD ANDERSON) in favour of the insurers, but upon different grounds.

H The assured raised an action against the insurers, the respondents in which they sought to recover a sum of £500 and interest. The sum sued for was the amount covered by a policy of insurance issued by the respondents to the appellants on Feb. 8, 1917, in respect of a motor lorry which the respondents thereby insured against (i) loss by fire to the amount of £500, and (ii) claims by the public up to £1,000. The premium paid was £11 17s. 6d. The claim was based on the allegation that the lorry had been destroyed and rendered valueless on Dec. 27, 1917, in consequence of a fire which broke out in the garage occupied by the appellants at Dovehill Farm, Newlands, Glasgow. In their defence the respondents pleaded that the appellants could not recover under the policy, because in the proposal executed by the appellants relative to the policy, which had been declared in the policy itself to be the basis of and to be incorporated therein, they gave, inter alia, these answers, of which the third (No. 4) was untrue in fact, and was known to the appellants to be untrue: "(i) Proposer's name?—Messrs. Dawsons, Ltd.; (ii) Proposer's address—

46, Cadogan Street Glasgow . . . ; (iv) State full address at which the vehicle will usually be garaged.—Above address.” The respondents said that the answer to the third of the above questions (No. 4) must be presumed to be, and separatim was in fact, material to the risk, and that the answer was untrue, and entirely misleading and had misled them. They founded on the following condition which was the fourth condition of the policy and ran as follows :

“Material misstatement or concealment of any circumstances by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void.”

They said that this condition covered any misstatement or concealment which was in fact material whether in answer to a question in the proposal or not. At the hearing of the appeal before the Second Division the appellants contended (a) that the said answer was, not a warranty, but merely a statement of the nature of a representation; (b) that, in order to avoid the policy, the misstatement must be material to the contract; (c) that the false statement must induce the contract and be fraudulent; (d) that, as it was a “composite” policy covering road as well as fire risks, the misstatement was not material.

The Lord Ordinary and the Lord Justice-Clerk decided the case against the appellants on the proposal form, and LORD DUNDAS and LORD ORMIDALE upon the condition. The appellants appealed to the House of Lords where the respondents supported the judgment of the Court of Session on the grounds that (i) the statement complained of was untrue, and, being one of the statements declared to be the basis of the contract and incorporated therein, it became a warranty and its falsehood avoided the contract of insurance; (ii) even if the statement was a misrepresentation merely, the fact misrepresented was material to the risk, and its falsehood avoided the contract of insurance; (iii) the proposal of the appellants was false and misleading in its statement as to the place where the insured vehicle would usually be garaged which the parties agreed to treat as material and which was in fact material, and the appellants in consequence were not entitled to recover under the policy.

A. Morrice MacKay, K.C., T. Gentles, K.C., and W. D. Patrick (all of the Scottish Bar) for the appellants.

J. Robertson Christie, K.C., and W. Ingram (both of the Scottish Bar) for the respondents.

Their Lordships took time for consideration.

July 14. The following opinions were read.

VISCOUNT HALDANE.—This is an appeal from a judgment of the Second Division of the Court of Session, which affirmed a decision of the Lord Ordinary, who had tried the action, but varied the reasons on which that decision was based. The action was brought by the appellants to recover a sum of £500 and interest against the respondents, with whom they had insured a motor lorry against fire, and also against any claims for injuries made by the public. The vehicle had been in fact destroyed by fire. The question in the appeal is whether the respondents were freed from liability under the policy by reason of inaccuracy in a statement made by the appellants in the proposals submitted when the policy was issued, to the effect that the vehicle would usually be garaged at a certain address, whereas it was garaged elsewhere.

The policy was issued to the appellants on Feb. 8, 1917, by the agent in Glasgow of the respondents, who were Lloyd's underwriters. The transaction was initiated by a proposal form, signed on behalf of the appellants, who were furniture removal contractors carrying on business at 46, Cadogan Street, Glasgow. They used motor cars and lorries in this business, and they had been in the habit of insuring them. Among others with whom they had had transactions of this kind was a

A Mr. Hamilton, an insurance broker, who acted for various insurance societies. He appears to have called on them, and to have offered a quotation for the insurance in question, which was accepted. He then filled in a form of proposal from information which he thought he had obtained from them, and this, when signed, became the proposal form as to which the question has arisen.

B It commenced by setting out the particulars of the motor vehicle intended to be insured, the make being of what was called the Halley lorry type, and the scope of the indemnity desired being confined to fire and to claims by the public. There, then, followed ten questions—to each of which a statement in answer was given—relating to the proposer's name and address, 46, Cadogan Street, Glasgow, and the purpose for which the vehicle was to be used. The fourth of these statements was made in response to a request for a statement for the full address at which the vehicle would usually be garaged. The answer given was "above address"—that is to say, 46, Cadogan Street. There was a subsequent question as to the district in which the vehicle would be used, to which the answer was "Glasgow and district." The rest of the ten questions and answers are not material. Following on the proposal form and in the same document came the policy itself. It proceeded on the narrative that the insured (the appellants) had subscribed and delivered to the insurers the proposal form dated Jan. 22, 1917, "which proposal shall be the basis of the contract and be held as incorporated herein." The policy then stated that the premium had been paid for an insurance for twelve months, and it set forth the terms of the insurance as including (inter alia) indemnity to the extent of £500 against loss or damage caused by fire. Appended to the policy and qualifying it there was a statement of "conditions of insurance." The fourth condition
E was in these terms :

"Material misstatement or concealment of any circumstance by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void."

F What happened was this. On Dec. 27, 1917, the vehicle insured was garaged, not at 46, Cadogan Street, but at Dovehill Farm, which had been a farm steading at Newlands, on the outskirts of Glasgow but within the city of Glasgow area. On that date it was burned accidentally. The vehicle was at the time of the fire within a building at Dovehill which had been a hay shed and was built of wood. In this shed, which was used by the appellants as a garage for their motor lorries, there were other vehicles. One of these, a petrol motor lorry, took fire, and in the con-
G flagration the insured motor was burned up. The question which arises is whether, in these circumstances, the respondents are liable under the policy which they had issued. They contend that the fourth of the answers in the proposal form was untrue. They say that the vehicle insured was not intended to be usually garaged at 46, Cadogan Street, but at Dovehill; and that the answer actually given to the fourth question was not accurate, inasmuch as it amounted either to a misrepresentation
H of intention as to present and future storing or to a contract as to storing in the future which was broken. They also argued that the fourth of the conditions appended to the policy was that any material misstatement or concealment of any circumstance material to assessing the premium was by express provision to render the policy void, and that there was actually misstatement or concealment of the circumstance that the vehicle was to be garaged at Dovehill, a garage which they
I alleged was in such a situation and of such a character that, if disclosure had been made, the assessment of the premium would have been affected. The reply of the appellants, the insured, on this point was that the question whether the motor vehicle was to be stored at Dovehill or at Cadogan Street was not a material one. The chief risks covered by the policy were in the main wholly unconnected with fire at the garage, and the percentage of the premium which could be allocated to that risk was very small. The respondents called evidence to prove that they did consider that the question was one of importance; and the learned judges in the

courts below appear to have given credence to that evidence, and to have attached weight to it. This is an important fact, and I am reluctant to differ from them. But I think that, notwithstanding some differences in the way in which they cross-examined the witnesses called for the respondents, the appellants have sufficiently proved, by testimony which commends itself, that in all probability no importance would have been attached to any answer to the fourth question in the proposal form to the effect that Dovehill was to be the place of garage. But that does not dispose of the case; for if the respondents can show that they contracted to get an accurate answer to this question, and to make the validity of the policy conditional on that answer being accurate, whether of material importance or not, the fulfilment of this contract is a condition of the appellants' being able to recover.

For this reason it appears to me that the question which really lies at the root of the matter in dispute is one of construction simply. I do not look on the fourth condition appended to the policy as that which is important for this purpose, for that condition extends to classes of possible misstatements and concealments which go beyond those to which the proposal statements are confined. On the other hand, they relate to any such as may be actually material in assessing the premium, as distinguished from such as are made, by special stipulation as to accuracy, conditions of the validity of the general contract of insurance. If there are statements in the answers to the questions in the proposal form which are in this way constituted by special stipulation conditions, they are, therefore, unaffected by the subsequent and independant condition dependant on materiality.

As to the character of such conditions and what is implied in their constitution, there is a good deal of authority which is instructive. It is worth while to consider how the distinction between a condition and a representation came to be drawn in this connection. The distinction had its origin in the historical development of the law of England; but as LORD WATSON observed of the existing state of the law, the doctrine of warranty as applied to such stipulations in a contract of assurance is the same in the law of Scotland as in that of England: *Thomson v. Weems* (1). Warranty is a somewhat unfortunate expression to have been used in this connection. The proper significance of the word in the law of England is an agreement which refers to the subject-matter of a contract, but, not being an essential part of the contract either intrinsically or by agreement, is collateral to the main purpose of such a contract. Yet irrespective of this, the word came to be employed in England when what was really meant was something of wider operation, a pure condition. If goods tendered in performance of a contract do not satisfy the conditions stipulated for, the buyer may reject them; but he may, alternatively, accept the goods and claim damages for breach of the stipulated condition, thus treating his claim as one for damages for a breach of warranty, sufficiently so constituted. The condition is thus wider than the warranty strictly so called, but may sometimes be founded on as giving rise to a contract of warranty.

But the restricted limits of the English common law encourage the development of the notion of warranty in a way which would not have been required in Scotland, where law and equity were never severed. In England it was always possible to set aside a contract for misrepresentation, but the representation, although sufficient for the jurisdiction, even though perfectly innocent, had to be material. Moreover, at common law it was no defence to an action on a contract that there had been misrepresentation, unless the misrepresentation were fraudulent, or of a recklessness analogous to fraud: see the judgment of SIR G. JESSEL, M.R., in *Redgrave v. Hurd* (2) (20 Ch.D. at p. 13). Possibly in order to provide for the difficulty occasioned by the limits of their jurisdiction, the courts of common law showed great readiness to construe a representation sufficiently expressed to be the foundation for the acceptance of a proposal made by a would-be insured to an insurer, as a condition which, if accepted, had to be observed independently of any question of

A materiality. As LORD BLACKBURN observed in *Thomson v. Weems* (1) (9 App. Cas. at p. 683):

B

"It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract; and if they do so the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material."

C

He goes on to point out that in policies of marine insurance it is settled that any statement of a fact bearing on the risk is, by whatever words and

"in whatever place, to be construed as a warranty, and, prima facie at least, that the compliance with that warranty is a condition precedent to the attaching of the risk."

D

Without going so far as to hold that this rule is also applicable to the construction of life policies generally, he thought that it applied to the life policy before him, and said

E

"... when we look at the terms of this contract, and see that it is expressly said in the policy, as well as in the declaration itself, that the declaration shall be the basis of the policy, it is hardly possible to avoid the conclusion that the truth of the particulars (which, I think, include the statement that he was of temperate habits) is warranted."

F

LORD BLACKBURN lays stress in these words on the expression "basis." In *A.-G. v. Ray* (3), JAMES and MELLISH, L.JJ., two great masters of accuracy in legal phraseology, employ the same term to denote what they consider descriptive of what was foundational or essential in the transaction before them. The case was not one in which the expression "basis" occurred in any policy, for it was concerned with a grant of an annuity for life, based on a representation as to age, granted by the Commissioners for the Reduction of the National Debt. MELLISH, L.J., none the less, likened the transaction to one of an ordinary contract of life assurance where the representation is made the "basis," or an essential term, of the contract, and materiality is consequently irrelevant. I do not think that it matters whether the representation which is made "basic" is as to a state of present fact, or to something to be carried out in the future, such as garaging at a particular place. What is important in the latter alternative is that the insured cannot recover, unless he can show that he has performed his part, for his performance has been made the condition of performance by the other party.

G

H

I

With these principles of construction in view, I turn to the contract before us. As to the fourth of the appended conditions, this, as I have already observed, extends to matters which go beyond in some respects, and are outside in other respects, those dealt with specifically in the proposal form. Moreover, the fourth condition is limited to what is "material to assessing the premium," and I will assume for present purposes that nothing material in this sense was misstated or concealed. If so, that fourth condition does not apply. But, on the other hand, I do not find in the language used in it anything which cuts down or interferes with the effect of the fourth of the answers in the proposal form, if this in itself imports a condition. If it does import by itself a condition, then I think that, as LORD BLACKBURN laid down in the passage quoted, it imports a condition which must be shown to have been complied with, whether material from an ordinary business standpoint or not. It is clear that the answer was textually inaccurate. I think that the words employed in the body of the policy can only be properly construed as having made its accuracy a condition. The result may be technical and harsh; but if the parties have so stipulated, we have no

alternative, sitting as a court of justice, but to give effect to the words agreed on. Hard cases must not be allowed to make bad law. The proposal—in other words—the answers to the questions specifically put in it is made basic to the contract. It may well be that a mere slip, in a Christian name, for instance, would not be held to vitiate the answer given if the answer were really in substance true and unambiguous. *Falsa demonstratio non nocet*. But that is because the truth has been stated in effect within the intention shown by the language used. The misstatement as to the address at which the vehicle would usually be garaged can hardly be brought within this principle of interpretation in construing contracts. It was a specific insurance, based on a statement which is made foundational if the parties have chosen, however carelessly, to stipulate that it should be so. Both on principle and in the light of authorities such as those which I have already cited, it appears to me that, when answers, including that in question, are declared to be the basis of the contract, this can only mean that their truth is made a condition exact fulfilment of which is rendered by stipulation foundational to its enforceability.

For these reasons I feel myself compelled to assent to the general conclusion arrived at by all the learned judges in the Court of Session. But, for the reasons assigned, I prefer the ground taken by the Lord Ordinary and the Lord Justice-Clerk to that on which LORD DUNDAS and LORD ORMDALE rest their reasoning. The former decided the case on the proposal form, the latter on the fourth of the appended conditions. I should, accordingly, desire, speaking for myself, to vary the language of the interlocutor of the Second Division by assoilzieing the respondents from the petitory conclusion of the summons, but only on the ground of the untrue answer given to the question in the proposal form. As to expenses, I should be content to adopt the findings of the Inner House. It would follow that the respondents should have their costs of this appeal.

VISCOUNT FINLAY.—This action was brought by the appellant, the owners of a motor lorry, to recover upon a policy of insurance issued by the respondents as underwriters. The lorry was completely destroyed by fire on Dec. 27, 1917, in the garage at Dove Hill, Newlands, Glasgow. The respondents raised several defences to the claim. The first was a charge of fraud in the claim. As to this, the Lord Ordinary said that the defenders' allegations of a fraudulent claim were not only not proved, but had been disproved. The respondents further pleaded that there were misstatements on material matters which vitiated the policy under the fourth of the conditions indorsed thereon. The Lord Ordinary found that this defence had no foundation in fact, and nothing has been said about it on the present appeal.

There remains for consideration only the defence raised in the second answer and in the first and fourth pleas in law for the defenders. The second answer contained the following averment: "In the proposal which is the basis of the policy, the following question and answer occur: 'State full address at which vehicle will usually be garaged.' (A) 'Above address' [which was 46, Cadogan Street Glasgow]. The said answer is untrue and misleading. The information requested and given was of material importance to the defenders in considering the said proposal, and they contracted on the faith that the answer was true. In consequence of its falsehood, the policy is void." The first plea in law for the defenders was this: "The policy is void because of the untrue answer given to the question in the proposal referred to, and because the information contained in said answer was material to the formation of the contract, and misled the defenders on a material matter." The fourth plea in law was the following: "The proposal of the pursuers being false and misleading with reference to the place where the motor-car insured would be garaged, the defenders are entitled to absolvitor." The defenders contend that the mistake in the answer as to the garage forms a good defence to the action, and its validity must, of course, be decided on legal

A principles. No defence has been pleaded raising any question how far the respondent can take advantage of a mistake in the answer for which their agent was primarily responsible, and the question whether this mistake in the proposal vitiated the policy must be decided simply on grounds of law and on the pleadings.

B The proposal form contained a description of the vehicle to be insured, and the answers to which I have already referred. The policy itself recites the proposal, and says that it is to "be the basis of the contract and be held as incorporated herein." The underwriters bound themselves to indemnify the assured subject to the conditions on the back as against certain perils, including loss by fire. The fourth of the conditions on the back is this: 4. Material misstatement or concealment of any circumstances by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void." It was urged on behalf C of the respondents that the statement of the usual place of garage was a warranty in the sense in which that term is used with reference to contracts of insurance, and that, if it was not correct, the action must fail, whether the statement was material or not in itself. The Lord Ordinary held that this statement was such a warranty, and, in his interlocutor of July 15, 1920, found that the policy "is void because of the untrue answer given to the question in the proposal." On appeal D the Second Division also decided in favour of the underwriters, the respondents, on the present appeal, but on grounds entirely different from that on which the Lord Ordinary had proceeded. They held that the fourth condition endorsed on the policy applied, and that the policy was void, because the answer on the proposal form contained a material misstatement by the assured of circumstances material to assessing the premium on the policy.

E I agree with the Second Division that the case is governed by the fourth of the endorsed conditions. I am unable to agree with them in the view that the statement as to the garage was material to assessing the premium on the policy, and if I am right in this view, it will follow that the appeal should be allowed and judgment entered for the appellants. I am wholly unable to adopt the view on which F the Lord Ordinary proceeded, that the clause amounted to a warranty. The expression "warranty" imports that a particular state of facts in the present, or in the future, is a term of the contract, and, further, that if the warranty is not made good, the contract of insurance is void. It is not necessary that the term "warranty" should be used, as any form of words expressing the existence of a particular state of facts as a condition of the contract is enough to constitute a warranty. If there is such a warranty, the materiality of the facts in themselves G is irrelevant; by contract their existence is made a condition of the contract. But if the language used is not clear, the materiality or immateriality of the facts said to be warranted may be an element in arriving at a conclusion on the question whether the language used should be construed as constituting a warranty. In the present case it appears to me that the evidence establishes that the statement H as to the garage was not material to the present insurance. In the case of an ordinary policy covering a motor against fire risk, the question of the garage might be very material. Its structure and locality might affect the chances of fire, or the chance of fire being extinguished, if it should break out, but as to the present policy, the evidence of the pursuers' witnesses is quite distinct that the risk of fire in the garage is so insignificant in comparison with the other risks insured, I which are those of the road, including fire on the road which might result from self-ignition, that it is ignored in fixing the premium. It is true that the evidence of the defenders, upon whom lay the onus probandi, had been taken before the evidence for the pursuers, and it is said, and I think with justice, that the cross-examination of the defenders' witnesses on this point was insufficient. The defenders, however, did not object on this ground to the reception of the pursuers' evidence on the point, and, further, the defenders if they had been in a position to controvert the pursuers' evidence, might have applied to be allowed to adduce

evidence on the point which had been clearly developed in the evidence of the pursuers' witnesses. They made no such application, and for this there can be only one reason, namely, that they were not in a position to controvert the truth of the evidence given by the pursuers' experts. We must, therefore, take the evidence as it stands, with the result that there is no contradiction of the pursuers' evidence on this point. If the risk of fire in the garage did not affect the premium, it could not be material. It would require clear language in the policy to establish that a statement on an immaterial point of this nature had been made a condition of the policy by warranty. The very usual clause making the truth of the answers in the proposal a condition of the policy, so that it is void if they are in any respect untrue, does not occur in the present policy, and the fact that such a clause is usual cannot be ignored in determining whether a policy in which it is absent amounts to a warranty.

The respondents are, therefore, driven to rely solely upon the clause in the policy that the proposal should be the basis of the contract and be held as incorporated therein. This clause appears to me to be inadequate to support the conclusion which the respondents desire to draw from it. The proposal is, no doubt, the basis of the contract of insurance, in the sense that it initiated the transaction, and that in response to it the insurance was granted. But this does not in the least involve the proposition that any inaccuracy on any point in any of the answers, however immaterial, would be fatal to the policy. If the statement were immaterial to the risk, it might be another matter altogether. The policy is put forward by the underwriters, and it must be construed contra proferentes. If its effect is ambiguous, it must be read in favour of the assured. The existence of the fourth condition endorsed on the policy tends strongly to show that the answer as to the garage should not be read as a warranty. The fourth condition is one subject to which the contract of insurance came into existence, and it is an integral part of the contract. On the fair reading of the contract as a whole, including the fourth condition, the inference seems to me irresistible that it was only material misstatements, whether in the proposal or elsewhere, which were to render the policy void.

A great many authorities were cited in the argument. The most important of them is *Thomson v. Weems* (1). In that case the "declaration" was stated to be the basis of the assurance, and it was provided that if anything averred in the declaration should be untrue, the policy should be void, and all moneys received by the insurance company in respect thereof should belong to the company. The policy was on life, and in the answers to the questions in the proposal it was stated that the habits of the assured were temperate and had always been so. These answers were false in fact. It was held in the House of Lords that the truth of the particulars in the declaration was warranted, and that their untruth, apart from any question of fraud or recklessness, vitiated the policy (9 App. Cas. at p. 684). LORD WATSON said (*ibid.* at p. 687):

"The question [as to temperance] must, in my opinion, be interpreted according to the ordinary and natural meaning of the words used, if that meaning be plain and unequivocal, and there be nothing in the context to qualify it. On the other hand, if the words used are ambiguous, they must be construed contra proferentes and in favour of the assured."

In the present case there are no such words as those which formed the ground of decision in that case, and I think that the attempt to sell out their equivalent from the terms used in the present policy has not succeeded. The case really falls to be determined on the fourth of the endorsed conditions, and as the misstatement was not material to the question of premium, the appeal, in my opinion, should be allowed.

A **VISCOUNT CAVE.**—It is common ground that the proposal for the policy of insurance issued by the respondents to the appellants contained a misstatement as to the place where the lorry to be insured would usually be garaged. The only question is whether this misstatement avoids the policy.

B The policy commences with a recital of the proposal—a full copy of which is annexed to the policy—and proceeds “which proposal shall be the basis of this contract and be held as incorporated therein.” It was faintly contended on behalf of the appellants that this provision did not bind them, as it was not contained in the proposal which they signed, but only in the policy which was not signed by them; but this contention appears to me to be wholly untenable. The appellants accepted the policy and sued upon it; and they cannot, while relying upon the policy, repudiate one of its provisions. I, therefore, put aside this contention and treat the words quoted as a term of the contract.

C What, then, does the sentence quoted mean? I cannot think that it amounts to nothing more than a statement that the proposal initiated the transaction and led to the grant of the policy. That fact sufficiently appears from the recital of the proposal; and the addition of an express stipulation, that the proposal shall be treated as incorporated in the policy and shall be the basis of the contract, is plainly intended to have some further effect. “Basis” is defined in the **IMPERIAL**
D **DICTIONARY** as “foundation of a thing—that on which a thing stands or lies,” and similar definitions are to be found elsewhere. The basis of a thing is that upon which it stands, and on the failure of which it falls, and when a document consisting partly of statements of fact and partly of undertakings for the future is made the basis of a contract of insurance, this must, I think, mean that the document is to be the very foundation of the contract, so that if the statements of
E fact are untrue, or the promissory statements are not carried out, the risk does not attach. No doubt, the stipulation is more concise in form than those which were contained in the policies which fell to be construed in *Anderson v. Fitzgerald* (4) and *Thomson v. Weems* (1) in each of which cases the policy contained an express provision to the effect that if anything stated in the proposal was untrue the
F policy should be void; but I think that the effect is the same as if those words had been found in the present policy. Indeed, it is remarkable that, in *Anderson v. Fitzgerald* (4) (4 H.L.C. at p. 500), LORD CRANWORTH referred to the above-mentioned provision, as to the avoidance of the policy if any of the statements in the proposal should be untrue, as a provision making those statements the basis of the contract; and in *Thomson v. Weems* (1) (9 App. Cas. at p. 684), LORD
G BLACKBURN said:

“But I think when we look at the terms of this contract, and see that it is expressly said in the policy, as well as in the declaration itself, that the declaration shall be the basis of the policy, that it is hardly possible to avoid the conclusion that the truth of the particulars . . . is warranted.”

H LORD ESHER, M.R., in *Hambrough v. Mutual Life Insurance Co. of New York* (5) (72 L.T. at p. 141), uses the word “basis” in the same sense. Upon the whole, it appears to me, both on principle and on authority, that the meaning and effect of the “basis” clause, taken by itself, is that any untrue statement in the proposal, or any breach of its promissory clauses, shall avoid the policy; and if that be the
I contract of the parties it is fully established, by decisions of your Lordships’ House, that the question of materiality has not to be considered.

But it is contended on behalf of the appellants that the “basis” clause is limited or qualified by the fourth condition on the back of the policy, which is in the following terms:

“Material misstatements or concealment of any circumstance by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void.”

And it is argued that, having regard to this condition, a misstatement in the proposal does not avoid the policy unless it is a material misstatement. I do not take that view. The "basis" clause and the fourth condition do not cover the same ground. The former includes promissory statements which are apparently not with the condition, and the condition covers misstatements and concealments outside the proposal with which the "basis" clause is not concerned. I think that the two clauses are independent and cumulative provisions, each of which must take effect. But even if it be otherwise, and if the effect of the condition is that the policy is only to be made void by misstatements which are material, the result is, I think, the same, for it seems to me impossible for a court to say that statements which the parties themselves have described in the policy as incorporated in and forming the basis of the contract are wholly immaterial to the contract. As LORD SUMNER said in *Yorkshire Insurance Co. v. Campbell* (6) ([1917] A.C. at p. 225), "... since the parties have imported this statement into their contract presumably they thought it material." This is certainly not less true when they have agreed that the statement shall be the basis of the contract. In these circumstances, it appears to me to be irrelevant to consider the conflicting evidence in the case as to whether a misstatement as to the place of garage is, in the ordinary sense, material or not. The parties have agreed that it shall be deemed material and that concludes the matter. I must confess that I have little sympathy with the respondents, who seek to profit by a mistake to which their agent contributed; but the case must be decided according to law, and I think that the law is on their side. I would, therefore, vary the interlocutor of the Second Division in the manner proposed by VISCOUNT HALDANE, the appellants to pay the costs of this appeal.

LORD DUNEDIN.—I have found this case one of difficulty. Had I been able to take the view which was taken of the evidence by the learned judges of the Court of Session, it would have been easy. That view is embodied in the finding: "Find that the policy is void, because the answer to the fourth question in the proposal form contains a material misstatement of a circumstance by the insured material to the assessing of the premium under the policy." I think that the evidence shows that the misstatement was not in fact material to the assessment of the premium. I cannot, therefore, decide the case upon the ground of the application of the fourth section of the conditions of assurance, which provides that

"material misstatement or concealment of any circumstance by the insured material to assessing the premium herein or in connection with any claim shall render the policy void."

The same view of the evidence disposes of what I may call the common law doctrine in insurance cases as to disclosure of facts material to the risk. Nor am I able to say that the series of cases, of which *Thomson v. Weems* (1) may be taken as a type, enable me to find direct authority. In each of these cases—they are cited by the Lord Ordinary in his opinion—there was either a statement signed by the proposer that his answers to the questions put to him were true, and that he warranted them to be true, or there was a clause in the policy that if any of the statements were untrue the policy was to be void.

Was, then, the statement as to the usual place of garage material? I pointed out in *Wade v. Waldon* (7) (1909 S.C. at p. 576) that there are in contracts certain stipulations which go to the root of the contract, a breach of which entitles the other party to hold the contract at an end, and other stipulations which do not go to the root and only give rise, if broken, to actions of damages. At the same time I quoted LORD WATSON in *London Guarantee Co. v. Fearnley* (8) who in his turn quoted the judgment of LORD BLACKBURN in *Bettini v. Gye* (9), and pointed out that it was within the power of parties to contract that particular matters,

A however trivial, might form conditions precedent. Have the parties so contracted in this case? That raises the pure question, as yet, I think, undecided, when certain statements are said to be the "basis of the contract and incorporated therewith," is that equivalent to saying that these statements are held to be contractually material? After much consideration, unwillingly, in the circumstances of the case and contrary to my first impression, I have come to the conclusion that it is. I think that "basis" cannot be taken as merely pleonastic and exegetical of the following words, "and incorporated therewith." It must mean that the parties held that these statements are fundamental—that is, go to the root of the contract—and that consequently, if the statements are untrue, the contract is not binding; and, therefore, I come to the same conclusion as has been come to by VISCOUNT CAVE, and for essentially the same reasons. I ought, in justice to the learned judges of the Court of Session, to say that I find that they had proposed to follow what LORD SUMNER said in *Yorkshire Insurance Co. v. Campbell* (6), but by the finding quoted they put the judgment on the other ground. I am of the opinion that the appeal must be dismissed, with the variation proposed.

D LORD WRENBURY.—I make two preliminary observations upon the fourth question in the proposal. First, the appellants have argued that the purpose of that question: "State full address at which the vehicle will usually be garaged," is to fix the area for rating purposes—that is, for the purpose of determining the rate under which the risk will fall: that the relevance of the answer lies in the word "Glasgow"; and that no discrimination is to be made as between Dovehill Farm and Cadogan Street. That argument overlooks the ninth question, "In what district will the vehicles be used?" The answer to that question will determine the area. E The purpose of the fourth question must be some purpose other than that. Secondly, the fourth question is directed solely to the situation, and not to the construction of the garage. The second question asked for the proposer's address. The fourth asked for what may be called the car's address. It made no inquiry whether the building of the garage would be of stone, brick, iron, wood, or any other material. F There is no question anywhere in the proposal form as to construction. At most it asked information which would enable the intending insurers to visit the building and see what its construction was.

With this premiss I turn to consider the contract. It may be described as consisting of three parts. The first part consists of the proposal. This is a document signed by the intending assured, but not by the intending insurers. It contains no words, such as there were in *Thomas v. Weems* (1) and in *Yorkshire Insurance Co. v. Campbell* (6), expressing that the intending assured declares or vouches or warrants that the statements contained in it are true. It is a document whereby the proposer makes certain statements of fact, and if those statements are inaccurate or misleading the proper consequences will follow which result from misstatement made in inducing a contract. In order to see what these are in this case it is necessary to look further. The second part consists of the operative body of the policy, consisting of recital and operative words of obligation. By way of recital this document states that the proposer has made a proposal which is to be "held as incorporated herein." As this proposal was a unilateral document signed by the proposer only, it can be incorporated only by way of recital. When I have incorporated it, I find only that the policy says that the proposer had made certain statements, and so he had. As further part of the recital under review, the document runs: "Which proposal shall be the basis of this contract." The whole effect of these words, I think, is to state that the proposal is to be taken to be the initiation and foundation of the contractual relation, and the statements contained in the proposal are to be statements on the faith of which the insurers are prepared to contract. The statements in the proposal are thus made material. I must look at the contract to see what effect is to be given to their

materiality. To see what is to ensue if any of them are inaccurate, I have therefore still to look further. A

If a contract is induced by misrepresentation, the misrepresentation does not necessarily render the contract void. It may render the contract voidable at the instance of the contracting party who proves that he was misled. This differs toto cœlo from a case in which the contract itself provides that if a certain alleged fact is not true the contract shall be void. In that case the contract becomes contractually void, because the contract itself provides that in that event it shall be void. In the former case the contract remains an operative obligation, but one from which the party misled may be in a position to relieve himself, because he cannot be held to a contract which was tainted at its source. The question here is : What was in this case the position of the insurers in this respect? This brings me to the third part of the contract, namely the "conditions of insurance." By the operative words of the policy the obligation of the insurers is "subject to the conditions on the back hereof, the due observance of which is a condition precedent to all liability of the underwriters hereunder." The fourth condition is : B C

"Material misstatements or concealment of any circumstance by the insured material to assessing the premium herein or in connection with any claim shall render the policy void." D

As a matter of construction, I hold that this means : "Material misstatement, by which I mean misstatement material to assessing the premium." Further, I think that the sentence is a pregnant sentence; and by providing that certain statements shall render the policy void it intends that those, and only those, misstatements shall render the policy void, thus excluding a construction which would give to other statements the effect of a warranty. Misstatements not material to assessing the premium are not to render the policy contractually void, but their effect is to be determined by the considerations relevant to misstatement as distinguished from warranty. E

This being my view of the contract, I turn to the evidence. I am satisfied that the question whether the car is to be garaged in a building of brick, stone, or wood makes no difference in assessing the premium. The risk of fire, including both risk on the road and risk in the garage, carries a very small proportion, say 5 per cent. of the premium and fire risk on the road is so much greater than fire risk in the garage that the latter is negligible, and, in point of fact, the construction of the garage is not taken into account at all in assessing the premium. Assuming that there was a misstatement as to construction of the garage, this was not within condition 4 a misstatement material to assessing the premium. Further, there was no misstatement at all as to the construction of the garage. There was no statement about it. None was asked for. Neither under the condition nor under the general law as to misstatement, therefore, can the insurers avoid the contract. I have the more satisfaction in arriving at this conclusion, because I can have no doubt that the insurers attributed no importance at all to this question of construction; that at most they asked for, and obtained, information as to locality of which they might have availed themselves if they attributed importance to construction, but that they never did so. In my opinion, the resistance of the insurers who have taken the premium to satisfy the claim of the assured upon his policy is neither creditable nor capable of being sustained. I think the assured is entitled to succeed on this appeal. F G H I

Appeal dismissed.

Solicitors : *Simmons & Simmons*, for *Manson, Turner & MacFarlane*, Edinburgh; *Carpenters*, for *Allan Lowson & Hood*, Edinburgh, and *A. P. Hamilton & Callander*, Glasgow.

[*Reported by W. C. SANDFORD, Esq., Barrister-at-Law.*]

A DOUBLE v. SOUTHAMPTON ASSESSMENT COMMITTEE AND OTHERS

[KING'S BENCH DIVISION (Lord Trevethin, C.J., Sankey and Swift, JJ.), February 6, 1922]

[Reported [1922] 2 K.B. 213; 91 L.J.K.B. 803; 126 L.T. 796;
86 J.P. 86; 66 Sol. Jo. 473; 20 L.G.R. 297; 2 B.R.A. 849]

Rates—Assessment—Properties of the same class to be treated similarly—Unfair rate—Ratepayer a “person aggrieved.”

It is a principle of rating that all properties of the same class are to be treated similarly, for every ratepayer is entitled to compete with his rival traders on an equal footing and the rating authority has no right to handicap him even to a small extent by imposing on him a higher rate than that imposed on an owner of a similar property. If that principle is not observed, the rate is unfair and the ratepayer can appeal against it as a “person aggrieved.”

The ratepayer was the occupier of licensed premises in the parish of the appellant assessment committee, and before March, 1920, his premises were assessed at £60 gross and £48 rateable. In November, 1919, valuers were appointed to reassess all the licensed houses, breweries, places of amusement, and waterside properties in the parish. In March, 1920, the valuers had not completed the revaluation of the licensed properties, having revalued 127 of them, leaving 327 to be revalued. The ratepayer's premises had been revalued at £110 gross and £88 rateable. The assessment committee approved a supplemental list containing the revalued licensed properties, among them the ratepayer's, the assessment of the remaining licensed properties, which had not been revalued, remaining unchanged. In April, 1920, a rate was made on the basis of the old valuation list as amended by the supplemental list. The revaluation having been completed in July, 1920, a further supplemental list was made in September, 1920, including the remaining 327 licensed premises. The effect of the increase of the assessment of the 127 licensed premises included in the March supplemental list was that those premises had to bear rates on an increase of £2,773 in their assessed value, whereas the 367 remaining licensed premises escaped rates on £2,334, the amount of the increase of their assessments in the September supplemental list.

Held: the assessment committee had no right to impose upon some owners of a certain class of property a higher rate than that imposed on other owners of property of the same class, and, therefore, the higher rate imposed on the ratepayer was illegal.

Notes. The law with regard to rating is now to be found in Parts 3, 4, and 5 of the Local Government Act, 1948 (20 HALSBURY'S STATUTES (2nd Edn.) 220), the Valuation for Rating Act, 1953 (ibid., vol. 33, p. 583), the Rating and Valuation (Miscellaneous Provisions) Act, 1955 (ibid., vol. 35, p. 377), the Rating and Valuation Act, 1957 (ibid., vol. 37, p. 900), and the Rating and Valuation Act, 1959 (ibid., vol. 39, p. 799). By s. 40 (1) of the Local Government Act, 1948, a person who is “aggrieved” by, inter alia, “any value ascribed in the [valuation] list to a hereditament” may make a proposal for the alteration of the list, and the Act provides for appeals to a local valuation court, the Lands Tribunal (see Lands Tribunal Act, 1949, s. 1 (3) (e)), and on a point of law to the Court of Appeal (s. 3 (4), s. 11 of Act of 1949). Thence an appeal lies to the House of Lords.

Distinguished: *Ladies' Hosiery and Underwear, Ltd. v. West Middlesex Assessment Area Assessment Committee*, [1932] All E.R. Rep. 427; *R. v. Cornwall County Valuation Committee, Ex parte Falmouth Rating Authority*, [1937] 2 All E.R. 266.

Case Stated by Southampton Quarter Sessions.

The ratepayer, John Frederick Double, appealed to quarter sessions against a rate for the relief of the poor of the parish of Southampton made on Apr. 9, 1920, at the rate of 4s. 4d. in the £ on buildings and other hereditaments, not being agricultural land, and at one half of the said rate on agricultural land, wherein the ratepayer was rated as the occupier of premises described in the rate as the Cambridge Inn, 51, Brinton's Road, and therein numbered 85, in the sum of £100 as the gross estimated rental and the sum of £80 as the rateable value. The appeal was heard at the adjourned court of general quarter sessions of the peace held in and for the borough of Southampton on June 7, 1921, before Temple Cooke, Esq., recorder of the borough, when that court allowed the appeal with costs and ordered that the rate should be amended, subject to the opinion of the High Court on the following Case.

1. The ratepayer was at all material times the occupier of the licensed premises known as the Cambridge Inn. 2. Previously to March, 1920, the assessment of the Cambridge Inn for the purposes of the rate for the relief of the poor of the parish was as follows: £60 gross estimated rental, £48 rateable value. 3. On Sept. 15, 1919, it was resolved by a sub-committee of the assessment committee to recommend the committee that a professional valuer be engaged to reassess all the licensed houses, breweries, places of amusement, and waterside properties in the parish. 4. On Oct. 2, 1919, it was resolved by the assessment committee that the report of the sub-committee containing the recommendation be adopted. 5. On Nov. 27, 1919, it was resolved by the board of guardians of the parish that a report of the assessment committee should be received and adopted whereby it was recommended that Messrs. W. Eve & Sons, of Old Broad Street, London, should be engaged to reassess the hereditaments mentioned, conditionally upon the revaluation being completed not later than Jan. 31, 1920. Messrs. W. Eve & Sons were accordingly appointed and instructed to make the said revaluation. 6. Messrs. W. Eve & Sons proceeded with the revaluation in pursuance of the said instructions. By Mar. 17, 1920, the revaluation of the licensed properties had not been completed, and the position was as follows: Total number of licensed properties in the parish 454; total number revalued by Mar. 17, 1920 127; total number still to be revalued on that date 327. The increase in value on properties already revalued was £3,391, subsequently reduced by the assessment committee to £2,773. 7. By Mar. 17, 1920, Messrs. W. Eve & Sons had also revalued a large number of waterside properties and places of amusement, the increase in value on which amounted to £19,414. 8. On Mar. 17, 1920, it was resolved by the assessment committee that the revaluations, so far as already prepared by Messrs. W. Eve & Sons should be included in supplemental valuation lists for re-deposit and inclusion in the then ensuing rate. 9. The Cambridge Inn was one of the 127 properties revalued previously to Mar. 17, 1920, the assessment being increased as follows: From £60 as the gross estimated rental to £110, and from £48 as the rateable value to £88. 10. On Mar. 29, 1920, the assessment committee by resolution approved a supplemental valuation list prepared in accordance with the revaluation and containing the 127 licensed properties. The remaining 327 licensed properties were not included therein, and, consequently, their assessment remained unchanged for the rate next mentioned. 11. On Apr. 9, 1920, a rate was made for the relief of the poor in the parish by the assessment committee in conformity with the valuation list as amended by the supplemental valuation list. The ratepayer was rated at a sum of £19 1s. 4d. calculated upon the rateable value of £88. 12. On Aug. 26, 1920, Messrs. H. H. Fuller, Peiser & Co., rating surveyors, as agents for the ratepayer gave notice in writing to the assessment committee, the overseers, and J. Smith (the occupier of licensed premises known as the Southampton Arms at 98, Millbank Street, in the parish, all of whom were made

- A respondents to the appeal), that the ratepayer was aggrieved by, and objected to, the last deposited valuation list affecting the Cambridge Inn. The grounds of the said objection were stated to be (*inter alia*) as follows: That the said list was unfair, unequal, and incorrect, and had not been made or deposited in conformity with law; that the ratepayer was excessively and incorrectly assessed in the list, and that the principle upon which the annual value of the hereditaments, described
- B in the list as being in his occupation, was estimated, was erroneous; that other hereditaments similar in character and description to the said hereditaments and occupied for purposes similar to those for which the said hereditaments were occupied by the ratepayer, and situate within the parish, had not been valued for the valuation list in the same manner or by the same method as the hereditaments occupied by the ratepayer, more especially the premises known as the Southampton
- C Arms. 13. The licensed premises known as the Southampton Arms were among the 327 licensed properties not revalued previously to Mar. 17, 1920, and were not included in the supplemental list. The assessment of the said Southampton Arms for the rate remained as follows: Gross estimated rental £15, rateable value £12. 14. On Oct. 27, 1920, the assessment committee considered the ratepayer's said objection, and on the ground that he was excessively assessed in fact, reduced the assessment of the Cambridge Inn as follows: Gross estimated rental from £110 to £100; rateable value from £88 to £80. The rate was amended by the overseers accordingly, and the sum in which the ratepayer was rated thereto was reduced to £17 6s. 8d. The consideration of the objection on the ground of inequality was adjourned, and on Feb. 17, 1921, the objection was over-ruled. 15. In July, 1920, the said revaluation by Messrs. W. Eve & Sons aforesaid having been completed, a further supplemental valuation list was prepared and deposited in which the whole of the remaining 327 licensed premises not previously revalued were included. 16. The increase in the assessment of the premises known as the Southampton Arms, and of five other licensed houses hereinafter named, and occupied by the respondents other than the assessment committee and the
- F overseers, was as follows:

			Previous Assessment		September 1920	
			Gross	Rateable	Gross	Rateable
			£	£	£ s.	£
G	Southampton Arms		15	12	27 10	22
	Surrey Hotel		100	80	120	96
	Belvois Castle Hotel		60	48	90	72
	Rainbow Tavern		170	136	260	160
	Hampton Court Inn		80	64	100	80
	Exeter Inn		70	56	125	100

- H The majority of the 327 licensed premises were increased in value in the September supplemental list, the total increase in the assessable value of all those being £2,334. 17. There was no general increase in the value of licensed premises in the parish between the dates of the two said supplemental lists, and no difference in their value as at March and September, 1920, and there were no circumstances, other than the non-completion of the revaluation by Mar. 17, 1920, which led to the exclusion
- I of the 327 houses from the March or their inclusion in the September supplemental list. 18. The rate made in April, 1920, was made upon a total assessable value of £680,502. If the 327 hereditaments had been assessed in the rate at the same rateable values at which they were subsequently assessed, as mentioned, the total assessable value would have been increased to £682,836. The effect of such assessment on the amount in the £ at which the rate was calculated would have been less than $\frac{1}{4}$ d. in the £, but by the assessment of the 127 licensed premises being increased in the March supplemental list, before the remaining 327 licensed premises

were dealt with, the 127 licensed premises, including those of the ratepayer, had to bear rates upon a total increase of £2,773 in their assessed value for the half-year covered by the rate of Apr. 9, 1920, whereas the 327 licensed premises, which were competing licensed premises situate in the same and adjoining districts, and were all in the same union, escaped rates for that half-year upon £2,334, the amount by which their assessments taken collectively were raised in the September supplemental list. Many of the 327 licensed premises were owned by the same firms of brewers who owned many of the 127 licensed premises.

On Mar. 10, 1921, the ratepayer by his solicitors gave notice to the respondents of his intention to appeal against the rate made on Apr. 9, 1920, on the ground: that the occupiers of other hereditaments similar in character and description to the ratepayer's hereditaments, and occupied for purposes similar to those for which the hereditaments were occupied by the ratepayer, and situate within the parish, had not been rated in the rate in the same manner or by the same method as the hereditaments occupied by the ratepayer. The recorder decided that the ratepayer's contentions were correct. He allowed his appeal with costs, and ordered the rate book to be altered with regard to the rate of April, 1920, on the Cambridge Inn to £60 gross and £48 rateable value, and the excess paid by the ratepayer to be repaid by the respondents. The respondents appealed.

Konstam, K.C., and *du Parc* for the assessment committee and the other appellants.

Wootten, K.C., and *C. Bray* for the ratepayer.

LORD TREYETHIN, C.J.—This is a Case stated by the recorder of Southampton in a rating appeal. The recorder allowed the appeal and reduced the rate to the rate existing in March, 1920. The circumstances out of which the appeal arose are these. The assessment committee of the parish of Southampton were minded to have certain of the properties—they call them "special properties"—reassessed, as they were perfectly entitled to do. In the course of that reassessment the rating surveyor who was employed fell ill, and by Mar. 17, 1920, the firm had only completed the assessment of 127 of the licensed houses which they were employed to assess, leaving 327 unreassessed. In that condition of affairs the assessment committee filed a supplemental list which included the 127 houses and omitted the 327. The ratepayer was the occupant of one of the 127 houses, and he lodged this appeal.

It has been contended on behalf of the assessment committee that, first of all, the ratepayer was not a person "aggrieved." I think that that is a wholly untenable suggestion, because by the time this case got to quarter sessions the other 327 houses had been reassessed, and their assessments were largely increased. It was, accordingly, manifest when the case was before the recorder that the ratepayer had been over-assessed for the half-year in the April rate made on the March assessment. Counsel suggested that the ratepayer was not an "aggrieved" person because the amount of the increase of his rate was very small by reason of the omission of the 327 houses. It does not seem to me that this is a ground for saying that he was not a person "aggrieved." He was entitled to compete with his rival traders in the same trade upon an equal footing, and the assessment committee had no right to handicap him even to a small extent. The other argument against the ratepayer's being a person "aggrieved" was that there was a considerable number of other properties, other than licensed properties, that were reassessed, and counsel suggested, as I understood, him, that the assessment committee would have to leave those out too. I do not quite follow on what ground he says that. If they were licensed houses no doubt the assessment committee would have had to leave them out, but, if they were not licensed houses, I do not see that the assessment committee would have had to leave them out. If they were reassessed upon the same footing as all similar properties, they could go into the list and the

A ratepayers would have to pay. It is a principle of rating that one treats all properties of the same class similarly, but not that one treats all properties upon the same method of assessment. One may apply methods of assessment which are applicable to each particular form of property. These places of amusement and waterside properties bear no comparison or relation to the licensed houses, but the licensed houses left out and the 127 houses put in were comparable things, and the ratepayer B was "aggrieved" by being treated upon a different footing from the occupiers of the 327 licensed houses.

Then counsel argued that the assessment committee had a discretion. It is not denied that they have a discretion as to when they will have a reassessment. It is not denied that they have a discretion in many respects; but they had no discretion to discriminate between two owners of similar properties, and to impose a C higher rates upon the one than was imposed on the other. A further ground which was suggested was that here was no evidence of inequality. I think I have already answered that argument sufficiently. It seems to me, in short, that, as was suggested by SWIFT, J., during the argument, this is really a question of fact, and the recorder has found that the contentions of the ratepayer, most of which, if not D all, were contentions of fact, were correct. The ratepayer contended that the rate was bad upon the ground of inequality or unfairness. It was admitted, on the facts, that the rate was unequal. Whether it was admitted that it was unfair may or may not have been the case. Then it was contended that the rate was bad because it was not made upon an estimate of the net annual value of all the several hereditaments rated thereto, and was contrary to s. 1 of the Parochial Assessments Act, 1836, in that, while 127 licensed properties had been revalued, the other 327 had E not. That is an admitted fact. The rate was clearly unequal, and, as I think, also clearly unfair. Next came the contention that the rate was not made on a uniform and correct valuation of all the hereditaments comprised therein. That again is an admitted fact. Upon the reassessment of the 327 licensed houses, a house, which had been rated for the April rate at £12, was assessed at £22; in F another case a licensed house, which had previously been rated at £56, was assessed at £100, so that it was admitted that the April rate was based upon an assessment that was not equal and fair. The only answer that could have been made to that would have been that between April and September these 327 houses had wholly changed in their value. But there was no such evidence given, and, consequently, it became plain upon the admitted facts that the assessment was unequal and G unfair. I think, therefore, that the learned recorder was quite right, and that this appeal must be dismissed.

SANKEY, J.—I agree.

SWIFT, J.—I agree.

Appeal dismissed.

Solicitors: *Speechly, Mumford & Craig*, for *E. R. Ensor*, Southampton; *Godden, Holme & Ward*.

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

IN THE ESTATE OF BEECH. BEECH v. PUBLIC TRUSTEE

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), November 14, 15, 1922]

[Reported [1923] P. 46; 92 L.J.P. 33; 128 L.T. 616; 39 T.L.R. 88; 67 Sol. Jo. 145]

Will—Soldier's will—Need of expression of wishes as to disposition of property—Letters written on active service—Statements relating to, and inconsistent with, previous formal will.

A soldier's will is now in the same position as the will of a civilian before the Statute of Frauds was passed. To be effective it must be a definite expression by the testator of his wishes regarding the disposition of his property after his death. A document or conversation which only refers to, and does not purport to alter, revoke, add to, or confirm a previous effective disposition cannot be of a testamentary character.

Letters written by a soldier on active service containing statements regarding the disposition of his property in a formal will executed by him about a year previously, those statements being inconsistent with the provisions of the formal will, **held**, not to contain any intimation of the writers' wishes as to the disposition of his property, and so would not be admitted to probate to have the effect of altering the dispositions in the formal will.

Notes. Applied: *In the Estate of Macgillivray*, [1946] 2 All E.R. 301. Considered: *Re Spicer, Spicer v. Richardson* (1949), 65 T.L.R. 590.

As to soldiers' wills see 34 HALSBURY'S LAWS (2nd Edn.) 55, and for cases see 44 DIGEST 304, 305.

Cases referred to:

- (1) *Godman v. Godman*, [1920] P. 261; 89 L.J.P. 193; 123 L.T. 274; sub nom. *Re Godman, Godman v. Godman*, 36 T.L.R. 434; 64 Sol. Jo. 424, C.A.; 44 Digest 234, 598.
- (2) *Whyte v. Pollok* (1882), 7 App. Cas. 400; 47 L.T. 356; 47 J.P. 340, H.L.; 44 Digest 228, 525.

Also referred to in argument:

Constable v. Stiebel (1827), 1 Hag. Ecc. 56.
Drummond v. Parish (1843), 3 Curt. 522; 2 Notes of Cases, 318; 1 L.T.O.S. 207; 7 Jur. 538; 163 E.R. 812; 39 Digest 333, 195.

In the Estate of Gossage, Wood v. Gossage, [1921] P. 194; 90 L.J.P. 201; 124 L.T. 770; 37 T.L.R. 302; 65 Sol. Jo. 274, C.A.; 39 Digest 338, 245.

Appeal from a decision of SALTER, J., sitting in the Probate Divorce and Admiralty Division.

By his will, dated Feb. 23, 1917, the testator, Colonel Rowland John Beech, appointed the Public Trustee executor and trustee thereof, and made certain dispositions with regard to his estates known as the Shawe estate and the Brandon estate. On Feb. 4, 1918, he made a codicil which did not affect the present action. In March, 1918, whilst on active service in France, he wrote two letters, dated respectively Mar. 16, 1918 and Mar. 23, 1918, to his son, Douglas Charles Murray Beech. The first, which was subsequently lost, was proved by the son to have contained the sentence:

"I daresay you would like to know that I have left you, after me, both the Brandon and the Shawe estates, also the London house."

The second contained the following sentence:

"When I told you about Shawe going to you after me, I should have also said that Kitty will be able to use the house if she wishes during her lifetime,

- A she paying the house rates. I take it Brandon will be a sufficient residence for you and Clare."

The testator died in August, 1919, and his will, together with the codicil was duly proved in November, 1919. In 1920 a summons was issued in the Chancery Division for the determination of a question of construction under the will. In June, 1921 the present action was commenced in the Probate Division by the testator's son, Douglas Charles Murray Beech, for the revocation of the probate granted and a grant of probate of the will omitting therefrom certain words, and the codicil of Feb. 4, 1918, together with two further codicils, consisting of the two letters referred to, on the ground that they were effective as soldiers' wills. The dispositions as stated in the letters were not identical with those contained in the will. SALTER, J., held that the letters were not testamentary in character or intention, and were not entitled to probate; and he pronounced for the will and codicil of Feb. 4, 1918 only. From this decision the plaintiff, Douglas Charles Murray Beech, appealed.

Maugham, K.C. and *Noel Middleton* for the plaintiff appellant.

Hughes, K.C. and *T. Bucknill* for the defendants.

- D *Stafford Crossman* for the Public Trustee.

Victor Russell for an infant interested.

LORD STERNDALÉ, M.R.—This is an appeal from a decision of SALTER, J., sitting in the Probate, Divorce, and Admiralty Division. He decided that a document with the proved contents of another document ought not to be admitted to probate as a soldier's will of the testator. I think he was right.

- E The will of a soldier on active service is not subject to the same restrictions as the wills of other persons. That is a matter which, until quite the last few years, has not received much consideration from the courts because such cases have not often arisen, for reasons which I mentioned in my judgment in *Godman v. Godman* (1). But of late years, during the recent war [1914-1918], a very considerable number of cases with regard to soldiers' wills have arisen. In my opinion, which I have expressed before, and I see no reason to depart from it, a soldier's will, now, is in the same position as the will of a civilian before the Statute of Frauds was passed. It may be, as I have already said, that sometimes the courts have been inclined, from sympathy I daresay, to treat the question whether a document or a conversation said to be a soldier's will should be admitted to probate with greater leniency than that with which such matters are treated in the case of a civilian. But, in my opinion, there is no difference in principle between the two.

- G We have referred to a great number of cases which I do not propose to discuss, because they were very admirably and exhaustively discussed by SCRUTTON, L.J., in his judgment in *Godman v. Godman* (1), and I do not think it is necessary to repeat that discussion. I think that the principle may be taken, as SALTER, J., said, from the words of LORD SELBORNE in a case in the House of Lords of *Whyte v. Pollak* (2), where he said (7 App. Cas. at p. 405):

- I "In the first place, I lay it down that it is, in my judgment, a proposition universally true that nothing can receive probate which was not intended to be a testamentary act by the testator. Of course it might happen that something which he did not originally intend to be a testamentary act was converted into a testamentary act by a subsequent and sufficient manifestation of intention on his part; but, either at the time when the act was originally done or at some other time, he must, in a sufficient way, manifest his purpose that it should be a testamentary act."

I think that is, although it is not for me to say so, a perfectly correct statement of the law, because it carries this explanation, that by a testamentary act the learned Lord did not mean a document executed with the formalities of a will; he did not mean a document even, which the person who wrote it, or a statement of the

person who made it, thought was a will. It would satisfy the words of LORD SELBORNE if what the testator said, or wrote, was an expression of his wishes as to the disposition of his property, that is to say, an expression of his wishes as to what was to be done after his death with his property; but it must be that. A document or a conversation, which is such that it only speculates on the wishes of the person making the statement or writing the document, is not sufficient. It must be something which is, in however informal a manner, an expression of his wishes as to the disposition of his property. A

We have to apply that principle to the documents, and the documents are these. The testator had made a will, about which I say nothing except that it was a will made in the ordinary way, containing certain dispositions of his property, and especially of two landed estates which he possessed, called Shawe and Brandon. As to what those dispositions were I say nothing, because they are the subject of another appeal. But they were full and exhaustive dispositions. On Mar. 16, 1918, some time after the will had been made, the testator being on active service in France—and we know Mar. 16 was about the time when operations in France were very critical and severe—wrote a letter. The letter has, unfortunately, been lost. We do not know how, but there is the evidence of the son to whom it was written, and of the son's wife, as to its contents. Their statements do not differ in substance, although they do differ a little in words. The one that has been adopted is in these terms: B

"I daresay you would like to know that I have left you, after me, both the Brandon and the Shawe estates, also the London house."

The second letter is dated Mar. 23, a week afterwards: C

"My dear Douglas,—We are in the midst of a most tremendous battle . . . When I told you about Shawe going to you after me, I should have also said that Kitty will be able to use the house if she wishes during her lifetime, she paying the house rate. I take it Brandon will be sufficient for a residence for you and Clare [the son's wife]."

The only question for us to consider is: Are those documents, one or either, or both of them, expressions of the testator's wishes as to what was to be done with his property? Were they documents by which he meant to express a wish as to the way in which his property should go after his death? It seems to me that they are not. They are only statements of what he says he has done, and no doubt in saying what he has done he is referring to his will. On a construction that has been put upon that will they are, so far as they say that the son is to have the Brandon and the Shawe estates after the testator's death, inconsistent with the will. According to one construction of the will the son would only get much less than the fee simple of the property. With regard to the second letter, where he says at the end of it: D

"When I told you about Shawe going to you after me, I should have also said that Kitty will be able to use the house if she wishes during her lifetime, she paying the house rate"

is also inconsistent with the will. Under the will, the lady who is called Kitty there was to have not only the house, but also the sporting rights, and there was provision as to her paying a certain part of the taxes as well as the rates. I can see no indication that the testator in any way intended to alter the provision that he had made for this daughter whom he calls Kitty. This document, if it be testamentary, is inconsistent with the will inasmuch as it gives her less. I think that the letters are simply statements in one case certainly, in another possibly, erroneous, of the disposition that he had made, and in no way contain an intimation of his wishes as to the disposition of his property. If he had been asked: "Those things are inconsistent with your will; do you wish your will to be altered?" I cannot say what he would have said. I do not know. But there is on the face of those E

A documents, to my mind, no intimation whatever that he is expressing a wish or intention as to the destination and disposition of his property. He is merely saying: "That is what I have done, and I think you would like to hear it." I cannot do better than repeat the words of *SALTER, J.*:

B "I think that in order to constitute a will the words used by the testator must be intended by him, at or after the time he uses them, to be preserved or remembered so as to form a guide to those who survive in carrying out his wishes. In my opinion, these letters are not testamentary in character or intention. They are merely a statement, and an inaccurate statement, of the legal effect of an existing will. If these letters are codicils they partly revoke the will. It seems to me they show a contrary intention, an intention to approve and affirm the will."

C Those words, to my mind, quite correctly describe these documents. I ought to say also that the testator returned from active service in April, 1918. He had, about a year or more after that, some further conversation with regard to his will. He did not die until August, 1919, considerably more than a year after he came back from active service, and he did nothing whatever to carry out any intention which it is said he expressed by these documents. That does not tend to show that he changed his mind, but it does tend to show that in what he wrote in these letters he had no intention of making a future disposition, or expressing any wishes as to the future disposition of his property and merely intended to make a statement as to what he had done. I think that is *SALTER, J.*'s view, and that it is perfectly right. The appeal should be dismissed.

E **WARRINGTON, L.J.**—I am of the same opinion. The question to be determined is whether the two documents, probate of which is sought by the plaintiff, are testamentary documents. In determining that we have to consider, as was said by *LORD SELBORNE* in *Whyte v. Pollok* (2), whether the testator has manifested in a sufficient way that in performing the act of signing them he was purporting to perform a testamentary act. A testamentary act seems to me to be one which falls under one or other of the following categories: First, it may be a fresh disposition of property; secondly, it may be a mere confirmation of what had been originally effected, or intended to be effected by a previous testamentary disposition; thirdly, it may be a revocation, without any new disposition of property, of a previous effective disposition; or, fourthly, it may be a combination of acts falling under these categories, or any of them. But, in my judgment, a document, or in the case of a nuncupative will, a conversation which only refers to, and does not purport to alter, revoke, add to, or confirm, a previous effective disposition cannot, in my opinion, be of a testamentary character.

G I turn to the letters themselves to see what they really are. It must be borne in mind that at the time they were written here was in existence a will signed a little more than a year previously dealing with the three properties, Shawe, Brandon, and the London house. There was also in existence a formal codicil to that will, not, it is true, dealing with those properties, but still a codicil to that will, and, that codicil is dated so recently as Feb. 4, 1918. The first of the two letters was written about Mar. 16, 1918. That letter is addressed to the testator's son, Douglas, and says:

I "I daresay you would like to know that I have left you, after me, both the Brandon and the Shawe estates, and also the London house."

There is no question that that statement was accurate with regard to the London house. There is a question on the construction of the will whether it is accurate as regards the Brandon and the Shawe estates, or one of them. It has been decided already in the court of construction, but that decision is under appeal, that it was accurate with regard to Shawe, but that it was not accurate with regard to Brandon. That is a question on the construction of the will. But it may well

be that the testator thought that the disposition which he had really made by the will is the one which he refers to in this letter. Whether that was so or not, when the terms of the letter are looked at, it appears to me that that letter, at all events, is plainly only a statement of what he had done and not either a fresh disposition of any of the three items of property, or a confirmation of something which he had previously done, and which he had some reason to believe might possibly be defective. If you turn to the second letter, I think that that view is strongly confirmed. The only material part of it is the passage :

“When I told you about Shawe going to you after me, I should have also said that Kitty will be able to use the house if she wishes during her lifetime, she paying the house rates. I take it Brandon will be sufficient for a residence for you and Clare.”

When we look at that letter in the light of what he had actually done, it becomes abundantly clear that he is referring in a summary, and, because it is summary, an incorrect and incomplete manner to certain provisions in the will which he had made for the occupation by his daughter Christabel of Shawe House, and of the shooting and some other benefits connected with the house. But, again, it is obviously, I think, not intended to be a disposition of Shawe House in favour of his daughter Christabel, for, if so, it would have been entirely incomplete, and narrower than the provision he had made by his will. I think he is referring, as I say, in a summary way, to what he had done in greater detail in the will. So, again, the reference to Brandon is no indication that he intended by that letter to give Brandon to his son. It is merely an expression of his expectation that Brandon, having, as he had been told in the first letter, been left to him after the testator's death, would be a sufficient residence for him and his wife, and, I suppose, as a sort of justification for the provision which the testator had made for his daughter Christabel out of his interest in Shawe House. On the whole, I have come to the conclusion that the judgment of *SALTER, J.*, is correct, and that neither of these two letters can be treated as testamentary, and they are, therefore, rightly excluded from probate.

YOUNGER, L.J.—I am of the same opinion. At the date when these letters were written, the testator had executed a formal will on Feb. 27, 1917, and an equally formal codicil on Feb. 4, 1918. The codicil was executed while he was on active service. Having regard to its attestation, it was probably executed during one of his visits to London during the period of his active service because we are told by the evidence which was given by an official of the War Office, that the testator returned from active service on April 6, 1918. The position, therefore, was that, he having gone to France, I think, on Feb. 24, 1917, his formal will was made on the eve of his departure. The codicil was executed while he was still, so far as the War Office was concerned, on active service in France, and these letters were written shortly after that codicil had been executed. From that I draw the inference that the letters were not written, nor were they prompted by any difficulty in which the testator found himself by reason of his military service. If one might guess from the terms of the letters themselves why it was they were written, one might, I think, arrive at this possibly accurate conclusion, that they were written with a view of relieving any anxiety his son might feel with regard to his own position, his son at that moment being on active service in Palestine. But be that as it may, they were not occasioned by any difficulty caused by the testator's military service. That had not prevented him executing a formal codicil in which he expressly confirmed his will a little more than a month before the first letter was written. Nor, again, when one looks at the letters, does one see that the testator was asking, for instance, that his will might be sent to him in order that he might see whether it correctly represented his views or wishes with reference to the matters that he refers to in his letters. Had the letters taken that form one

- A can understand that they might have been regarded as the equivalent of instructions for a new will; they would be valid as a soldier's will as indicating testamentary intent, even although no further will was executed. But that is not the effect of the letters. The effect of the letters is nothing more than a statement, inaccurate if you like, of the effect of the will which he had, in point of fact, executed with no intention, so far as one can judge from the terms of the letters, that the will as executed should in any way thereby be altered, or should have any effect, so far as construction was concerned, other than it would have had had these letters never been written at all. That that is so is, in my judgment, shown very clearly by the
- B second letter which is the only document under the hand of the testator that is surviving, because, as counsel very candidly agreed, it is not possible to contend that the statement made in that letter with reference to the disposition which
- C he had made by his will of a life interest in Shawe House or estate in favour of his daughter, could be regarded as intended to supersede the precise directions which, with reference to that matter, are contained in the will, and which are not correctly reproduced in the letter. Accordingly, I arrive at the clear conclusion at which the learned judge arrived, namely, that these letters manifest no intention on the part of their writer that anything contained in his then testamentary disposition which had been formally executed by him under competent advice was to be in any way affected by anything that was contained in both, or either, of the letters. Accordingly I think they are not admissible to probate.

Appeal dismissed.

- E Solicitors: *William Sturges & Co.; Finch, Jennings & Tree for Moore-Bayley & Co. Birmingham; Bischoff, Coxe, Bischoff & Thompson; Thickness & Hull; William Cecil Harris.*

[Reported by J. L. DENISON, Esq., Barrister-at-Law.]

F

SWEET v. WILLIAMS

- G [KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Sankey, JJ.), October 18, 19, 1922]

[Reported 128 L.T. 379; 87 J.P. 51; 67 Sol. Jo. 183;
21 L.G.R. 23; 27 Cox, C.C. 373]

- H *Child—Employment—Street trading—Boys under fifteen employed as agents of newsagent—"Employment"—Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 1, s. 2, s. 13.*

- I A newsagent authorised two boys to obtain newspapers at his expense, his arrangement with the boys being that he should receive part of the money obtained by them by selling the papers in the street, any unsold papers to be handed over to him. He also gave football programmes to two other boys on the terms that he was to receive from them a sum proportionate to the number sold, and that unsold programmes should be returned to him. He exercised no control over the boys and they received no payment except their share of the money received on the sales. On a charge against him of "employing" the boys in street trading contrary to a byelaw made under the Employment of Children Act, 1903, s. 1 and s. 2.

Held: the boys, being occupied in street trading, were "employed" in street trading within the meaning of s. 13 of the Act, and of the byelaw, and, as there

was evidence that each of them was employed by the newsagent as his agent, he had committed an offence under the byelaw.

Morgan v. Parr (1), [1921] 2 K.B. 379, applied.

Notes. The Employment of Children Act, 1903, has been repealed. See now as to street trading by children and young persons, the Children and Young Persons Act, 1933, s. 20.

As to restrictions on the employment of children see 21 HALSBURY'S LAWS (2nd Edn.) 301 et seq.; and for cases see 28 DIGEST (Repl.) 719 et seq. For the Children and Young Persons Act, 1933, s. 20, see 12 HALSBURY'S STATUTES (2nd Edn.) 990.

Cases referred to:

- (1) *Morgan v. Parr*, [1921] 2 K.B. 379; 90 L.J.K.B. 1199; 125 L.T. 307; 85 J.P. 165; 37 T.L.R. 587; 19 L.G.R. 277; 26 Cox, C.C. 739, D.C.; 28 Digest (Repl.) 720, 2320.
- (2) *Elderton v. Emmens* (1848), 6 C.B. 160, Ex.Ch.; affirmed sub nom. *Emmens v. Elderton* (1853), 13 C.B. 495; 4 H.L. Cas. 624; 22 L.T.O.S. 1; 18 Jur. 21; 138 E.R. 1292, H.L.; 34 Digest 110, 826.
- (3) *Turner v. Goldsmith*, [1891] 1 Q.B. 544; 60 L.J.Q.B. 247; 64 L.T. 301; 39 W.R. 547; 7 T.L.R. 233, C.A.; 12 Digest (Repl.) 701, 5358.

Case Stated by Manchester justices.

On May 16, 1922, informations were laid by the respondent, James Williams, a police constable of the city of Manchester, against the appellant, William Sweet, for that the appellant (i) on Mar. 22, 1922, at the city unlawfully employed a boy under the age of fifteen years in street trading, to wit, one George Daley, of the age of fourteen years, contrary to certain byelaws duly made by the lord mayor, aldermen, and citizens of the city under and by virtue of s. 1 and s. 2 of the Employment of Children Act, 1903, and all other enactments them thereunto enabling; (ii) on Mar. 25, 1922, at the city unlawfully employed a boy under the age of fifteen years in street trading, to wit, one John Carter, of the age of fourteen years, contrary to the byelaws; (iii) on Mar. 25, 1922, at the city unlawfully employed a boy under the age of fifteen years in street trading, to wit, one Harold Ashton, of the age of fourteen years, contrary to the byelaws; and (iv) on May 5, 1922, at the city unlawfully employed a boy under the age of fifteen years in street trading, to wit, one Francis Hagan, of the age of fourteen years, contrary to the byelaws.

On the hearing of the informations, the following facts were admitted or proved: The appellant was a wholesale and retail newsagent carrying on business in the city of Manchester. The ages of the four boys were as stated in the informations. The appellant on the respective dates alleged in the informations relating to George Daley and Francis Hagan had delivered to each of the boys tickets which authorised them to obtain, and by means of which they did in fact obtain, newspapers from the newspaper offices, and the newspaper offices debited the appellant for the same. The arrangement between the appellant and the boys was that the appellant should receive 9d. for every thirteen copies sold by the boys after the newspapers had been sold by them in the streets, and that any unsold newspapers should be returned by the boys to the appellant. The papers were sold in the streets by the boys at 1d. each and the boys took a profit of 4d. for every thirteen newspapers sold, and subsequently handed over to the appellant 9d. in respect of every thirteen newspapers sold and returned to the appellant the unsold copies. The boys John Carter and Harold Ashton on the respective dates alleged in the informations relating to them, obtained football programmes from the appellant. The arrangement between the appellant and the boys was that the appellant should receive from the boys the sum of 1s. 7½d. for every thirteen programmes sold by the boys after the programmes had been sold by the boys in the streets, and that any unsold programmes should be returned by the boys to the appellant. The programmes

A were sold by the boys in the streets at 2d. each, and the boys took a profit of 6½d. for every thirteen programmes sold, and subsequently handed over to the appellant 1s. 7½d. in respect of every thirteen programmes sold, and returned to the appellant the unsold programmes. The appellant made a profit by way of discount on the net sales of the newspapers and football programmes. The appellant exercised no power or control over the boys and paid them no wages, nor did he
B make any payment to them with the exception of the profits on the sale of the newspapers and/or the football programmes, which profits were of the same amount as the boys would have made if they had obtained the newspapers or football programmes from other wholesale agents or from the publishers. The four boys were not under any obligation to obtain papers or football programmes from the appellant and were free to obtain or refrain from obtaining newspapers and/or football programmes as they desired. The appellant delivered the newspapers and/or football
C programmes to the boys on the ordinary trade terms, to wit, on sale or return, each boy receiving credit from the appellant in respect only of the newspapers and/or football programmes returned by him to the appellant. No responsibility attached to the appellant on account of any newspapers and/or football programmes lost or destroyed by any of the boys nor on account of any credit given by any of the boys
D to any customer of theirs for any of the newspapers and/or football programmes.

The respondent contended that the appellant had employed each of the four boys within the definition of the term "employ" as set out in s. 13 of the Employment of Children Act, 1903. The appellant contended that: (a) the true relationship which existed between the appellant and each of the four boys in respect of the transactions in question was that of vendor and purchaser on a wholesale basis.
E (b) no contract of service existed between the appellant and any of the four boys so as to constitute the relationship of master and servant between them, and that, consequently, there was no employment of the boys or any of them by the appellant within the meaning of the statute. (c) the relationship of principal and agent did not exist between the appellant and the four boys or any of them.

F The justices came to the conclusion that each of the four boys was an agent of the appellant and in that sense was employed by the appellant and that the appellant was guilty of an offence under the byelaw in so employing the four boys, who were under the age of fifteen years. The appellant was fined 20s. in respect of each offence, and he now appealed.

The Employment of Children Act, 1903, provided :

G "1. Any local authority may make byelaws—(i) prescribing for all children, or for boys and girls separately, and with respect to all occupations or to any specified occupation—(a) the age below which employment is illegal; and (b) the hours between which employment is illegal; and (c) the number of daily and weekly hours beyond which employment is illegal: (ii) prohibiting absolutely or permitting, subject to conditions the employment of children in any specified occupation.
H

"2. Any local authority may make byelaws with respect to street trading by persons under the age of sixteen, and may by such byelaws—(a) prohibit such street trading, except subject to such conditions as to age, sex, or otherwise, as may be specified in the byelaw, or subject to the holding of a licence to trade to be granted by the local authority . . ."

I "13. In this Act . . . The expressions 'employ' and 'employment' used in reference to a child, include employment in any labour exercised by way of trade or for the purposes of gain, whether the gain be to the child or to any other person . . ."

Paragraph 7 of the byelaws relating to the employment of children and to street trading in force in the city of Manchester provided :

"A girl under the age of sixteen and a boy under the age of fifteen shall not be employed in street trading."

Singleton, K.C., and *Joseph C. Jackson* for the appellant.
Ashton, K.C., and *Gilbert Jordan* for the respondent.

LORD HEWART, C.J.—The question raised in this case is two-fold; (i) whether the boys were “employed” in street trading within the meaning of the byelaw; and (ii) whether there was any evidence to show that the boys were so employed by the appellant.

As to the first point, the word “employ” is, no doubt, used in different senses in different statutes and elsewhere, as was observed by *PARKE, B.*, in *Elderton v. Emmens* (2) (6 C.B. at p. 176), and the variety and width of the meaning of the word are also illustrated by *Turner v. Goldsmith* (3). In *Morgan v. Parr* (1) *DARLING, J.*, said ([1921] 2 K.B., at p. 382) :

“I think it is plain that the intention was to give a very wide protection to children, and that the legislature did not mean to be specially technical in its use of the words ‘employ’ and ‘employment.’ That is shown by the definition cl. 13, and by the way those words are used in various parts of the statute.”

In that case, the words were very fully considered for the purpose of the statute with which we are now dealing. In the present case, it is not denied that the boys were “occupied” in street trading, but the appellant’s contention is that they were not “employed.” But in view of *Elderton v. Emmens* (2) and *Turner v. Goldsmith* (3), which illustrate the comprehensiveness of the meaning of the word “employ,” and in view of the observations of the court in *Morgan v. Parr* (1), I think that there can be no doubt that these boys were “employed” within the meaning of the Act. In *Morgan v. Parr* (1), the magistrate found that the relation of master and servant did not exist, but nevertheless the court held that there was such a relationship of principal and agent as amounted to “employment” within the meaning of s. 13. It would seem that, in the present case, an ingenious attempt has been made to get round that decision, but it is not sufficiently ingenious for that purpose. The only difficulty that arises is on the finding that “No responsibility attached to the appellant on account of any newspapers and/or football programmes lost or destroyed by any of the boys, nor on account of any credit given by any of the boys to any customer of theirs for any of the newspapers and/or football programmes.” That finding is not strictly consistent with the rest of the findings, from which it is clearly apparent that the appellant was responsible to the newspaper offices for all newspapers lost or destroyed and had to account for them. But I think that the finding which I have quoted may well mean that, as between the appellant and the boys, newspapers and programmes lost or destroyed were to be treated as if they had been sold. My view of the facts stated is that the terms were that the boys were the agents of the appellant and were entrusted with the newspapers and programmes on sale or return, and those lost or destroyed were to be treated as having been sold. Therefore, in my opinion, the boys were “employed” within the meaning of the Act and of the byelaw, and there was evidence to justify the conclusion that they were employed by the appellant as his agents. The appeal must accordingly be dismissed.

AVORY, J.—I am of the same opinion. The question is whether there was evidence that the boys were employed as the appellant’s agents for the sale of newspapers and programmes in the streets, and on the authority of *Morgan v. Parr* (1) it appears to me from the findings in the case that it is plain that they were so employed. It may be that their position was that of *del credere* agents, but it is plain that the relationship of vendor and purchaser did not exist. The findings bring the appellant within the decision in *Morgan v. Parr* (1) where it was held that, although there was no relationship of master and servant, yet there was such a relationship of principal and agent as amounted to “employment” within s. 13 of the Employment of Children Act, 1903.

A I desire to add that it is important for local authorities to observe that, in the case of a contravention of any byelaw made by them as to street trading under the Act, it is competent for the authority to take proceedings not only against the employer, but also against the child or young person, because s. 5 (3) contains an express provision to that effect.

B **SANKEY, J.**—I agree that the appeal must be dismissed. The definition of "employ" and "employment" in s. 13 of the Employment of Children Act, 1903, is by no means exhaustive. The words have, as is shown by the observations quoted by my Lord from the judgment of DARLING, J., in *Morgan v. Parr* (1), a wide significance, and, on the facts found in this case the justices could properly hold that the appellant employed these boys as his agents.

C *Appeal dismissed.*

Solicitors: *T. H. Hinchcliff*, Manchester; *P. M. Heath*, Manchester.

[Reported by J. F. WALKER, Esq., Barrister-at-Law.]

D

E **Re WOMBWELL'S SETTLEMENT. CLERKE v. MENZIES**

[CHANCERY DIVISION (Russell, J.), March 28, 29, 1922]

[Reported [1922] 2 Ch. 298; 92 L.J.Ch. 18; 127 L.T. 295]

F *Settlement—Marriage settlement—Nullity of marriage—Trust to hold settled fund for settlor "until the said intended marriage"—Effect of decree of nullity—Right of settlor to fund.*

G By a settlement by which the settlor settled a sum of money in contemplation of the marriage of his son it was provided that the trustees should hold the settled fund on trust for the settlor "until the said intended marriage" and then on specified trusts. The marriage was solemnised, but subsequently the wife obtained a decree pronouncing the marriage "to be and to have been absolutely null and void" on the ground of the impotence of the husband.

Held: the "said intended marriage" in the settlement meant a valid and effectual marriage; the decree of nullity established that there never had been such a marriage; and, therefore, the settlor was entitled to the funds comprised in the settlement under and by virtue of the express trust in his favour.

H *Re Garnett* (1) (1905), 74 L.J.Ch. 570, applied.

Notes. Considered: *Re Ames' Settlement*, *Dinwiddy v. Ames*, [1946] 1 All E.R. 689; *Re Dewhirst*, *Flower v. Dewhirst*, [1948] 1 All E.R. 147. Referred to: *Nepean (otherwise Lee-Warner) v. Nepean*, [1925] All E.R. Rep. 166; *Fowke v. Fowke*, [1938] 2 All E.R. 638; *Re Eaves*, *Eaves v. Eaves* [1940] Ch. 109.

I As to marriage settlements generally see title, Settlements, 29 HALSBURY'S LAWS (2nd Edn.) 528 et seq., and for cases see 40 DIGEST (Repl.) 494, 495, 567–581, 591.

Cases referred to:

(1) *Re Garnett*, *Richardson v. Greenep* (1905), 74 L.J.Ch. 570; 93 L.T. 117; 40 Digest (Repl.) 573, 780.

(2) *Bishop v. Smith* (1875), 1 V.L.R. (Eq.) 313; 40 Digest (Repl.) 572, *142.

(3) *P. v. P.*, [1916] 2 I.R. 400; 27 Digest (Repl.) 658, *222.

(4) *Dormer (Otherwise Ward) v. Ward*, [1901] P. 20; 69 L.J.P. 144; 83 L.T. 556; 49 W.R. 149; 17 T.L.R. 12, C.A.; 27 Digest (Repl.) 648, 6110.

- (5) *Corrance v. Corrance and Lowe* (1868), L.R. 1 P. & D. 495; 37 L.J. P. & M. 44; 18 L.T. 535; 16 W.R. 893; 27 Digest (Repl.) 662, 6253. A
- (6) *Attwood (Otherwise Pomeroy) v. Attwood*, [1903] P. 7; 71 L.J.P. 129; 87 L.T. 750; 18 T.L.R. 833; 27 Digest (Repl.) 658, 6199.
- (7) *Chapman v. Bradley* (1863), 4 De G. J. & Sm. 71; 3 New Rep. 182; 9 L.T. 495; 10 Jur. N.S. 5; 12 W.R. 140; 46 E.R. 842, L.J.J.; 40 Digest (Repl.) 571, 769. B

Also referred to in argument :

- A. v. B.* (1868), L.R. 1 P. & D. 559; 17 W.R. 14; sub nom. *P. v. S.*, 37 L.J. P. & M. 80; sub nom. — v. —, 19 L.T. 22; sub nom. *Anon.*, 32 J.P. 743; 27 Digest (Repl.) 270, 2166.
- Benyon v. Benyon and O'Callaghan* (1876), 1 P.D. 447; 45 L.J.P. 93; 24 W.R. 950; 27 Digest (Repl.) 650, 6126. C
- Dunbar v. Dunbar*, [1909] 2 Ch. 639; 79 L.J.Ch. 70; 101 L.T. 553; 26 T.L.R. 21; 27 Digest (Repl.) 152, 111.
- Turner v. Thompson* (1888), 13 P.D. 37; 58 L.T. 387; 52 J.P. 151; 36 W.R. 702; 4 T.L.R. 243; 11 Digest (Repl.) 355, 244.

Originating Summons to determine whether, in the events which had happened, a settlor was absolutely entitled to the funds which he brought into settlement in contemplation of the marriage of his son, and, secondly, if he was not so entitled and his son was the sole object of the discretionary trust contained in the settlement, whether the trustee in bankruptcy of the son was entitled to the income arising from the settled funds. D

Clauson, K.C. and *C. J. Farwell* for the settlor. E

Ashworth James for Victor M. Wombwell, son of the settlor.

Dighton Pollock for Sybil R. Wombwell, "wife" of Victor M. Wombwell.

Wilfrid Hunt for the trustee in bankruptcy of Victor M. Wombwell.

RUSSELL, J.—This is a summons to determine whether, in the events which have happened, the settlor, William Menzies, is absolutely entitled to the fund of £25,000 which he bought into settlement in contemplation of the marriage of his son, Victor M. Wombwell, with Sybil R. Neuman, and, secondly, if he is not so entitled, and Victor M. Wombwell is the sole object of the discretionary trust contained in the settlement, whether the latter's trustee in bankruptcy is entitled to the income arising from the settled funds. Under the settlement the trustees hold the settled funds upon trust for the settlor until the said intended marriage and then upon trust to pay the income to Victor M. Wombwell for life, or until his bankruptcy, when the trustees in their sole discretion are to apply the income for the maintenance and benefit of any one or more of the following persons, namely Victor M. Wombwell, Sybil R. Neuman, and any children of the marriage. There are no children of the marriage, and Sybil R. Neuman disclaims any interest under the settlement. In the event of there being no children who should obtain a vested interest under the settlement, there is an ultimate trust, as to the settled fund, in favour of the settlor. The marriage was duly solemnised and on Apr. 25, 1921, the wife obtained a decree nisi for nullity of marriage on the ground of the impotence of her husband. The form of the decree nisi is that the marriage in fact had and solemnised F

"be pronounced and declared null and void to all intents and purposes in the law whatsoever, by reason of the impotence of the said respondent, and the said petitioner be pronounced to have been and to be free from all bond of marriage with the said respondent." G

The decree was made absolute on Oct. 31, 1921, when the learned President, on the application of the petitioner, by his final decree "pronounced and declared the said marriage to be and to have been absolutely null and void, and that the petitioner was and is free from all bond of marriage with the said respondent." H I

A The question I have to decide is: Who is entitled to the trust fund? The settlor contends that he is entitled to it, either under the express trust in his favour, or under a resulting trust, because the settlement has ceased to exist because no marriage took place. Mrs. Wombwell disclaims all interest in the fund, Victor M. Wombwell supports the claim of the settlor, and his trustee in bankruptcy, who is the effective opponent of the settlor, contends that the settlement must be
B treated as existing because in fact marriage did take place. The decision in *Bishop v. Smith* (2), an Australian case, is opposed to the contention of the settlor. In that case the court held that the trust of that particular settlement still continued after a decree of nullity on the ground of impotence had been pronounced. That decision is not binding upon me, although, of course, I treat it with all respect; and neither is the decision in the Irish case
C of *P. v. P.* (3) where the wife, after obtaining a decree of nullity on the ground of impotence, was held to be entitled as on a consideration that had entirely failed, to be repaid by her husband her marriage dowry. The Australian decision was brought to the attention of the judges in the Irish case, and their reasoning appeals to me as sound rather than that of the Australian judges. The result of a decree of nullity is not only that the parties are not now married, but that they
D never were.

The matter came before the Court of Appeal in *Dormer (Otherwise Ward) v. Ward* (4) on the question of varying a settlement after a decree of nullity had been pronounced. The court consisted of A. L. SMITH, M.R., and VAUGHAN WILLIAMS, L.J., who delivered the judgment of the court. He said:

E "Now assuming that the court has jurisdiction under s. 5 [of the Matrimonial Causes Act, 1859, repealed by Supreme Court of Judicature (Consolidation) Act, 1925: see now Matrimonial Causes Act, 1950, s. 25] to make orders with reference to the application of the settled property, notwithstanding the fact that the parties to the avoided marriage can never have any child, it still remains to consider the question whether there is in this case any property
F settled as to which the court can exercise its jurisdiction by making an order with reference to the application of it. Now, generally, no doubt, it is true that the section only gives power to make orders with reference to the application of property settled and does not give the court power to vary the settlement by treating as settled property which is not settled. But it is obvious that, inasmuch as the section applies to decrees of nullity of marriage, there must,
G if the section is to apply at all to nullity cases be a power not only to make orders with reference to the application of the property settled amongst the beneficiaries contemplated by the settlement, but also for the application of the property settled in favour of persons outside the settlement and under conditions outside the settlement. In other words, the court must read, in the settlement, child or children as meaning a child or children who are not
H issue of a marriage and who are, therefore, illegitimate, and must read marriage as including a connection which is no marriage at all, being a voidable marriage which has been avoided. The section says that the court may inquire into the existence of settlements. Existence at what time? I think this means the existence of the settlements at the time of pronouncing the decree: *Corrance v. Corrance and Lowe* (5). Now I propose to read this settlement in the
I light of these conclusions. I find that at the time of the pronouncing of the decree a settlement existed between Mr. and Mrs. Ward. I do not find that a settlement continued in force after the decree. In my opinion this settlement did not do so. But I think the court has power to make orders with reference to the application of the property settled by the settlement in existence at the time of the decree, and I think that, on a motion for an order for the application of property settled, the court, in the case of a decree of nullity, must, for the purpose of the order, (if the section is to be applied to cases of nullity at

all), read the settlement as if extended and varied so as to make the words 'parties whose marriage' connote parties whose marriage was no marriage."

Thus VAUGHAN WILLIAMS, L.J., describes the marriage as no marriage, and finds that after the decree annulling the marriage the settlement did not continue in force. In *Dormer (Otherwise Ward) v. Ward* (4), by the marriage settlement, the respondent, the intended husband, had covenanted with the trustees to pay them if the marriage took place, a yearly sum of £200 upon trust to pay the same to the petitioner, his intended wife. The learned judge said:

"It seems to me that the right, and the only right, of the petitioner in respect of this covenant is to apply to the court under s. 5 to make an order for the application of this £200 for her benefit. This, of course, is pro tanto to vary the settlement, because, unless there was a valid marriage, she, in my judgment, is not entitled to the benefit of the covenant. She could not recover on the covenant unless varied, but I think, for reasons which I have already given, that the court, in the case of a decree of nullity, can and ought to vary the settlement, treating for the purpose of the order that which was no marriage as if it had been a valid marriage, and make the order for application for the benefit of a woman not a wife of this yearly sum of £200."

Those expressions show that, in the opinion of the judges of the Court of Appeal, a marriage which has been annulled on the ground of impotence was never a marriage at all, although it is recognised as valid until one of the parties to it takes proceedings to annul it.

In 1905 the very point that I have to decide came before KEKEWICH, J., in *Re Garnett* (1) where, in a settlement made in contemplation of his daughter's marriage, a father covenanted that if the marriage was "solemnised" his executors would within twelve months of his death pay £25,000 to the trustees of the settlement. The marriage took place in 1891. The father died in 1894, and in June, 1896, his executors paid over the £25,000 to the trustees, not knowing that on the previous day a decree had been made absolute, declaring the marriage to have been and to be null and void on the ground of the impotence of the husband. The question was who was entitled to the £25,000, the plaintiff asking for a declaration that the covenant by the testator to pay the £25,000 never became operative by reason of the decree of nullity of the marriage, and that such sum and the investments represented the same were never in fact subject to the trusts of the settlement. In the course of his judgment KEKEWICH, J. said:

"There is no occasion upon the present application to enter into a consideration of the question whether the settlement made upon a marriage necessarily fails altogether by reason of that marriage not taking effect either because there has been no valid ceremony or because the marriage has been annulled by a decree of the Divorce Court. It would, to my mind, be going much too far to say that a marriage settlement necessarily fails by reason of the non-solemnisation of the marriage, or by reason of the marriage having been solemnised and then set aside. It is quite possible that a settlement might be drawn which would stand, even if the marriage were no marriage at all. I do not for a moment suppose that VAUGHAN WILLIAMS, L.J., means anything to the contrary when he says in *Dormer (Otherwise Ward) v. Ward* (4):

'for, as I have already said, inasmuch as all marriage settlements are subject to the condition of marriage . . .'

"The learned President of the Divorce Division avoided this large question in *Attwood (Otherwise Pomeroy) v. Attwood* (6). He says:

'It is not, I think, necessary for me to decide whether or not the settlement has come to an end on the pronouncing of the decree absolute annulling the marriage.'

A "Counsel for the legal representative of the daughter has given me good reason for holding that this marriage settlement could very well stand, even if no marriage were solemnised or if it were annulled. Of course, the settlement does stand, notwithstanding the annulment of the marriage, for the purposes of the application of s. 5 of the Matrimonial Causes Act, 1859. There is a distinct decision to that effect in *Dormer (Otherwise Ward) v. Ward* (4) decided by the Court of Appeal. So that for some purposes the settlement must be regarded as standing, even if it is ineffectual by reason of there having been no valid marriage. But I am not deciding any question of that kind. Nor am I concerned in the least degree to criticise the application of s. 5 of the Act of 1859, as amended by the [Matrimonial Causes Act] 1878, to a settlement made on the occasion of marriage where such marriage has been annulled. It has been decided that, notwithstanding the annulment, the power of the court to vary the settlement stands; and it must be for the court to consider in every case not only whether the jurisdiction ought to be exercised, but whether it can be exercised, and it is for the Court of Probate to consider whether the trust of the funds brought into settlement by the husband or wife, or, as the case may be, directed to be held in trust for a husband or wife until the solemnisation of the marriage, is equally open to the application of that power to which I have referred, and whether the court cannot vary it under the provision of the statute. It has been left to the court to consider in each particular case how to vary it. I gather from a perusal of the report in *Attwood (Otherwise Pomeroy) v. Attwood* (6) that trusts of the kind are within its jurisdiction, and it can vary the trusts if it is necessary to do justice. . . . I am prepared to decide this case upon the particular meaning and effect of the settlement before me. It is a settlement made on the marriage of Mary Beatrice Richardson, one of the daughters of Joseph Richardson; and he entered into a covenant in contemplation of the intended marriage, that if such marriage were solemnised his executors were, within twelve calendar months after his death, to pay to the trustees of the settlement £25,000. He bound himself to pay that money if the marriage was solemnised, but not otherwise. . . . Counsel for the legal personal representative of the daughter says on behalf of those claiming under her will that the trustees are to hold this money upon the trusts of the settlement, and all that means is that the ceremony of marriage shall be gone through. Counsel feels himself to be little embarrassed by the decision in *Chapman v. Bradley* (7) to which I am about to refer, but he says that there the marriage ceremony was not gone through, in the sense that the ceremony was futile, being one which the law would not recognise. Here it is said that a different rule must apply to those marriages which are void altogether and those which are not. He says it would be monstrous to say that the marriage here failed, and had not been solemnised, when the parties had gone through the ceremony and intended to become man and wife, and believed that they were. All that depends upon the meaning of the word 'solemnised.' I agree that the decision in *Chapman v. Bradley* (7) proceeded upon a different state of facts. There the parties were married in Switzerland, and honestly believed that they were legally married. But the law of England did not recognise their marriage and it was annulled. The trusts there were also a little different in form, because there the trustees were to hold the money in trust for the settlor until the intended marriage should be solemnised, and then after the solemnisation thereof, upon the trusts in the usual manner. The judgment of KNIGHT BRUCE, L.J., which is concurred in by TURNER, L.J., turned upon the meaning of the word 'solemnised'; but whether you find it in a trust or a covenant seems to be utterly immaterial. KNIGHT BRUCE, L.J., says :

'The first question is, what is the meaning to be ascribed to the word "solemnised" as used in that instrument? As used in that instrument it must, in my judgment, mean validly and effectually solemnised.'

'The ceremony of marriage was indeed gone through afterwards, but the lady and gentleman were domiciled in England and this domicile had not been changed, and the lady was the niece of the gentleman's deceased wife. Therefore the marriage ceremony, although it took place at Neufchâtel, was as ineffectual as if there had never been any such ceremony at all. And TURNER, L.J., says: 'The word "marriage" must be taken to mean a valid and effectual marriage.' What is the difference between a marriage such as that now in question here, which has never been valid by reason of the incapacity of the parties and a marriage in which the relationship has been too close, or where the ceremony was conducted by some unauthorised person, or by one who was not in a position to celebrate it in a particular church, or by a person who pretended to be a registrar and was not? The learned judge then referred to the form of the decree nisi in the Divorce Court and continued:

'Therefore there never was a marriage, although the ceremony was gone through and the parties lived together as man and wife after that date. The marriage is pronounced null and void ab initio. Not only are they not now married, but they never were.'

'In other words, as TURNER, L.J., says in *Chapman v. Bradley* (7), 'There has never been any valid marriage.' I have nothing to do with the trusts of the settlement. There never was any obligation to pay under the settlement, as the covenant never took effect.'

In my opinion, this case is not distinguished from *Re Garnett* (1). Here the £25,000 was transferred to trustees "to the intent that the same shall be held in trust for the said William Menzies until the said intended marriage." In my opinion that means a valid and effectual marriage. The other trusts of the settlement would only come into operation after that valid and effectual marriage had taken place. The decree of the Divorce Court establishes the fact that there never was a marriage and, therefore, the settlor is absolutely entitled to the funds comprised in the settlement under and by virtue of the express trust in his favour. It is quite true that no claim could be made by him for the return of the payments made by the trustees during the time when the validity of the marriage was not questioned, for, unless and until the wife intervened, all parties were bound to treat the marriage as valid and effectual. It is not in my power to prevent the Divorce Court, in exercise of their powers under the Matrimonial Causes Acts, 1859 and 1878, making an order to vary the settlement, but both the former spouses disclaim any intention of making such an application. I hold that, in the events that have happened, the defendant William Menzies is absolutely entitled to the funds in the settlement and the trustees are entitled to transfer the funds to him.

Solicitors: *Burton, Yeats & Hart; M. A. Jacobs; Williams & James; Lewis & Lewis.*

[Reported by J. L. DENISON, Esq., Barrister-at-Law.]

A

PULFORD v. PULFORD

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Henry Duke, P., and Hill, J.),
October 13, November 1, 1922]

[Reported [1923] P. 18; 92 L.J.P. 14; 128 L.T. 256; 39 T.L.R. 35;
67 Sol. Jo. 170]

B

Divorce—Desertion—Unavoidable cessation of cohabitation—Rejection of opportunities of resumption of cohabitation.

Desertion is the withdrawal, not from a place, but from a state of things, and what the law seeks to enforce is recognition and discharge of the obligation of the conjugal state. The conduct of the party charged with desertion must be looked at, and, though cohabitation may have ceased owing to circumstances over which the party charged had no control, he may nevertheless be guilty of desertion if he has rejected opportunities of resuming cohabitation.

C

Fitzgerald v. Fitzgerald (1), (1869), L.R. 1 P. & D. 694, explained.

Husband and Wife—Summary proceedings—Desertion—Summons—Need to state date of commencement of desertion.

D

The fact that the date of the commencement of desertion is not given in a summons under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, is not a point of substance in objecting to the order.

Notes. Explained: *Jackson v. Jackson*, [1924] P. 19. Applied: *Sotherden v. Sotherden*, [1940] 1 All E.R. 252. Considered: *Weatherley v. Weatherley*, [1946] 2 All E.R. 1; *Lane v. Lane*, [1951] P. 284. Referred to: *Bowron v. Bowron*, [1925] All E.R. Rep. 148; *Papadopoulos v. Papadopoulos*, [1935] All E.R. 311; *Herod v. Herod*, [1938] 3 All E.R. 722; *Jordan v. Jordan*, [1939] 2 All E.R. 29; *Mummery v. Mummery*, [1942] 1 All E.R. 553; *Abercrombie v. Abercrombie*, [1943] 2 All E.R. 465; *Shilston v. Shilston* (1945), 174 L.T. 105; *Cook v. Cook*, [1949] 1 All E.R. 384; *Whitrey v. Whitrey*, [1951] 1 All E.R. 301; *Lowry v. Lowry*, [1952] 2 All E.R. 61; *Perry v. Perry*, [1952] 1 All E.R. 1076; *Hopes v. Hopes*, [1948] 2 All E.R. 920.

F

As to desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 241 et seq., and as to application for an order in a magistrates' court, see *ibid.* 493 et seq.; and for cases see 27 DIGEST (Repl.) 333 et seq. For the Summary Jurisdiction (Married Women) Act, 1895, s. 4, see 11 HALSBURY'S STATUTES (2nd Edn.) 849.

G

Cases referred to:

- (1) *Fitzgerald v. Fitzgerald* (1869), L.R. 1 P. & D. 694; 38 L.J.P. & M. 14; 19 L.T. 575; 17 W.R. 264; 27 Digest (Repl.) 334, 2784.
- (2) *Gatehouse v. Gatehouse* (1867), L.R. 1 P. & D. 331; 36 L.J.P. & M. 121; 16 L.T. 34; 27 Digest (Repl.) 357, 2954.
- (3) *Lawrence v. Lawrence* (1862), 2 Sw. & Tr. 575; 31 L.J.P.M. & A. 145; 6 L.T. 550; 8 Jur. N.S. 972; 164 E.R. 1120; 27 Digest (Repl.) 341, 2835.
- (4) *Henty v. Henty* (1875), 33 L.T. 263; 27 Digest (Repl.) 342, 2836.

H

Appeal from justices.

The parties were married on Mar. 26, 1883, the husband being then aged twenty-four, and the wife twenty-three, and lived happily together at Dovercourt in Suffolk, till January, 1884, when the wife was admitted to an asylum at Ipswich, whence she was subsequently removed to the Brentwood Asylum, and there remained until she was discharged as cured in 1902. The husband had meanwhile remained at Dovercourt till 1886, and had then lived with his mother at Gislingham, Suffolk, till 1892, when he had gone to London, and had there acquired the business of one David Porter, a tobacconist and stationer, and, as he said, to preserve the goodwill, had carried it on in and assumed that name. It did not appear whether he took any interest in his wife or showed her any attention whilst she was in the asylums, but after her discharge in 1902 he knew where she was, as he occasionally

I

sent her sums of money during the next two or three years. She was at that time supporting herself in domestic service, and in 1905 he sent her a sum of money, which apparently reached her, but he said that, as he received no acknowledgment of it, he concluded that she was dead. He admitted that he made no inquiry as he did not want to do so, and that he was in fact living with another woman. In July, 1922, he was served with a summons under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, charging him with having wilfully neglected to maintain the wife and thereby caused her to live separately and apart from him. That summons was heard before the justices at Bungay on July 20 and Aug. 3, 1922, and no order was made. At the hearing of July 20, the wife, in answer to the question: "Do you recognise the man opposite to you as your husband?" had said: "I can hardly recognise him," and the husband had denied all knowledge of her, and said he had never seen her before. At the hearing of Aug. 3, the wife had said that she recognised the husband by his walk, and he had again denied that he recognised her. On Aug. 17, 1922, on a fresh summons charging that he had deserted the wife, no date of desertion being specified in the summons, the justices found him guilty of having deserted the wife as from Aug. 3, 1922, and ordered him to pay 10s. a week maintenance. They also ordered that the wife should no longer be bound to cohabit with him.

J. P. Eddy for the appellant.

G. C. Tyndale for the wife.

Cur. adv. vult.

Nov. 1. **SIR HENRY DUKE, P.**, stated the facts, and continued: Before the justices two pleas were urged in reply to the wife's claim for a finding that her husband had been guilty of desertion. First it was objected that the date of the alleged desertion was not inserted in the summons. This is a point which might have been discussed with interest and perhaps, with profit in the eighteenth century in the Court of King's Bench, but, in my judgment, it is at the present day a point of no substance. The issues were never for a moment in doubt, and I dismiss the objection.

The second objection was of a more serious character. Counsel for the husband referred to the following passage in the judgment of LORD PENZANCE in *Fitzgerald v. Fitzgerald* (1) (L.R. 1 P. & D. at p. 697):

"Desertion means abandonment, and implies an active withdrawal from a cohabitation that exists."

That passage is frequently cited by counsel as if it were a text governing all cases which might arise, and which the court is only entitled to construe and to apply. In this case, it was stated by counsel for the husband: "How can it be said that cohabitation existed between this husband and this wife in face of its termination by the act of the public authorities, effective until 1902, never followed by a resumption of cohabitation?"

If that passage of LORD PENZANCE's judgment is to be regarded as a complete and final statement of the whole law on the subject, as counsel contended, the objection might be well founded, but I am satisfied that the passage cannot be so regarded. I look first to see the facts of the case with which LORD PENZANCE was dealing. The wife in that case was living apart from the husband by her own choice. The decision is not a decision that there can never be desertion unless the parties are actually living together in the matrimonial home. LORD PENZANCE in the next paragraph of his judgment dwelt on exceptions to the principle which he had enunciated. He said (*ibid.*):

"No doubt there are cases in which actual cohabitation does not exist at all, because the circumstances of the parties do not permit it. I am not now dealing with such cases. No doubt, again, there are cases in which the parties may have innocently ceased for a time to be actually living together, separated by the

A calls of every-day life, or the exigencies of public duty, and the husband or the wife, taking advantage of the separation, may have purposely rejected all subsequent opportunities of coming together again; and this may constitute desertion."

B That is the broader doctrine with which LORD PENZANCE qualified his previous statement. The question is one which constantly arises, and it has been almost a commonplace in this court to hold that, in order to ascertain whether or not there had been desertion, the whole conduct of the parties must be reviewed. Desertion is not the withdrawal from a place but from a state of things. What the law seeks to enforce is recognition and discharge of the obligations of the conjugal state. If one party renounces these, or without the consent of the other renders them impossible of fulfilment, that is desertion. I shall not attempt a definition of desertion. Definitions are dangerous, and the mistake in the argument addressed to us is that it treats LORD PENZANCE's dictum as a comprehensive definition of desertion.

D [The learned President, after referring to the facts in *Gatehouse v. Gatehouse* (2), and *Lawrence v. Lawrence* (3), continued:] In the present case, cohabitation was suspended while the wife was in the asylum, but the conjugal duties of the husband had not ceased. What was the conduct of the husband? After remaining in Suffolk for a time, he removed to London and started an adulterous association which has continued ever since. Moreover, he lived under an assumed name. What was the effect of that conduct? From 1905 onwards there was a renunciation by him of every conjugal duty. To suggest that his wife should, under these circumstances, have searched for him in London is to scout justice. I am satisfied that, at any rate from 1905, there was clear evidence of desertion, and that state was continuing on Aug. 3, 1922, as the justices have found. In conclusion I would refer to the decision in *Henty v. Henty* (4), where the facts as to the impossibility of actual cohabitation between the parties were as strong as in this case. This appeal fails and must be dismissed with costs.

G HILL, J. delivering a concurring judgment, in the course of which he said: The legal relationship known as cohabitation subsisted all the time while the wife was in the asylum. There was ample evidence before the justices that the husband intended to put an end to that relationship, and that he did so. He was thereby guilty of desertion.

Solicitors: C. T. Lewis; John E. Gibbs & Co., for Gudgeons, Peacock & Prentice, Stowmarket.

[Reported by J. A. C. SKINNER, ESQ., Barrister-at-Law.]

IN THE ESTATE OF GREY

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), February 20, 27, 1922]

[Reported [1922] P. 140; 91 L.J.P. 111; 126 L.T. 199; 38 T.L.R. 401]

Will—Soldier's will—"Actual military service"—"On an expedition"—Question of fact—Need for testator to be in some place for purpose of war—Existence of state of war insufficient—Wills Act, 1837 (7 Will. 4 & 1 Vict., c. 26) s. 11—Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 58), s. 2—Termination of the Present War (Definition) Act, 1918 (8 & 9 Geo. 5, c. 59), s. 1 (1).

When a man ceases to be in actual military service is a question to be decided on the facts of each case. For a soldier to be in actual military service, it is not sufficient that there should be a state of war; he must be in some place for the purposes of the war, and "actual military service" does not depend on a date artificially fixed by Act of Parliament or Order in Council.

Notes. Considered: *Re Wingham*, [1948] 1 All E.R. 208; *In the Estate of Colman*, [1958] 2 All E.R. 35. Referred to: *In the Estate of Anderson*, [1943] 2 All E.R. 609; *In the Estate of Rowson*, [1944] 2 All E.R. 36.

As to wills of soldiers and sailors, see 16 HALSBURY'S LAWS (2nd Edn.) 176 et seq., and for cases see 39 DIGEST 332 et seq. For the Wills Act, 1837, s. 11, and the Wills (Soldiers and Sailors) Act, 1918, s. 2, see 26 HALSBURY'S STATUTES (2nd Edn.) 1335, 1361, and for the Termination of the Present War (Definition) Act, 1918, s. 1, see 4 HALSBURY'S STATUTES (2nd Edn.) 603.

Cases referred to :

- (1) *Drummond v. Parish* (1843), 3 Curt. 522; 2 Notes of Cases, 318; 1 L.T.O.S. 207; 7 Jur. 538; 163 E.R. 812; 39 Digest 333, 195.
- (2) *In the Goods of Hiscock*, [1901] P. 78; 70 L.J.P. 22; 84 L.T. 61; 17 T.L.R. 110; 39 Digest 334, 202.
- (3) *Re Limond, Limond v. Cunliffe*, [1915] 2 Ch. 240; 84 L.J.Ch. 833; 113 L.T. 815; 59 Sol. Jo. 613; 39 Digest 335, 213.

Also referred to in argument :

Gattward v. Knee, [1902] P. 99; 71 L.J.P. 34; 18 T.L.R. 163; sub nom. *In the Goods of Knee, Gattward v. Knee*, 86 L.T. 119; 46 Sol. Jo. 123; 39 Digest 334, 197.

In the Goods of Saunders (1865), L.R. 1 P. & D. 16; 35 L.J. P. & M. 26; 13 L.T. 411; 11 Jur. N.S. 1027; 14 W.R. 148; 39 Digest 333, 187.

Re Stable, Dalrymple v. Campbell, [1919] P. 7; 88 L.J.P. 32; 120 L.T. 160; 39 Digest 336, 228.

Godman v. Godman, [1920] P. 261; 89 L.J.P. 193; 123 L.T. 274; sub nom. *Re Godman, Godman v. Godman*, 36 T.L.R. 434; 64 Sol. Jo. 424, C.A.; 39 Digest 337, 240.

Motion.

This was an application made on motion with the consent of all interested parties for admission to probate as a soldier's will under the Wills Act, 1837, s. 11, of a document dated May 9, 1921, and written and signed by Charles Joselyn Eden Grey, a major in the Grenadier Guards, who died at a military hospital in London on May 15, 1921. The document purported to dispose of the deceased's whole property, and appointed the applicant sole executrix. It bore an attestation clause, but had been signed by the deceased alone. The deceased had been on active service in France, and had spent some time as a prisoner in Germany, and had subsequently in 1919 served in the expedition to Northern Russia, but from early in 1920 till he went into hospital on May 9, 1921, he had been stationed in barracks in London. He was liable to be sent on active service, and his battalion was said to have been expecting orders to proceed to Ireland, but was not shown

- A to have had any definite orders to do so. By Order in Council dated Aug. 10, 1921 (S.R. & O. 1921 No. 1276), the general date for the termination of the 1914-18 war was fixed as Aug. 31, 1921.

Noel Middleton for the applicant.

Cur. adv. vult.

- B Feb. 27. **HILL, J.** stated the facts, and continued: It is contended that it is a valid will as the will of a soldier being in actual military service. Ever since the judgment in *Drummond v. Parish* (1) it has been settled that the Act does not apply to every soldier but only to a soldier who is "on an expedition." When that relation begins and when it ends must be decided by the circumstances of the particular soldier. As to the point at which a soldier begins to be on an expedition,
- C *In the Goods of Hiscock* (2) shows that a liberal interpretation must be given. A soldier there was held to be on expedition from the time he took the first step of going into barracks with a view of being drafted to the front. That rule has often been applied in regard to wills made during the late war. *Re Limond* (3) likewise shows that a liberal interpretation must be given as to the point at which a soldier ceases to be on an expedition. In that case, the military operations
- D were undertaken for the opening up and occupation of the Tochi Valley, and the limitation of the frontier was an operation incident to the war in question. The soldier was, at the time he made the will, part of the military escort to the delimitation party. He was held to be within the privilege because the actual military service did not cease until the full conclusion of the operation. But, giving the most liberal interpretation, I fail to see how it can be said that Major
- E Grey was on an expedition in May, 1921. He was neither in the field, nor proceeding to or from the field, nor in any place for the purpose of proceeding to or from the field. I can see no material distinction between his situation and that of Major-General Drummond in *Drummond v. Parish* (1).

- F It was argued that every soldier was on an expedition in May, 1921, because on that date an Order in Council had not yet been made declaring the date which was to be treated as the date of termination of the war under the Termination of the Present War (Definition) Act, 1918. That matter seems to me to be irrelevant, as (i) for a soldier to be in actual military service, it is not sufficient that there should be a state of war; he must be in some place for the purposes of the war, and (ii) "actual military service" refers to a state of fact not to a date artificially fixed by Act of Parliament or Order in Council.

- G I must, therefore, decline to admit the document in question to probate.

Solicitors: *Hunter & Haynes.*

[*Reported by J. A. C. SKINNER, Esq., Barrister-at-Law.*]

STERNS, LTD. v. VICKERS, LTD. A

[COURT OF APPEAL (Bankes and Scrutton, L.JJ., and Eve, J.), October 16, 1922]

[Reported [1923] 1 K.B. 78; 92 L.J.K.B. 331; 128 L.T. 402]

Sale of Goods—Incidence of risk—Buyer's risk—Sale of specified quantity out of bulk—Bulk controlled by storage company—Delivery order obtained by seller from storage company and accepted by buyer. B

Sellers sold to buyers 120,000 gallons of white spirit out of a larger quantity lying in a tank belonging to a storage company, from whom they obtained a warrant for the delivery to the buyers of "120,000 gallons ex white oil in bulk." The buyers indorsed this warrant to a sub-purchaser who did not take delivery for some months, and, when he did, found that the spirit had deteriorated in quality. On a claim by the buyers against the sellers for breach of warranty, C

Held: whether or not the property in the oil sold had passed to the buyers, the sellers were selling a specified quantity out of a bulk, the selection to be made by a third person (the storage company); when the delivery order which they had obtained from the storage company was accepted by the buyers the sellers could no longer exercise any control over the oil sold and had done all that they had undertaken to do; and the risk relating to it passed to the buyers. D

Per SCRUTTON, L.J.: I do not think the property in the oil passed; only a right to an undivided share in the bulk to be selected by a third person.

Notes. Distinguished: *Re Wait*, [1926] All E.R. Rep. 433; *Laurie and Morewood v. Dudin*, [1925] 2 K.B. 383; *Shell-Mex v. Elton Cop Dyeing Co.* (1928), 34 Com. Cas. 39; *Comptoir d'Achat et de Vente du Boerenbond Belge S.A. v. Luis de Ridder, Limitada*, [1949] 1 All E.R. 269; *Demby Hamilton & Co. v. Barden*, [1949] 1 All E.R. 435. E

As to the incidence of the risk of goods on a sale see 29 HALSBURY'S LAWS (2nd Edn.) 99-103, and for cases see 39 DIGEST 527-529.

Cases referred to: F

- (1) *Inglis v. Stock* (1885), 10 App. Cas. 263; 54 L.J.Q.B. 582; 52 L.T. 821; 33 W.R. 877; 5 Asp. M.L.C. 422, H.L.; 39 Digest 530, 1433.
- (2) *Gillett v. Hill* (1834), 2 Cr. & M. 530; 4 Tyr. 290; 3 L.J. Ex. 145; 149 E.R. 871; 39 Digest 487, 1063.

Also referred to in argument: G

Austen v. Craven (1812), 4 Taunt. 644; 128 E.R. 483; 39 Digest 485, 1049.

White v. Wilks (1813), 5 Taunt. 176; 1 Marsh. 2; 128 E.R. 654; 39 Digest 488, 1069.

Whitehouse v. Frost (1810), 12 East. 614; 104 E.R. 239; 39 Digest 542, 1531.

Mordaunt Bros. v. British Oil and Cake Mills, Ltd., [1910] 2 K.B. 502; 79 L.J.K.B. 967; 103 L.T. 217; 54 Sol. Jo. 654; 15 Com. Cas. 285; 39 Digest 633, 2297. H

Appeal from an order of SHEARMAN, J., in an action tried by him without a jury.

On Jan. 3, 1920, the Admiralty sold to the defendants, Vickers, Ltd., 200,000 gallons of white oil or spirit then lying at Thames Haven in a tank belonging to the London and Thames Haven Oil Wharves Co. and numbered 78 upon the terms that the defendants should have free storage until Jan. 31, and that, if further storage was required after that date, they should make their own terms with the storage company. By a letter dated Jan. 17, the defendants agreed to sell and the plaintiffs, Sterns, Ltd., agreed to buy I

"120,000 gallons of spirit of Admiralty origin similar to the bulk samples you drew and now lying in tank No. 78 at Thames Haven in the care of the London and Thames Haven Oil Wharves Co., and to be delivered into the plaintiffs' packages or tanks at 1s. 11d. per gallon."

A By a further letter dated Jan. 20, with regard to the question of storage, the defendants wrote :

"With reference to the question of storage . . . we suggest that it would be much better for you to make your own arrangements with the Thames Haven Co."

B On Jan. 23 the plaintiffs re-sold the spirit to a Mr. Lazarus,

"for delivery spot at 2s. 7d. per gallon. All charges including storage and insurance for buyer's account. Quantity about 120,000 gallons—good spirit of Admiralty origin similar to bulk sample submitted, now lying in tank 78 London and Thames Haven Oil Wharves Co."

C The copy was attached of a certificate stating that the specific gravity of the spirit was .786. On Jan. 28 the defendants obtained from the London and Thames Haven Oil Wharves Co. a delivery warrant for

"120,000 gallons ex white oil in bulk deliverable to Messrs. Sterns, Ltd., or assignees only against this warrant duly indorsed on payment of rent from Jan. 28, 1920, and all other charges. . . . This warrant is the only document issued as a legal symbol to these goods."

D The plaintiffs thereupon indorsed the warrant to Lazarus; but he, not being anxious to take delivery at that time, made his own arrangements with the company for further storage and paid them rent accordingly. When he came to take delivery some months later he found that the spirit had deteriorated in quality, the specific gravity which, according to the contract, was .786, having risen to .8045, and he claimed damages from the plaintiffs for the deterioration.

E The plaintiffs claimed over against the defendants for a breach of warranty on the ground that 120,000 gallons when delivered in bulk did not correspond with the sample, but were altogether inferior and unmerchantable, and did not correspond with the specification. SHEARMAN, J., held upon the facts that it was not intended that the property in the goods should pass until there had been an actual severance

F of the property. The loss must, therefore, fall upon the defendants and judgment must be entered for the plaintiffs. The defendants appealed.

Cyril Atkinson, K.C. and H. M. Givcen for the defendants, the sellers.

Thorn Drury, K.C. and C. T. Le Quesne for the plaintiffs, the buyers.

G **BANKES, L.J.**—In my opinion, this appeal succeeds. The judgment of the learned judge only deals with one of the two points that have been mentioned during the argument, namely, the question whether the property passed, and I do not propose to express any opinion upon that particular point. The case seems to me to be a plain one in reference to the other point to which the learned judge does not allude, but to which we are told his attention was in fact called.

H [His LORDSHIP stated the facts and continued:] It seems to me that, apart altogether from the question whether the property had passed from the purchasers or not, the responsibility for any deterioration in the quality of the oil as regards its specific gravity, whether it arose from natural causes, e.g., evaporation, or from the act of the warehousemen, rested upon the persons who had employed the warehousemen for this purpose to warehouse for them. It is agreed that any deterioration in the quality of the oil and any alteration in the specific gravity was due partly to natural causes, but mainly to the fact that the Thames Haven Oil

I Wharves Co. had mixed oil of a different specific gravity with this oil. The question is: Who is responsible for that? It seems to me to be quite plain upon the facts which I have indicated, and upon the terms of the contract as made, that the responsibility rests upon the buyers and not upon the sellers. With regard to the cases which have been referred to I only desire to say, without deciding the question whether the property passed or not, that it is quite obvious that in this case the goods were in the possession of a third party as against whom, when once the

delivery order had been given, it seems to me, the sellers could exercise no control. For the reasons I have given I think that the risk of deterioration rested upon the buyers and that they must bear the loss. The appeal must, therefore, be allowed with costs. A

SCRUTTON, L.J.—The plaintiffs have got judgment below for a sum for damages based on the very simple and attractive allegation that they contracted to purchase so many gallons of oil of a particular specific gravity, that that quantity of oil had never been appropriated to them, and that when they came to take delivery it was found to be not of the specific gravity contracted for. The fault that I find with that statement of the plaintiffs' case is that it does not fit in with the facts, which are these. Messrs. Vickers, the vendors, were themselves purchasers from the Admiralty of about 200,000 gallons then lying in the London and Thames Haven Oil Co.'s tanks. That contract was made on Jan. 3, 1920. On Jan. 17 Messrs. Vickers re-sold to the plaintiffs about 120,000 gallons, part of the 200,000 gallons. B C

"now lying in tank 78, London and Thames Haven Oil Wharves Co. Copy of Redwood's certificate attached. Payment to be made for 120,000 gallons at the end of this month and any adjustments to be met on either side when the whole of the parcel (or more) is cleared. With regard to the question of storage, insurance, etc., after the end of the month we will discuss this with you and do everything in our power to fix the matter up on a satisfactory basis." D

There were no specific 120,000 gallons in which the property passed. Messrs. Vickers never had nor could they pass the property in 120,000 specific gallons.

This sort of question has arisen in the courts for years, and I think every case that has ever been decided upon the subject was cited in the well-known case of *Inglis v. Stock* (1), where an argument very similar to that addressed to us by counsel for the plaintiffs was addressed to the court to show that the persons who had bought a certain quantity of sugar had no property in it because the specific tons of sugar had not been allotted to them. LORD BLACKBURN there pointed out that what the buyers had was not the property in any particular number of tons, but an undivided interest in a larger bulk. The undivided interest in a larger bulk will not suffice to pass the property when the selection has to be made by the vendor himself. That is the definition which was pointed out by BAYLEY, B., in *Gillett v. Hill* (2) where he says (2 Cr. & M. at p. 535): E F

"Those cases may be divided into two classes; one in which there has been a sale of goods and something remains to be done by the vendor, and until that it done the property does not pass to the vendee so as to entitle him to maintain trover. The other class of case is, where there is a bargain for a certain quantity ex a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit, then the right to them does not pass to the vendee until the vendor has made his selection, and trover is not maintainable before that is done." G H

That would be the ordinary case, like the cases which have been cited by counsel for the plaintiffs, but it seems to me you get quite a different class of case when the power of selection rests, not in the vendor, but in a third party against whom the vendor only has the right to say: "Deliver to me 'so much' ex bulk. You are the person who has to settle which you deliver ex bulk." In that case what is passing is an undivided right in a bulk, the selection to be made by some person other than the vendor. The question there, it seems to me is: What are you selling? You are selling a specified quantity out of a bulk, the selection to be made by a third person, and it seems to me that you fulfil that obligation when the third person undertakes to the purchasers to deliver to them that quantity out of bulk. I

In this case there was, at the time of the contract and of the payment, a bulk which was larger than the quantity sold and of the contract quality according to sample. A delivery warrant was issued by the Thames Haven Oil Wharves Co.,

- A** undertaking to deliver that quantity which at the time complied with the sample. That warrant was accepted by the purchasers, the plaintiffs, and by their sub-purchaser Lazarus, who proceeded to pay rent for the storage from the date of the issue of the warrant, viz., Jan. 28. I clearly come to the conclusion on that special contract in the way I have stated it that, after the acceptance of that warrant, the risk is on the purchaser. The vendor has done all that he undertook to do.
- B** The purchaser has a right, whatever it may be, against the Thames Haven Oil Wharves Co., and if he exercises it at the time when he gets the warrant he will get whatever the vendor had undertaken to sell him, for it was there at that time. What the purchaser is doing here is to try and put the risk, after the acceptance of the warrant upon a person who had then no control whatever over the goods, for it seems to me to be quite clear that after the issue and acceptance of that warrant the vendor would have no power to go to the storage company and say: "Do not deliver to the purchaser." The Thames Haven Oil Wharves Co. would have said: "We have nothing to do with you; you have had a warrant issued to you; you have handed it to a third person; a third person has brought it to us and has accepted it and has been paying rent."
- C**

- D** For these reasons, treating it rather as a question of risk arising under that contract than as a question of passing of property—strictly I do not think property passes, but only a right to an undivided share in the bulk, to be selected by a third person—I think that the learned judge's view was erroneous. I see that he considers the question of transferring the risk and thinks that there is no evidence of it in this case. I am sorry to say that I think exactly the opposite. I think that the only conclusion that could be drawn from the evidence is that the risk did pass,
- E** and when the learned judge finds as a fact that the delivery was never made, and was not contemplated to be made until the oil was separated and taken away, I do not know on what evidence he finds it in the circumstances. I think the true inference is that the delivery to be made was the delivery of the right to receive a part of a bulk from the Thames Haven Oil Wharves Co., the latter making the selection. For these reasons, which turn rather on the special facts of the case
- F** than on the authorities cited by counsel for the plaintiffs, I think the learned judge came to a wrong conclusion, and that the appeal should be allowed.

EVE, J.—I do not think I can usefully add anything to what has fallen from my Lords. I agree in the conclusions at which they have arrived and for the reasons which they have given.

Appeal allowed.

Solicitors: *Braby & Waller; Bradshaw & Waterson.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

CRUISE AND ANOTHER v. TERRELL

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Scrutton, L.JJ.),
February 15, 1922]

[Reported [1922] 1 K.B. 664; 91 L.J.K.B. 499; 126 L.T. 750;
38 T.L.R. 379; 66 Sol. Jo. 365; 20 L.G.R. 418]

Rent Restriction—Application of the Acts—Tenancy for fixed term—Termination of contractual tenancy—Right of landlord to exercise common law right to re-enter—Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12 (2).

The Rent Restriction Acts apply to a tenancy for a fixed term as they do to a continuing tenancy.

Where a contractual tenancy has been terminated by effluxion of time or by notice the tenant is protected by the Acts, and the landlord cannot exercise his common law right to treat him as a trespasser and re-enter the premises.

Remon v. City of London Real Property Co., Ltd. (1), [1921] 1 K.B. 49, applied.

Notes. Referred to: *Keeves v. Dean*, *Nunn v. Pelligrini*, [1923] All E.R. Rep. 12; *Skinner v. Geary*, [1931] All E.R. Rep. 302; *Lavender v. Betts*, [1942] 2 All E.R. 72; *Lewis v. Gunter-Jones*, [1949] L.J.R. 769; *Hutchinson v. Jauncey*, [1950] 1 All E.R. 165.

As to controlled premises and recovery of possession see 23 HALSBURY'S LAWS (3rd Edn.) 731 et seq., and 813 et seq. For case see 31 DIGEST (Repl.) 634 et seq., 695 et seq. For Increase of Rent &c. Act, 1920, see 13 HALSBURY'S STATUTES (2nd Edn.) 981.

Cases referred to:

- (1) *Remon v. City of London Real Property Co., Ltd.*, [1921] 1 K.B. 49; 89 L.J.K.B. 1105; 123 L.T. 617; 36 T.L.R. 869; 18 L.G.R. 691; 84 J.P. Jo. 349, C.A.; 31 Digest (Repl.) 638, 7455.
- (2) *Whitham v. Kershaw* (1886), 16 Q.B.D. 613; 54 L.T. 124; 34 W.R. 340; sub nom. *Witham v. Kershaw*, 2 T.L.R. 281, C.A.; 31 Digest (Repl.) 399, 5285.

Also referred to in argument:

Merest v. Harvey (1814), 5 Taunt. 442; 1 Marsh. 139; 128 E.R. 716; 17 Digest (Repl.) 105, 203.

Emblen v. Myers (1860), 6 H. & N. 54; 30 L.J.Ex. 71; 2 L.T. 774; 8 W.R. 665; 158 E.R. 23; 17 Digest (Repl.) 105, 199.

Kimpson v. Markham, [1921] 2 K.B. 157; 90 L.J.K.B. 393; 124 L.T. 790; 37 T.L.R. 342; 19 L.G.R. 346, D.C.; 31 Digest (Repl.) 718, 8023.

Appeal from an order of DARLING, J., in an action for damages for trespass.

The plaintiffs were two women living and engaged in professional work in London, and in 1919 they entered into an agreement with the defendant, who owned an estate at Ashmansworth, near Kingsclere, Hants, to take a cottage on the estate for a year from Mar. 25, 1919, at a rent of £8 per annum. They visited and stayed in the cottage during holiday periods, and at week-ends, but at other times it was kept locked and unoccupied. In March, 1920, they renewed the tenancy for another year certain and paid the rent in advance. Early in 1921 the defendant's wife wrote to the plaintiffs saying that the defendant could not renew the tenancy at the same rent, but that owing to the cost of repairs and the increase of rates and taxes, he would be obliged to double the rent. The plaintiffs replied refusing to pay a higher rent. The defendant then wrote saying that he did not mind letting the cottage to a villager at a rent which would mean a loss to him, but that, as the defendants had no connection with the village and merely came down occasionally on pleasure visits, he could not renew the tenancy. He said that he wanted the

A cottage for the under-gamekeeper of a Mr. Turner, to whom he had let the shooting on the estate, and who had at that time to live in a van. On April 1 the plaintiffs went to Ashmansworth and tendered another £8 for rent in advance to the defendant, but their tender was refused. On April 7 in the absence of the plaintiffs, the defendant sent a blacksmith to break open the lock on the door, take it off, and affix a new lock. This was done and the door was locked. The plaintiffs then brought this action, claiming damages for trespass and pleading that they were statutory tenants under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The defendant counter-claimed for possession. DARLING, J., held that plaintiffs were statutory tenants under the Rent Restriction Act, 1920, and, therefore, were not trespassers when the defendant re-entered and locked them out on April 7, and that the defendant was liable to them in £60 damages for trespass. On the counter-claim, although there was no offer of adequate alternative accommodation, still he thought it would be a greater hardship on the defendant, who had bona fide promised Mr. Turner the use of the cottage for his gamekeeper, not to make an order for possession than it would be on the plaintiffs to grant it. He, therefore, made an order for immediate possession on the defendant undertaking to give the plaintiffs a month in which to remove their furniture and effects. The defendant appealed. The plaintiffs did not appeal from the order for possession.

J. H. Menzies for the defendant, the landlord.

J. B. Melville, called on only as to the question of damages, for the plaintiffs.

LORD STERNDALE, M.R.—This is an appeal from a decision of DARLING, J., which raises a difficult question on the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. It is contended that the Act does not apply in any way to a tenancy for a term certain, and, therefore, the letting was not within the Act. I can say very little on that point. I cannot understand how it can be said that the sections of the Act which apply to all lettings do not apply to a letting for a term certain. It is contradicted by expressions which occur in various parts of the Act, and I see no ground for that contention.

The next point is that, assuming the Act does apply and that these ladies are statutory tenants, it does not prevent the landlord from exercising his common law right when he has subsequently got an order for possession. The point was, however, decided against the landlord in *Remon v. City of London Real Property Co., Ltd.* (1). It is said that in the judgments in that case the point is dealt with by dicta. I think they were not dicta, but, even if they were, they were dicta from which we ought not to differ, and, in my opinion, we are bound by them.

There is another question. It is said that no damages can be given here because an immediate order for possession has been made, and, therefore, it must be inferred that the landlord had a right to re-enter when he did. But for the Act the landlord can re-enter at his peril. If he recovered judgment, well and good. If he was wrong, he paid damages to the tenant. It is said that if he recovers judgment for possession the order relates back to the date of his original entry. It is sought to apply that to this case. Here these ladies were statutory tenants at the date of the re-entry and continued to be so until the landlord satisfied the court that he was entitled to possession for one of the seven causes contained in the Act [see now Rent &c. Restrictions Act, 1933, Sched. I]. I think that the statutory tenancy continued until the order was made, and that until it was made these ladies were not trespassers. The landlord's entry was wrongful.

That leaves only the question of damages. The learned judge has awarded £60 damages, and he has also found that the landlord did no actual damage to the house or furniture, and that "there was no high-handed outrage perpetrated—not in the least." The landlord acted under an erroneous claim of right. The learned judge then proceeded to assess the damages at £60. I am sorry to say he gave no reason to show how he arrived at that sum. I cannot see how this sum can be justified on the evidence. It is not usually desirable to interfere with the judgment

of a court on a question of damages, but when it is found that there is no evidence of aggravation, vindictive damages ought not to be given. Here the ladies were deprived for some three or four months of the use of the cottage, a matter of only £3 or £4. They gave no evidence of any special damage in that they were put to expense in living to find other cottage accommodation. The judge's finding means that there were no aggravated circumstances. In that case the amount of the damages cannot be justified, and I think we should be treating the ladies very liberally in awarding them £10. I would repeat what BOWEN, L.J., said in *Whitham v. Kershaw* (2):

"I wish to add that nothing we have said must be understood as in any way derogating from the principle that, when a wrongful act is done by a trespasser, or by a tenant, to the property of his reversioner under circumstances which call for vindictive damages, the jury may give vindictive damages. There is, however, nothing of that kind in the present case."

The judgment will be varied by altering the sum of damages from £60 to £10. The rest of it will stand, but I think as the defendant has failed on the legal points there should be no costs of the appeal.

WARRINGTON, L.J.—I am of the same opinion. The landlord has raised three points before us. The first point is that the Rent Restriction Act, 1920, does not apply to tenancies for a fixed term. I, like the Master of the Rolls, have had a great difficulty in seeing on what ground that argument is rested. That cannot be the construction of the statute. I will test the argument by an examination of certain of the sections of the Act. By s. 12 (2):

"This Act shall apply to a house or part of a house let as a separate dwelling [at various rent or rateable values] and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies."

That is a clear provision that every house let by a landlord to a tenant at a certain standard rent, or which has a certain rateable value, is a house to which the Act applies. It may well be that so long as the tenancy lasts the Act does not come into operation, but it applies all the same. Section 15, to my mind, makes the matter perfectly plain. It provides by sub-s. (1):

"A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the dwelling-house only on giving such notice as would have been required under the original contract of tenancy, or, if no notice would have been so required, on giving not less than three months' notice."

There is nothing there said to suggest that the tenancy referred to must be a continuing tenancy and not a tenancy for a fixed term. Again, s. 8, contains a provision (sub-s (3)) that

"This section shall not apply to the grant, renewal or continuance of a term of fourteen years or upwards of any tenancy,"

thereby clearly indicating that tenancies for a fixed term were within the purview of the Act.

The second point, that on the date when the defendant entered the plaintiffs were mere trespassers has been disposed of by the decision in *Remon v. City of London Real Property Co., Ltd.* (1). There the landlords went into possession without an order in the same way and an action was brought for an injunction to restrain them. It is clear that there would have been no right of action unless the tenant were a statutory tenant under s. 15. **BANKES, L.J.**, there said ([1921] 1 K.B. at p. 58):

A "It is, however, clear that in all the Rent Restriction Acts the expression
'tenant' has been used in a special and peculiar sense, as including a person
who might be described as an ex-tenant, someone whose occupation had
commenced as tenant and who had continued in occupation without any
legal right to do so except possibly such as the Acts themselves conferred upon
him. The respondent, therefore, on the coming into operation of the new
B Act was a tenant within the meaning of that expression in the Act, and as the
Act for the first time included business premises within its protection the
premises were not excluded on the ground that they were business premises
only."

C Later in his judgment he expressed the view that the tenant was a person remain-
ing in possession by virtue of the provisions of the Act. SCRUTTON, L.J., said the
same thing. That decision is binding upon this court, but even without it I should
have taken the same view.

D The third point is whether the defendant was guilty of a wrongful act for which
the plaintiffs are entitled to damages. If I am right on the second point, of course,
the plaintiffs were entitled to some damages. The learned judge was, however,
not at all justified in awarding £60 damages, for four months dispossession on
a rental of £8, there having been no evidence on any special damage, nor of any
wrongdoing on the part of the defendant. I think that £10 was ample and even
more than ample damages.

E **SCRUTTON, L.J.**—I agree. But for hearing the argument, I should have
thought the tenants' first point was unarguable, and having heard it I still think it
is unarguable. It is that the Act applies only to continuing tenancies and not to
tenancies for a fixed term. That appears to me to involve reading into s. 12 (2) the
words "except where the letting is for a fixed term." I do not see my way to
inserting those words. The other sections which have been referred to by
WARRINGTON, L.J., make it quite plain that no such limitation ought to be
imposed on the sub-section.

F As to the second point it was said that the Act did not destroy the common law
right of the landlord to enter, but if he gets in peaceably he is all right. It is that
argument that as a member of the court in *Remon v. City of London Real Property*
Co., Ltd. (1) I listened to, and in my view we decided against it. It is true that in
that case the landlord had not obtained an order for possession under s. 5 of the
Act, and here he had. But the object of the Act was to fetter landlords and take
G away their common law rights, and until a judgment was obtained against him, a
tenant stayed on, not as a trespasser, but as a statutory tenant, even against the
will of the landlord. If the words of BANKES, L.J., and myself in *Remon's Case*
(1) which cover this point were obiter they may as well be repeated and affirmed.

H As to damages, in cases of high-handed or insulting conduct exemplary damages
have been awarded and allowed to stand by the Court of Appeal. But here I
respectfully adopt the view of BOWEN, L.J., in *Whitham v. Kershaw* (2) that where
there are no aggravating circumstances the damages awarded should be limited to
the actual damages proved. The plaintiffs here have not proved any special
damage, and, in my view, £10 at the outside would cover the whole of the damages
suffered.

Order varied.

Solicitors: R. H. Behrend & Co.; W. Ewart Craigen.

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

HOLT AND OTHERS v. MARKHAM

[COURT OF APPEAL (Bankes, Warrington and Scrutton, L.JJ.), December 8, 11, 12, 1922]

[Reported [1923] 1 K.B. 504; 92 L.J.K.B. 406; 128 L.T. 719;
67 Sol. Jo. 314]

Estoppel—Estoppel in pais—Estoppel by representation—Inaccurate representation that defendant entitled to sum paid to him—Lapse of time sufficient for mistakes to be detected and rectified—No contribution by defendant to mistake—Right to recover overpayment.

Mistake—Mistake of law—Misconstruction of orders and regulations—Plaintiff possessing means to ascertain mistake alleged by him—Mistake by agent—Right of agent to maintain action for recovery.

The defendant, an officer in the Royal Air Force, having in 1914 been placed on the Emergency List of the Royal Navy, was entitled at the end of the war of 1914–1918 to a gratuity of a certain amount. Officers who had not been on the Emergency List were entitled to a gratuity on a higher scale. On Sept. 18, 1919, in ignorance of the fact that the defendant had been on the Emergency List and misapplying various Orders relating to the matter, the plaintiffs, Royal Air Force bankers and agents, paid to the defendant a gratuity larger than that to which he was entitled. In February, 1921, the plaintiffs wrote to the defendant asking him to repay the difference between the gratuity which had been paid to him and that to which he was entitled, but basing that request on a ground which was inaccurate. The defendant, in reply, pointed out the inaccuracy, and heard no more from the plaintiffs until April, 1921, when they again demanded the return of the overpayment, the ground on which it was an overpayment then being stated correctly. By that time the defendant had spent the whole or most of the gratuity and was unable to repay it. In an action by the plaintiffs to recover the amount of the difference as having been paid under a mistake of fact,

Held: (i) the mistake of the plaintiffs was one partly of fact, but also of the misconstruction of a number of Orders and regulations in the special circumstances of the case, and, therefore, was a mistake rather of law than of fact; (ii) the plaintiffs had represented to the defendant that he was entitled to the sum of money which they had paid him, and, after a lapse of time sufficient for mistakes to be detected and rectified, the defendant, who had done nothing to contribute to the plaintiffs' mistake, had acted on that representation and had spent the money, and, therefore, the plaintiffs were estopped from maintaining their claim.

Per SCRUTTON, L.J.: (i) the fact that the plaintiffs had in their possession the means of ascertaining the fact as to which they said they were mistaken was irrelevant if, in truth, they were ignorant of the fact; (ii) the fact that the plaintiffs were agents acting for a principal would not have prevented them from recovering from the defendant if otherwise they had succeeded, there being sufficient privity between the parties to allow of an action for money had and received being brought.

Notes. Distinguished: *Reckitt v. Barnett, Pembroke and Slater* (1927), 44 T.L.R. 63. Considered: *Weld-Blundell v. Synott*, [1940] 2 All E.R. 580. Referred to: *Ord v. Ord*, [1923] 2 K.B. 432; *R. E. Jones, Ltd. v. Waring and Gillow, Ltd.*, [1926] All E.R. Rep. 36; *British and North European Bank v. Zalstein*, [1927] All E.R. Rep. 556; *Home and Colonial Insurance Co. v. London Guarantee and Accident Co.* (1928), 45 T.L.R. 134; *Marconi's Wireless Telegraph Co. v. Newman*, [1930] 2 K.B. 292; *Lever Bros., Ltd. v. Bell*, [1931] 1 K.B. 557; *Anglo-Scottish Beet Sugar Corp., Ltd. v. Spalding U.D.C.*, [1937] 3 All E.R. 335; *Larner v. L.C.C.*, [1949] 1 All E.R. 964.

- A As to estoppel in pais see 15 HALSBURY'S LAWS (3rd Edn.) 223 et seq., and as to the recovery of money paid under a mistake of fact see *ibid.*, vol. 26, p. 921 et seq. For cases see 21 DIGEST 287 et seq., and 35 DIGEST 147, et seq.

Cases referred to :

- (1) *Skyring v. Greenwood* (1825), 4 B. & C. 281; 6 Dow. & Ry. K.B. 401; 107 E.R. 1064; 21 Digest 338, 1294.
- B (2) *Sadler v. Evans* (1766), 4 Burt. 1984; 98 E.R. 34; 12 Digest (Repl.) 606, 4685.
- (3) *Baylis v. Bishop of London*, [1913] 1 Ch. 127; 82 L.J.Ch. 61; 107 L.T. 730; 29 T.L.R. 59; 57 Sol. Jo. 96, C.A.; 35 Digest 156, 526.
- (4) *Sinclair v. Brougham*, [1914] A.C. 398; 83 L.J.Ch. 465; 111 L.T. 1; 30 T.L.R. 315; 58 Sol. Jo. 302, H.L.; 35 Digest 167, 8.
- C (5) *Standish v. Ross* (1849), 3 Exch. 527; 19 L.J.Ex. 185; 12 L.T.O.S. 495; 13 J.P. 269; 35 Digest 158, 541.
- (6) *Kelly v. Solari* (1841), 9 M. & W. 54; 11 L.J.Ex. 10; 6 Jur. 107; 152 E.R. 24; 35 Digest 151, 487.
- (7) *Milnes v. Duncan* (1827), 6 B. & C. 671; 9 Dow. & Ry. K.B. 731; 5 L.J.O.S.K.B. 239; 108 E.R. 598; 35 Digest 154, 515.
- D (8) *Bell v. Gardiner* (1842), 4 Man. & G. 11; 1 Dowl. N.S. 683; 4 Scott, N.R. 621; 11 L.J.C.P. 195; 134 E.R. 5; 35 Digest 121, 235.
- (9) *Brownlie v. Campbell* (1880), 5 App. Cas. 925, H.L.; 35 Digest 123, 249.
- (10) *Deutsche Bank (London Agency) v. Beriro & Co.* (1895), 73 L.T. 669; 12 T.L.R. 106; 1 Com. Cas. 255, C.A.; 21 Digest 313, 1154.
- E (11) *Colonial Bank v. Exchange Bank of Yarmouth, Nova Scotia* (1885), 11 App. Cas. 84; 54 L.T. 256; 34 W.R. 417; sub nom. *Colonial Bank v. Bank of Nova Scotia*, 55 L.J.P.C. 14, P.C.; 35 Digest 156, 524.

Appeal by the plaintiffs from an order in an action tried by LUSH, J., without a jury.

- The plaintiffs were army agents and bankers, and in February, 1918, they were appointed by the Air Council as their agents for the issue of pay and allowances to officers of the Royal Air Force. In the action they sought to recover a sum of money alleged to have been paid to the defendant under a mistake of fact in excess of the amount of the gratuity due to him. LUSH, J., held that the case fell within the principle of *Skyring v. Greenwood* (1), and gave judgment for the defendant. The plaintiffs appealed.

- G *Holman Gregory, K.C.* and *Tindale Davis* for the plaintiffs.
Douglas Young (Sir Malcolm Macnaghten, K.C., with him) for the defendant.

- BANKES, L.J.**—This is an appeal from a judgment of LUSH, J., in a case in which the plaintiffs seek to recover a substantial sum of money from the defendant upon the ground that the money was paid to him under a mistake of fact. In order to decide this question it seems to me that there are four matters which have to be enquired into: (i) Whether there was any mistake at all with regard to the position of the defendant; (ii) whether, assuming there was a mistake, the plaintiffs paid the money acting under a mistake; (iii) assuming there was a mistake, whether it was a mistake of fact or a mistake of law; and (iv) whether there are circumstances which render it inequitable that the defendant should be asked to pay the money back. The position of the defendant under the various regulations in force during the war [of 1914–18] seems to me to be one of very considerable difficulty, in the sense that it is difficult to ascertain exactly what was the regulation which applied to his case at any particular moment during his service. I will try, first of all, to state the facts and then to call attention to the regulations which appear to apply.

The defendant joined the Royal Navy in 1887 as an engineer cadet; from 1892 to 1900 he served as an engineer lieutenant, and he resigned his commission in 1900.

In 1913, at his own request, he was placed on the Emergency List, where he became entitled, on being called up for active service, to a bonus of 25 per cent. upon his pay. In August, 1914, he was not called up in the ordinary sense, but he appears to have communicated with the Air Department of the Admiralty, offering his services, and on Aug. 20 he was given a temporary commission in the Royal Navy, being attached to the Air Service. The first point that was taken on behalf of the defendant was this. It was said that in these circumstances he was not on the Emergency List in the sense that his pay and gratuities were to be ascertained merely by reference to his position on the Emergency List, but that he had received a commission as a temporary officer, and whether he was or was not on the Emergency List, he was entitled to such benefits as the regulations give to a temporary officer. Instead, therefore, of its being a mistake to have treated him as a temporary officer, instead of as an officer on the Emergency List, the fact was that it was no mistake at all. I will deal with that presently. The plaintiff joined the Royal Naval Service, where he remained until he received a commission in the Royal Air Force on Apr. 1, 1918. His commission in the Royal Air Force was in this form. It is headed :

"George R. I. Temporary commission issued to an officer of the naval or military forces attached or lent to or seconded for service with, the Royal Air Force, while so attached, lent or seconded, subject to the special provisions of the Air Force Act relative to such officers. We, reposing especial trust and confidence in your loyalty, courage and good conduct, do by these presents constitute and appoint you to be an officer in our Royal Air Force from the 1st day of April, 1918. You are, therefore, carefully and diligently to discharge your duty as such in the rank of major."

Therefore, from April 1, 1918, he was a temporary officer in the Air Force, and he remained acting under that commission but with some increase of rank, until he left at or after the termination of the war.

What was his position under the regulations during the period from the date of his joining up in 1914 to the time when he retired in 1920? It seems to me that as regards pay and gratuity he came under three separate sets of regulations which applied during three separate periods of his service. For the first period, namely, during the time that he was in the Royal Naval Air Service, he was entitled, as being on the Emergency List, to 25 per cent. addition to his pay, and he was entitled under the Admiralty Order 921 of 1919 to thirty-one days' pay for every year's service or part of a year's service. That was his position so long as he remained in the Royal Naval Air Service. As I have just pointed out, he was gazetted an officer in the Royal Air Force on Apr. 1, 1918. At that time there was a temporary order in force applying to officers in the Air Force which it was intended should be superseded by some permanent order. That temporary order, which is dated Mar. 27, 1918, provided that the existing codes of pay and allowances for the Royal Navy and Army were abrogated for the personnel of the Air Force coming from those services, except in so far as their vested rights were reserved under the Air Force Constitution Act, 1917. The effect of that order, as I read it, is to apply Order 497 of the Royal Warrant, 1914, to the defendant until some further order was made to fix permanently the rates of pay of the Air Force. Order 497 deals with the officers employed under the conditions of Order 496, which applies to persons called up in cases of emergency, but it does not refer at all to persons on the Emergency List in the sense of being persons who are covered by the Admiralty Orders to which I have referred, because this is an army Order. It provides that if a man has served the full period of his engagement or of the emergency in respect of which he was employed, he was to be entitled, on the cessation of such employment, to a gratuity. There are two classes with reference to gratuity. One of them (a) applies in the case of an officer who retires on retired pay and is entitled to a gratuity of thirty-one days' pay for every year

A of service, or any part of a year; and (b) applies in the case of any other officer, and he is entitled to 124 days' pay for the first year of service or any part of a year, and to sixty-two days' pay for each subsequent year of service or part of a year. When it came to be ascertained what the defendant's gratuity was, the plaintiffs dealt with his case as being one to which (b) applied, and in those circumstances they treated him as being an officer who was entitled to the gratuity indicated under (b) rather than that indicated under (a). It seems to me quite plain that for a certain period of his service, that is to say, from Apr. 1, 1918, when he was gazetted into the Royal Air Force, until the passing of Order 263 on Feb. 2, 1919, he did come under this order, and under this order only, and that was by reason of the provisions of the Air Force Order as to Air service pay, which was passed on Mar. 27, 1918, and to which I have referred.

C The next step was that the Admiralty made an Order which provided that, so far as naval officers who were on the Emergency List were concerned, their gratuity was to be reckoned on the basis of thirty-one days' pay for every year's service or part of a year's service. The Air Ministry, by their weekly Order No. 263, dated Feb. 2, 1919, provided that:

D "All officers on the retired or Emergency Lists, Royal Navy and Royal Marines, employed during the war, and transferred or attached to the Air Force, will receive gratuity at the rate of thirty-one days' pay for each year or part of a year, whether served with the Naval Forces or the Air Force."

E What was the defendant's position at the time when this order was passed? If he had been treated as being on the Emergency List, he would have been entitled to his 25 per cent. bonus on his salary, but from the moment he joined the Air Force he was not allowed that, and, therefore, the authorities were not treating him as a person upon the Emergency List. If he was not effectively on the Emergency List, it seems to me that it is very difficult for a government department, or anyone else, to say to him: "You are not on the Emergency List in the sense that you are not entitled to receive emergency pay, but you are on the emergency list when we come to consider what your gratuity is to be." So far as the material dates are concerned, that was the position with reference to the defendant's service, and those are the regulations which were in force governing his rates of pay and his right to gratuity. The only remaining reference that I need make is to the Air Force (Constitution) Act, 1917, which created the Air Force as a separate force and gave to His Majesty, by order signified under the hand of a Secretary of State, power "to make orders with respect to the government, discipline, pay, allowances, and pensions of the Air Force." Section 3 (4) of that Act provided:

H "Where any person is attached to the Air Force under this section, the fact that he is so attached shall not affect any right to any pay, pension, gratuity, retired or half-pay, or such decoration or reward as aforesaid, already earned by him in that branch of His Majesty's naval or military forces to which he belonged at the date on which he was so attached. . . ."

I The defendant certainly had the right to 25 per cent. on his pay, if he was to be treated as being on the Emergency List, although he had a temporary commission; but, on the other hand, if they were not going to treat him as being on the Emergency List because he had a temporary commission, then he was entitled, when his right to a gratuity came to be considered, to be treated as a temporary officer, and to ignore the fact which the authorities themselves had ignored, that he was also on the Emergency List.

We come to what happened in reference to the calculation of the gratuity when the defendant's service terminated. He was not demobilised until March, 1920; but under Order 258, he was entitled to his gratuity as from Aug. 3, 1919. A form

was issued by the Royal Air Force to all officers, including the defendant, which is headed :

"Application for gratuity by an officer holding a temporary commission who is serving with the Royal Air Force on Aug. 4, 1919, in accordance with A.M.W.O. . . . of 1919. Part. 1. To be completed by commanding officer."

The defendant was himself, at the time, a commanding officer, but he filled up the form and got another commanding officer to sign it. He gives his name and his rank of major, late acting lieutenant-colonel, dépôt commander, and so forth. Then he gives the date of his first appointment to a commission as April 1, 1892, when he was appointed engineer-lieutenant. Then he has got in brackets "Aug. 17, 1914, Royal Naval Air Service," indicating that he had been transferred from his first position in the Royal Navy, and had received his first commission in the Royal Naval Air Service on Aug. 17, 1914. He gives his regiment or corps as "Royal Navy," and then, on the back of the form, he certifies that :

"The foregoing particulars are correct to the best of my knowledge and belief, and that any excess payments based thereon afterwards discovered will be refunded by me."

The only statements he had made upon which anybody could base anything were both absolutely correct, namely, that the date of his first appointment to a commission was April 1, 1892, and, in brackets, "Aug. 17, 1914, Royal Naval Air Service." This document also asks the officer how he would like his gratuity to be paid, and it gives him the option of taking part in money and part in war savings certificates. The defendant wrote on Aug. 25, 1919, to say that he wished to receive two-thirds of his gratuity in cash and the remainder in war savings certificates. There is a space which is to be completed by the agents, and in that portion of the form the agents have to fill up the length of service and the number of days' pay to which the applicant would be entitled by way of gratuity. Messrs. Holt did, in fact, complete it in this way: "Service from 17.8.14 to Aug. 3, 1919, 372 days at 40s. per day, £744." The 372 days is arrived at by treating the defendant as coming within art. 497 (b) of the Royal Warrant, and, therefore, entitled to 124 days' pay for the first year of service, and sixty-two days' pay for each of four remaining years. That amount was, in fact, paid to the defendant, partly in cash and partly in war savings certificates on Sept. 18, 1919. The exact amount he received was £248 in war savings certificates and £496 in cash, making a total of £744.

When a claim is put forward that a payment has been made under a mistake of fact, it is very material to ascertain what in fact happened. One would assume that persons in the position of the plaintiffs who desired to claim money back on the ground that they had paid it under a mistake of fact, would come and make a case somewhat of this kind: "We were quite well aware of all the regulations which had been made, and we were quite well aware of the regulations that applied to an officer on the Emergency List, and that he was only entitled to thirty-one days per year of his service, and we made a mistake in thinking that the defendant was anything but an officer on the Emergency List in treating him as a person coming under art. 497 (b). Therefore, we ought to have the money back." But there is absolutely no evidence of that kind forthcoming. At the trial there was no evidence from the person who made up this claim, and for all that appeared he might have been well aware of all the regulations and might have sat down and tried to think out what the defendant's position was in this confusing state of things and have come to the conclusion that he was entitled to gratuity under art. 497 (b). If that was the state of things, there was no mistake of fact at all. If it was a mistake at all, it was one of law. But now they have discovered the person who, in fact, is said to have made up this return, and he does not give any evidence of that kind at all. He does not say

- A that he was not well aware that the defendant was on the Emergency List, or that he did not consider it quite immaterial, and applying his brains to the best of his ability to this tangle of regulations, he thought that the defendant was entitled to £744. He comes and makes an affidavit to the effect that he made a mistake in that he did not appreciate that one of the items in the return, which it was his duty to check, had not been properly checked beforehand and that he
- B ought to have sent the document for verification, in which case some information might have turned up which might have caused somebody to take a different view. That is the beginning and the end of the affidavit. What the witness says (and says perfectly truly, I have no doubt) is that if he had known all that he knows now about these regulations and that the defendant was on the Emergency List, and if he had realised that there was a regulation definitely applying to his case
- C he would not have given him as large a gratuity as he did in fact allow. I accept that, but when one reads the correspondence it seems to me to be manifestly clear that there never was any mistake of fact at all in the sense in which the law understands that expression, because I think it is plain from the correspondence that the plaintiffs did not realise when considering the defendant's position that Order 263 had any application at all to his case, or that the fact that
- D he had been on the Emergency List, and was possibly, in a sense, still on that list (although he had not been treated as being on the Emergency List) had any relevance in the matter. This correspondence seems to me to be extremely material, and it represents the plaintiffs' view at the time. It sets out, I think, as plainly as it can be set out that this is a case where people were acting under a misapprehension as to the application of these confusing orders to the peculiar
- E position of the defendant, and that it was not a case of acting under a mistake of fact at all.

- [HIS LORDSHIP read certain of the correspondence which had been put in evidence in the case, and continued:] The position, therefore, is this. The plaintiffs have certainly to establish—the onus of proof being upon them—three points: Was there a mistake of fact? Was the defendant, although his name may have been
- F on the Emergency List, in fact on the Emergency List in the sense that he was limited to the gratuity allowed to persons on the Emergency List because he had no other position in His Majesty's forces? Or is it true to say that, although his name might have been on the Emergency List, for all practical purposes it was off the Emergency List for a considerable time and he was treated as being a person who was not entitled to the benefits of the Emergency List? If that is
- G true, there is no mistake at all about his position; he was a temporary officer not to be treated for this purpose as being on the Emergency List. On that point the plaintiffs have failed to satisfy me that that was his real position in all the circumstances of the case. The next thing is: Did they act under a mistake? I do not think they did. If it was a mistake, was it a mistake of fact? I
- H feel confident it was not. It is a case of misapplication or failure to apply what is now said to be the true construction of these regulations to the defendant's case. Lastly there is the question whether it is inequitable to ask the defendant to pay the money back. I need not go into the authorities about that, but there is the judgment of BAYLEY, J., to which we have been referred in *Skyring v. Greenwood* (1) and which, I think, applies directly to the defendant's case
- I because it does appear that for some considerable time he was left under the impression that at any rate, although there had been some question about his position, the storm had blown over. He then parted with his war savings certificates, and, he having done that, it does seem to me that he has altered his position for the worse as a result of what was said to be a mistake in the plaintiffs' office. In those circumstances, although upon somewhat different grounds, I agree with the result arrived at by LUSH, J., and I think that this appeal must be dismissed.

WARRINGTON, L.J.—I am of the same opinion. The plaintiffs' action is brought for the recovery of money alleged by them to have been paid to the defendant under a mistake of fact. They made that payment as the agents for the Air Ministry. In order to establish their case, they must establish (for the onus is upon them) that the money which they seek to recover was paid under a mistake of fact and, further, their claim may be defeated if the defendant is able to establish that by or through their conduct he has put himself into such a position that it would now be inequitable on their part to require the repayment of the money which they have paid. A B

The first question then is: Have they established that this money was paid under a mistake of fact? In my opinion, they have not. It seems to me, when the position of the defendant is considered and the various and conflicting regulations which might or might not be applicable to his case are also considered, that the mistake (if there is any mistake at all, as to which I am by no means satisfied) was not a mistake of fact, but was a mistake arising from the misapplication of the various Orders (some of which may have applied to his case, and some others may not), and from the misconstruction of the orders, having regard to the special circumstances of this case. That the defendant's case was a special case is evidenced (if any evidence were required) by the letter from the Admiralty under which the claim was ultimately made, namely, the letter dated May 15, 1922. That letter shows that they regarded the defendant as being in a special position under the regulations, and as one who should be treated as being on the Emergency List for part of his service, and as an officer holding an ordinary temporary commission for the rest of his service. How it can be said that the mere fact that he was an officer previously on the Emergency List (a fact which it was said was not considered at all) had given rise to a mistake of fact, I cannot understand. It seems to me, therefore, that on the facts of this case when they are carefully examined, there was no mistake of fact at all. It was in reality a mistake—if there was a mistake—arising from the doubt whether, in the circumstances of the particular case, the defendant was to be treated as being entitled to his gratuity under one of two articles, 497 (a) or 497 (b), or, as it was ultimately put by the plaintiffs, under Air Ministry weekly order No. 263 of 1919. C D E F

Assume, however, for the moment that the payment was made under a mistake of fact, we then come to the further question whether the conduct of the plaintiffs is such as to render it inequitable to give effect to the relief which they are claiming. In my opinion, it was. I rely particularly upon the letter which they wrote to the defendant on Feb. 2, 1921, and their subsequent proceedings. In that letter in which they ask him to repay the difference between the £744 which they paid, and the £310 to which they then said he was entitled, they based their claim entirely on the fact that he was a retired officer, and, therefore, as such entitled to gratuity under art. 497 (a) and not under art. 497 (b), under which they had calculated it. The point is that they based it entirely on the fact that he was an officer on retired pay. He answered that letter on Feb. 7, 1921, by saying, truly, that he was not a retired officer, or on retired pay. From that time until April he received no intimation that his answer was not satisfactory; no further communication was made to him until the plaintiffs made their demand upon him on April 18, after having received the letter of the Air Ministry of April 14 referring to weekly order No. 263 of 1919, and stating that it was under that, and under that alone, that he was entitled to a gratuity, which was only thirty-one days' pay per year for the whole period of his service. Meanwhile the defendant was entitled to conclude, I think, that his answer to the only suggestion of misstatement that had been made to him, was complete and was accepted. During that period he spent either the whole, or, at any rate, a large part, of the gratuity which had been paid to him, and he was not in a position to repay it. In my judgment, the plaintiffs had, by their conduct in February, put the defendant G H I

- A into the position of thinking that there was no more question about the amount of his gratuity, and left him at liberty to do what he pleased with it. He availed himself of that liberty and they are now estopped from asking that he shall repay it. It is on these grounds—first, that they have not established that there was any mistake of fact, and secondly, that, if they have established there was such a mistake, they would be estopped from setting it up—that I think the
- B judgment of LUSH, J., was correct, and that this appeal should be dismissed.

SCRUTTON, L.J.—This is a troublesome instance of a particularly troublesome class of action. It is an action for money had and received to the plaintiffs' use based upon payment under a mistake of fact. LORD MANSFIELD, with no doubt a praiseworthy desire to free the courts from the fetters of rules of law and

C enable them to do what they thought to be right in each case, said in *Sadler v. Evans* (2):

"It is a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money. The defence is an equity that will rebut the action."

- D In my respectful view, when that great judge used that language he obscured the whole action, and ever since the whole history of this particular class of action has been what I may call a history of well meaning sloppiness of thought. I do not propose to repeat the very pungent criticisms which LORD SUMNER has made upon that now discarded view of LORD MANSFIELD either in *Baylis v. Bishop of London* (3), or in *Sinclair v. Brougham* (4), but I, with respect, entirely agree
- E with what he says in the former case ([1913] 1 Ch. at p. 140):

"To ask what course would be ex aequo et bono to both sides never was a very precise guide, and as a working rule it has long since been buried in *Standish v. Ross* (5) and *Kelly v. Solari* (6). Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man.'"

- F I also agree with the similar passage in *Sinclair v. Brougham* (4) ([1914] A.C. at p. 456):

"There is now no ground left for suggesting as 'recognisable' equity the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer."

- G I also agree with LORD SUMNER's view that it is very hard to reduce to one common formula the conditions under which the law will imply a promise to repay money received to the plaintiff's use. I do not think the time has come in this case to do it. There is something to be said for the view that payment under a mistake of fact is not payment at all, and, therefore, capable of rectification in cases
- H where the defendant also receives under a mistake of fact, or where he has done anything to contribute to a mistake of fact, but that the position is otherwise where the defendant is under no mistake of fact and has done nothing to contribute to the plaintiffs' mistake of fact and does not appreciate that the payer is making the payment under a mistake of fact. However, the time has not come to settle conclusively what is the one formula which embraces all the cases where the
- I common law would have allowed an action for money had and received in consequence of a payment under mistake of fact.

I personally propose to decide this case on one main ground, although I have also a view which would be sufficient to decide it on another. I think this is a simple case of estoppel. In this case the plaintiffs have, in my view, represented to the defendant that he is entitled to a sum of money as a gratuity and have paid it, and after a lapse of time sufficient to enable mistakes to be detected and rectified, the defendant has acted on the representation and has spent the money before

any claim on him for return has been made. The defendant has done nothing to contribute to the mistake, if there was a mistake, under which the plaintiffs have paid. That seems to me to be a simple application of the rules of estoppel. I notice that in *Skyring v. Greenwood* (1) BAYLEY, J., took very much the same view. He said (4 B. & C. at p. 290):

"It would have been a good defence to that action to say that the defendant had voluntarily advanced money to the deceased when he asked no credit, and that they had told him that they had received the money for his use, and that on the faith of their representation he had drawn it out of their hands as his own money, and had been induced to spend it as such; and if they could not recover the money back, neither ought they now to be allowed to retain other monies belonging to the deceased upon the ground that they have paid or allowed him in account money which they had not in fact received to his use, but which they suffered him to consider his own for a long period of time."

That appears to me to state in other words the principle of estoppel I have been endeavouring to state. I quite appreciate that BAYLEY, J., in an action for money had and received, is not a very safe guide. He was inclined for a very considerable time to think that if one had the means of knowledge, although one did not know, the money was not paid under a mistake of fact, and he said so in *Milnes v. Duncan* (7); but that view has been distinctly overruled by the courts, first in *Bell v. Gardiner* (8), and later by LORD BLACKBURN in *Brownlie v. Campbell* (9). I quite appreciate that all BAYLEY, J., said about an action for money had and received is not to be followed, but it appears to me that the courts have subsequently acted on that view of BAYLEY, J.'s, particularly in the case to which we were referred of *Deutsche Bank (London Agency) v. Beriro & Co.* (10). There money was paid by the plaintiffs under a mistake of fact; information that it had been paid was given, whereupon the person to whom it was paid acted on it and paid the money over to another; and it was held that after that no claim could successfully be made by the plaintiffs for the money which they had paid away, acting as the payment to them on the ordinary principle of estoppel. That is a decision in the Court of Appeal, and it seems to me to adopt the same line of reasoning as that adopted by BAYLEY, J., in *Skyring v. Greenwood* (1). In the present case the payment was made in September, 1919, upon a form in which the defendant filled up correctly all the question that he was asked. It was not until some sixteen or seventeen months afterwards—in February, 1921—that any suggestion was made to him that a mistake had been made. Then the suggestion was made upon an entirely wrong ground, and the defendant at once said: "The fact that you allege is not the fact." It was not the fact. The matter then went on for another three months before any claim was made upon the lines now put forward, so that the defendant had had the money for twenty months at a time when all officers, it is common knowledge, wanted money badly, before any suggestion was made to him that the money was paid under the mistake of fact which is now put forward.

It appears to me that those facts bring the case well within the principle I have stated. There is a representation that the money is due and no counter-claim, or no counter-representation, until long after the period when, with ordinary diligence, the original mistake might have been corrected. I, therefore, rest my affirmance of the judgment below upon the ground that this is a simple application of the principle of estoppel to the action for money had and received. But I desire further to say that I am not at all satisfied that there was, in this case, a mistake of fact in the sense in which the term is used in the cases where that great lawyer, PARKE, B., expressed the principle in *Kelly v. Solari* (6). He expressed it in this way:

"I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle

A the other to money, but which fact is untrue, and the money would not have been paid if it had been known to the payee that the fact was untrue, an action will lie to recover it back."

What are the facts in this case? We now know by the admissions in the affidavit all that can be said as to the mistake in the plaintiffs' office. A temporary clerk, who is none the worse because he is a temporary clerk, had to deal with a form put before him as a basis for his calculation of the defendant's gratuity, and the mistake he made was that he thought that the signature certified two periods of employment, one in the Royal Naval Air Service and the other in the Air Force, when in fact it only certified one. The form, as it is drawn up (and we have looked at the original), looks as if it did certify both; the ink is so put as to suggest that both are certified, and the mistake he made was that he did not send the first period of service of the Royal Navy for certification. The entry said nothing whatever about in what capacity the defendant was serving; the form that was sent to be certified was that he had been paid between so many dates, and that was true. I do not think that at that time, whatever the position is now, anybody appreciated anything about the position on the Emergency List. I am not repeating the facts which have been stated by my Lord, but the man on the Emergency List was a very rare person; we have been furnished with a very extensive list of names from the Navy—a list that contains hundreds of names. I have looked through it and the defendant here is the only officer of those hundreds of names who was on the Emergency List. I am not at all satisfied that the mistake which the clerk, in fact, made would have resulted, if he had not made the mistake, in its being discovered that the man was on the Emergency List, and to its being appreciated, as a matter of construction of the very complicated orders of various sorts to which my Lord has referred, that it made a difference to his gratuity as calculated. I, therefore, come to the conclusion that the mistake here is one partly of fact and partly of construction, which now is seen to affect the question whether the defendant is entitled to the money. I use that, therefore, as a second reason for affirming the judgment below.

I desire to say just one word as to two other matters that have been argued. I do not think it is of any relevance that the plaintiffs had in their possession the means of ascertaining the fact as to which they say they were mistaken if, in truth, they were ignorant of the fact. I think, since *Kelly v. Solari* (6), that has been decided. In the second place, I do not think that the fact that the plaintiffs are agents acting for a principal in any way prevents them from recovering from the person to whom they have paid. There is sufficient privity to allow the action for money had and received to be brought, and I think that view is confirmed by the judgment of the Privy Council in *Colonial Bank v. Exchange Bank of Yarmouth, Nova Scotia* (11). Going back to what I started with, I am not deciding this case upon any ground of conscientious holding or ex aequo et bono, or as being the right and fair thing. I think that has been successfully excluded from the action. It was always a dangerous guide. Everybody's view of what is fair and right and conscientious differs, and once one is thrown to attempt to decide not on clear principles of law, but on vague principles of morality, one merely introduces confusion into the law. For these reasons, in my view, the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Ellis, Peirs & Co.; J. B. de Fonblanque.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

LORD NORTHBOURNE v. JOHNSTON & SONS

[CHANCERY DIVISION (Sargant, J.), May 24, 25, 26, June 14, 1922]

[Reported [1922] 2 Ch. 309; 92 L.J.Ch. 12; 128 L.T. 496]

Sale of Land—Restrictive covenant—Building estate—Land sold subject to covenant—Unsold land conveyed without benefit of covenant—Assignment of benefit of covenant to successor in title to purchaser—Enforcement of covenant.

By an indenture dated June 9, 1881, trustees of the will of C.E., and S.C.J., a cestui que trust, conveyed to R.F. part of the S. estate, R.F. covenanting with the vendors that he would erect buildings on the land which he would not permit to be used inter alia as shops. By an indenture dated July 25, 1884, the trustees of the will conveyed to S.C.J. all the part of the estate remaining unsold, but the conveyance did not include the benefit of the restrictive covenants entered into by R.F. and other purchasers of the sold portions of the estate. S.C.J. died in 1890, and in due course the plaintiff became entitled to the unsold portions of the estate. By an indenture dated June 9, 1920, R.F. sold a dwelling-house on the part of the estate conveyed to him in 1881 to the defendants who proposed to convert it into a shop. By an indenture dated Feb. 2, 1921, the executor of the will of the surviving trustee of the will of C.E. assigned to the plaintiff the full benefit of all restrictive covenants contained in the conveyances of any part or parts of the estate by the trustees to purchasers of such part or parts relating to the user of premises erected thereon. In consolidated actions by the plaintiff to enforce the covenants,

Held: (i) the restrictive covenants in the conveyance of 1881 were entered into for the benefit, not of the trustees, but of S.C.J.; the fact that by the conveyance of 1884 S.C.J. became the legal owner of the unsold land could not destroy her existing equitable right to have the restrictive covenants enforced for the benefit of that land; and the indenture of Feb. 2, 1921, had the effect of re-uniting in the plaintiff as legal rights those equitable rights which S.C.J. originally possessed under the trusts of the will; (ii) it was not incumbent on the plaintiff to show, as a condition precedent to the enforcement of the covenants, first, that his predecessors in title had intended the covenants to be for the benefit of such portions of the estate as they retained, and, secondly, that it was in fact for the benefit of those portions of the estate at the time when enforcement was sought, but it was sufficient for him to show, as in fact he had shown, that the bargain was that he, as successor to the covenantees, should be protected against certain acts which were likely to prove noxious or detrimental to the building estate treated as a whole; the defendants had failed to discharge the onus which was on them of showing that the estate remaining to the plaintiff was not intended to be protected by the covenants or that the breach of the covenants could not hurt such remaining estate; and, therefore, the plaintiff was entitled to succeed.

Notes. Distinguished: *Chambers v. Randall*, [1923] 1 Ch. 149; *Re Union of London and Smith's Bank, Ltd. Conveyance*, *Miles v. Easter*, [1933] Ch. 611. Referred to: *Newton Abbot Co-operative Society, Ltd. v. Williamson and Treadgold, Ltd.*, [1952] 1 All E.R. 279.

As to restrictive covenants, see 29 HALSBURY'S LAWS (2nd Edn.) 441-454, and for cases see 40 DIGEST (Repl.) 337 et seq.

Cases referred to:

- (1) *Formby v. Barker*, [1903] 2 Ch. 539; 72 L.J.Ch. 716; 89 L.T. 249; 51 W.R. 646; 47 Sol. Jo. 690, C.A.; 40 Digest (Repl.) 333, 2727.
- (2) *L.C.C. v. Allen*, [1914] 3 K.B. 642; 83 L.J.K.B. 1695; 111 L.T. 610; 78 J.P. 449; 12 L.G.R. 1003, C.A.; 40 Digest (Repl.) 328, 2698.

- A (3) *Renals v. Cowlshaw* (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 28 W.R. 9, C.A.; 40 Digest (Repl.) 346, 2796.
- (4) *Ives v. Brown*, [1919] 2 Ch. 314; 88 L.J.Ch. 373; 122 L.T. 267; 40 Digest (Repl.) 354, 2842.
- (5) *Rogers v. Hosegood*, [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 48 W.R. 659; 16 T.L.R. 489; 44 Sol. Jo. 607, C.A.; 40 Digest (Repl.) 340, 2769.
- B

Consolidated Actions to enforce restrictive covenants in a conveyance of land.

- The plaintiff was the owner in fee simple of the unsold portions of an estate called the "Shipcote estate," near Gateshead. From 1860 onwards the executors of Cuthbert Ellison, a former owner of the estate, had been developing the estate as a building estate by the successive sales of portions thereof to builders and others on the terms that they should erect houses thereon. On each sale it was stipulated that the houses to be erected should be in accordance with plans approved by the vendor, and that certain restrictive covenants as to user should be entered into. These covenants varied slightly in different parts of the estate, but were all devoted to forming and preserving the general amenities and character of the neighbourhood as a residential neighbourhood. Cuthbert Ellison, who died in 1860, by his will in the same year, devised his real estate, which included the Shipcote estate, to the use of trustees, their heirs and assigns, upon and for such trusts, intents, and purposes as the testator's daughter, Dame Sarah Caroline James, should by deed or will appoint. By an indenture dated June 9, 1881, to which the trustees of the will and Dame Sarah James were parties, a portion of the Shipcote estate, afterwards known as No. 223, Coatsworth Road, Gateshead, was conveyed to Robert Fraser, his heirs and assigns. By that deed Mr. Fraser, for himself, his heirs, executors, administrators, and assigns, covenanted with the trustees, their heirs and assigns, that he, the said Robert Fraser, his heirs and assigns, would erect and at all times thereafter maintain, on the piece of ground conveyed by the indenture, messuages or dwelling-houses with suitable conveniences in accordance with plans, elevations, and specifications to be provided by the said Robert Fraser, his heirs and assigns, and approved by Dame S. C. James, her heirs and assigns, and would at all times thereafter use the said messuages or dwelling-houses for not more than one family, and would not at any time thereafter use or permit to be used any part of the same premises as or for a shop or manufactory, or for the sale of wine, ale, beer, or excisable liquor under certain penalties therein specified. By an indenture dated July 25, 1884, the trustees of the will conveyed to Dame Sarah James all the real estate then remaining unsold and vested in them by virtue of the residuary devise in the will. By her will in 1889, Dame Sarah James (who had in the meantime become the Baroness Northbourne, and died in January, 1890) devised her residuary real estate, which comprised such portions of the Shipcote estate as had not been previously sold, to her husband (the first Baron Northbourne), and the plaintiff (then the Honourable Walter Henry James) upon trust to pay the rents, income, and annual proceeds thereof to the first baron for his life and after his death upon trust for the plaintiff and his heirs absolutely. The testatrix appointed the first baron and the plaintiff executors of the will. The first baron died on Feb. 4, 1893, whereupon the plaintiff succeeded to the title and became absolutely entitled to the then remaining unsold portions of the estate.
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In pursuance of the covenant in the indenture of conveyance of 1881, Robert Fraser erected a dwelling-house on part of the land conveyed to him by that deed, namely, No. 223, Coatsworth Road, and, until recently, it had been used as a private dwelling-house. The defendants purchased No. 223, Coatsworth Road, it being conveyed to them by an indenture dated June 9, 1920, for the purpose of converting the house into a shop and of carrying on there a branch of the defendant's business as a stationer. Prior to the purchase, the defendants had

notice of the restrictive covenants contained in the indenture of June 9, 1881. In December, 1919, they had made an application to the plaintiff to release the covenant against using the house for the purpose of a shop, which the plaintiff refused, but they resolved to disregard that refusal, and in or about the month of August, 1920, began to convert the house, or part of it, into a shop. The plaintiff (whose title to the unsold portions of the Shipcote estate was not disputed) alleges that the conversion would be detrimental to those unsold portions and that it was objected to by the owners of plots in the neighbourhood to whom portions of the estate had been sold subject to similar covenants.

The plaintiff thereupon commenced the earlier of the two consolidated actions for the enforcement of the covenant in question. On the hearing of a motion in that action on Aug. 25, 1920, the defendants undertook to keep the matter in statu quo until judgment in that action upon the usual terms as to the plaintiff giving cross-undertaking in damages. Subsequently, the plaintiff procured the execution of an indenture dated Feb. 2, 1921, whereby Charles Ridley Carr, the surviving executor of the will of Henry Byne Carr, the survivor of those trustees and joint covenantees named in the indenture of conveyance of Jan. 9, 1881, assigned to the plaintiff the full benefit of all covenants contained in the conveyances of any part or parts of the Shipcote estate by the trustees or any of them to purchasers or grantees of such part or parts thereof respectively and entered into with the trustees or any of them by such purchasers or grantees imposing restrictions as to building, maintenance, and user in respect of the premises comprised therein. In the second action, which was started on Feb. 21, 1921, and was consolidated with the earlier action, the plaintiff claimed an injunction to restrain the defendants from using No. 223, Coatsworth Road as a shop or for any other purpose than that of a dwelling-house in breach of the covenants in the indenture of June 9, 1881. The defendants pleaded, first, that after the execution of the indenture of July 25, 1884, the land for whose benefit the restrictive covenants were imposed became severed from the contractual right under the covenant, and that the two rights were not capable of being reunited by the assignment of Feb. 2, 1921, and, secondly, that the land still belonging to the plaintiff was not land for whose benefit the restrictive covenants were imposed or was not land, at any rate, which could be damaged by the breach of the covenant, and that the plaintiff could not enforce the covenant specifically against an assign of the original grantee.

Tomlin, K.C., and H. E. Wright for the plaintiff.

Alexander Grant, K.C., and J. J. Solomon for the defendants.

Cur. adv. vult.

June 14. **SARGANT, J.**, read the following judgment. These are consolidated actions to restrain the breach of a restrictive covenant contained in an indenture of conveyance dated June 9, 1881, and made between Walter Charles James, the Rev. Henry Byne Carr, and John Clayton (the trustees) of the first part, Dame Sarah Caroline James, of the second part, and Robert Fraser, of the third part. The defendants have recently purchased and had conveyed to them a dwelling-house, No. 223, Coatsworth Road, forming part of the premises comprised in the aforesaid indenture, with notice of the indenture and of the covenants therein contained, and have without any release of the covenants, and, indeed, in face of a refusal of the plaintiff to grant any such release, proceeded to make alterations in the structure of the house for the purpose of converting it into a shop, and threatened to complete such alterations and to use the house as a shop accordingly. Their position is that, for various reasons which I will state more precisely a little later, the plaintiff is not entitled to the benefit of the covenant and cannot enforce it against them. [His Lordship referred to the system of developing the Shipcoat estate from 1860 onward, and proceeded:] On these successive sales it was always stipulated by the vendor that the houses should be in accordance with plans

A approved by the vendor and that various restrictive covenants should be entered into as to user which varied to some extent in various parts of the estate, but were aimed in general at preserving the amenities and character of the neighbourhood both for the convenience of the residents in the houses that were from time to time built, and for the beneficial development of the portions of the estate that were for the time being unsold. It is obvious that these two results are closely connected, and that while the second object might be the only one in which the vendor on each successive occasion might be directly concerned, a considerable indirect effect would ordinarily be produced on the reputation and saleability of the unsold portions of the estate for the time being by the preservation or abandonment of those amenities of the developed portions of the estate which were secured or stipulated for by the various restrictive covenants introduced on the occasion of their being built upon. The conveyance of July 25, 1884, did not contain any express assignment to the baroness of the benefit of the restrictive covenants with reference to the sold portions of the estate that had from time to time been entered into by the various purchasers thereof with the trustees.

It is admitted by the defendants that the covenant in question, though expressed as entailing a penalty, is, if enforceable at all, enforceable by way of injunction. Further, the defendants do not contest the title of the plaintiff to the unsold portion of the Shipcoat estate or the position of Charles Ridley Carr as surviving executor of the survivor of the three point covenantees. The defences of the defendants are three, which I will endeavour to state as accurately as possible. The first is that after the execution of the indenture of July 25, 1884, the land, for the benefit of which the restrictive covenants were imposed, became severed from the contractual right under the covenant, and that the two rights were not capable of being reunited by the assignment of Feb. 2, 1921. The second is that the land still belonging to the plaintiff is not land for the benefit of which the restricted covenant was imposed, or, at any rate, is not land which would be damaged by the breach of the covenants, and, accordingly, that the plaintiff cannot enforce the covenant specifically as against an assignee of the original grantee. The third is that there has been, since the imposition of the covenant, such an alteration in the neighbourhood of No. 223, Coatsworth Road, and, further, such an active participation by the plaintiff in that alteration, that the plaintiff had lost any right he might otherwise have had to the specific performance of the covenant. Of these three defences the first is obviously one of pure law, while the remaining two are defences of mixed law and fact. I will examine them in the order stated.

Counsel for the defendants, dealing with the first defence, admitted that if by the indenture of July 25, 1884, the trustees had conveyed to Lady Northbourne not only the unsold portions of the Shipcoat estate, but also the benefit of the restrictive covenants relating to the sold portions, she and those entitled under her would have been in a position to enforce these covenants so far as this defence is concerned. But he maintained that, when once the trustees had conveyed the land to Lady Northbourne without the benefit of the covenants, there was a complete and final severance; that the covenants remained in the trustees as mere covenants in gross unconnected with the protection or benefit of land and were incapable of being enforced in equity as against an assign of the covenantor: *Formby v. Barker* (1) and *L.C.C. v. Allen* (2); and that this defect could not be cured either by Lady Northbourne or her devisees joining with the trustees in an action, or by any subsequent assignment of the covenants by them or their assigns to Lady Northbourne or her devisees. In my judgment, however, this argument is unduly technical, neglects the substance of the matter, and is unsustainable. It is, of course, clear that these restrictive covenants were entered into for the benefit, not of the trustees, but of Lady Northbourn, and that they were as much trustees for her of the benefit of these covenants as of the beneficial interests in the unsold portions of the estate. If before the execution of the

conveyance of July 25, 1884, they had capriciously refused to enforce the covenants, she would have been entitled to compel them to allow her to use their names in an action for the purpose on proper terms, and she could undoubtedly, had the question arisen, have insisted on the inclusion in the conveyance to her of an express assignment of the benefit of these covenants. The circumstance that by the conveyance Lady Northbourne became the legal owner of the unsold land could not destroy her existing equitable right to have the restrictive covenants enforced for the protection of that very land, and a subsequent assignment by the trustees or their successors in title to Lady Northbourne or her devisees would merely restore matters to the position in which Lady Northbourne was throughout entitled to have them placed, and reunite, as legal rights, those equitable rights that were subsisting together originally. The cases differ widely from either of the two reported cases last referred to (*Formby v. Barker* (1), and *L.C.C. v. Allen* (2)), and appears to me to be completely covered by the reasoning in the judgment of HALL, V.-C., in *Renals v. Cowleshaw* (3), and in my own recent decision in *Ives v. Brown* (4), a case which has many points of similarity to the present one.

The second defence, if well founded, would entirely, or almost entirely, destroy at a very early date, the enforceability of the restrictive covenants or any considerable building estate that was being developed on the freehold system. When once a building plot or house had passed from the hands of the original purchasers to those of a third party, it would be incumbent on the owner of the estate to show, as a condition precedent to the enforcement of the covenant, first, that he had intended the covenant to be for the benefit of such portions of the estate as he still retained, and, secondly, that it was in fact for their benefit at the time when enforcement was sought. In the case of a building estate of any size it would be impossible to define and point out precisely those portions of it which the owner was seeking to protect or benefit by the restricted covenants on any particular plot. To enter on every sale into such a precise arrangement as in *Rogers v. Hosegood* (5), would be impracticable and absurd, and, indeed, would not produce the result required. The practical and usual course is for the vendor to impose covenants, the benefit of which will not be attached to any particular parcel of land, but will be enforceable by the vendor for the general benefit of his unsold estate for the time being. Nor do I think that the vendor must on each occasion of enforcement show that the result will, in fact, be to benefit his remaining estate. Benefit or detriment is often a question of opinion on which there may be the greatest difficulty in arriving at a clear conclusion. It is, in my judgment, sufficient for the vendor to show, at any rate in the first instance, that the bargain was that he should be protected against certain acts which were recognised as being likely to prove noxious or detrimental to his building estate treated as a whole. The covenantor, being then, in my judgment, bound at the very least to show that the estate remaining to the covenantee at the date of the action was not intended to be protected by the covenants, or that the breach of the covenants could not possibly hurt such remaining estate, the question arises whether this onus has been discharged in the present case. In my judgment, not only have the defendants failed to do so, but the evidence points the other way. It seems to me that the covenants now in question, together with the other restrictive covenants on other portions of the estate, were imposed to preserve the general character and amenities of the whole estate as a building estate, including the very considerable portions thereof which still remain unsold. Further, the non-enforcement today of these restrictive covenants on this house and the other houses already built—for it is clear that they must all stand on the same footing in this respect—would, in my judgment, seriously prejudice the reputation of the estate and the development and sale of the unsold portions of the estate. Colonel Spain, the agent for the estate, was emphatic on this point,

A and the expert witnesses for the defendants, Messrs. Johnstone and Taylor, declined to express an opinion to the contrary.

Solicitors: King, Wigg & Brightman, for Clayton & Gilson, Newcastle-on-Tyne; Charles Rogers, for Criddle, Ord & Muckle, Gateshead.

[Reported by L. MORGAN MAY, ESQ., Barrister-at-Law.]

B

C

GRAHAM v. GRAHAM

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Horridge, J.), December 5, 6, 12, 1922]

D

[Reported [1923] P. 31; 92 L.J.P. 26; 128 L.T. 639; 39 T.L.R. 139; 67 Sol. Jo. 316]

Judicial Separation—Jurisdiction—Need for respondent to be resident within the jurisdiction.

E

There is no jurisdiction in the Divorce Court to entertain a suit for judicial separation brought by a wife who is resident within the jurisdiction against a husband who is not so resident.

Notes. Distinguished: *Eustace v. Eustace*, [1923] All E.R. Rep. 281. Referred to: *Raeburn v. Raeburn* (1928), 138 L.T. 672; *Johnstone v. Johnstone*, [1929] All E.R. Rep. 566; *Forsyth v. Forsyth* [1947] 1 All E.R. 406; *De Reneville v. De Reneville*, [1948] P. 100.

F

As to the jurisdiction of the Divorce Court see 7 HALSBURY'S LAWS (3rd Edn.) 105, 106, and *ibid.*, vol. 12 pp. 213–216, 285–287. For cases see 11 DIGEST (Repl.) 466 et seq.

Cases referred to in argument:

G

(1) *Collett v. Collett* (1843), 3 Curt. 726; 2 Notes of Cases, 504; 7 Jur. 1164; 163 E.R. 881; 27 Digest (Repl.) 468, 4031.

(2) *Armytage v. Armytage*, [1898] P. 178; 67 L.J.P. 90; 78 L.T. 689; 14 T.L.R. 480; 11 Digest (Repl.) 475, 1052.

(3) *Anghinelli v. Anghinelli*, [1918] P. 247; 87 L.J.P. 175; 119 L.T. 227; 34 T.L.R. 438; 62 Sol. Jo. 548, C.A.; 11 Digest (Repl.) 475, 1053.

(4) *Firebrace v. Firebrace* (1878), 4 P.D. 63; 47 L.J.P.C. 41; 39 L.T. 94; 26 W.R. 617; 11 Digest (Repl.) 342, 127.

H

(5) *Niboyet v. Niboyet* (1878), 4 P.D. 1; 48 L.J.P. 1; 39 L.T. 486; 43 J.P. 140; 27 W.R. 203, C.A.; 11 Digest (Repl.) 469, 1021.

(6) *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574; Seq. & Sm. 49; 29 L.J.P. & M. 34; 1 L.T. 194; 6 Jur. N.S. 24; 8 W.R. 134; 164 E.R. 866; 11 Digest (Repl.) 471, 1025.

I

(7) *Carden v. Carden* (1837), 1 Curt. 558.

(8) *Dasent v. Dasent* (1850), 1 Rob. Eccl. 800; 7 Notes of Cases, 126; 14 L.T.O.S. 48; 13 Jur. 832; 163 E.R. 1218; 27 Digest (Repl.) 467, 4026.

(9) *Manning v. Manning* (1871), L.R. 2 P. & D. 223; 40 L.J.P. & M. 18; 24 L.T. 196; 19 W.R. 479; 11 Digest (Repl.) 475, 1051.

(10) *Donegal v. Donegal* (1821), 3 Philim. 586.

(11) *Roberts v. Brennan*, [1902] P. 143; 71 L.J.P. 74; sub nom. *Brennan (Otherwise Roberts) v. Brennan*, 86 L.T. 599; 50 W.R. 414; 18 T.L.R. 467; 11 Digest (Repl.) 478, 1068.

Also referred to in argument :

Riera v. Riera (1914), 112 L.T. 223; 59 Sol. Jo. 206; 31 T.L.R. 50.

Sottomayor v. De Barros (1877), 2 P.D. 81; 46 L.J.P. 43; 36 L.T. 746; 25 W.R. 541; reversed 3 P.D. 1; 47 L.J.P. 23; 37 L.T. 415; 26 W.R. 455, C.A.; 11 Digest (Repl.) 460, 945.

Linke (Otherwise Van Aerde) v. Van Aerde (1894), 10 T.L.R. 426; 11 Digest (Repl.) 478, 1066.

Wilnett v. Loid (1706), Holt, K.B. 603.

Brodie v. Brodie (1861), 2 Sw. & Tr. 259; 30 L.J.P.M. & A. 185; 4 L.T. 307; 9 W.R. 815; 164 E.R. 995; 11 Digest (Repl.) 472, 1026.

Le Mesurier v. Le Mesurier, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 T.L.R. 481; 11 R. 527, P.C.; 11 Digest (Repl.) 468, 1011.

Whitcomb v. Whitcomb (1840), 2 Curt. 351.

Casdagli v. Casdagli, [1919] A.C. 145; 88 L.J.P. 49; 120 L.T. 52; 35 T.L.R. 30; 63 Sol. Jo. 39, H.L.; 11 Digest (Repl.) 344, 139.

Rayment v. Rayment and Stuart, Chapman v. Chapman and Buist, [1910] P. 271; 79 L.J.P. 115; 103 L.T. 430; 26 T.L.R. 634; 53 Sol. Jo. 721; 11 Digest (Repl.) 473, 1041.

Rush v. Rush, Bailey and Primenta, [1920] P. 242; 89 L.J.P. 129; 122 L.T. 792; 36 T.L.R. 302; 64 Sol. Jo. 323, C.A.; 11 Digest (Repl.) 474, 1050.

Morse v. Morse (1829), 2 Hag. Ecc. 608.

Wife's suit for judicial separation on the ground of the cruelty of her husband, who was stated in the petition to be domiciled in Scotland.

The petition was filed on Feb. 24, 1922, and under s. 42 of the Matrimonial Causes Act, 1857, was served upon the husband in Baghdad, where he was serving as an officer in the Indian Medical Service. An appearance was entered on his behalf under protest, and an act on petition was filed on June 14, 1922, alleging that there was no jurisdiction in the court to entertain the suit. An answer and reply put the question of jurisdiction in issue. Affidavits of the parties were filed, from which it appeared that they were married in British India on Feb. 24, 1912, and resided together at various places in India and Egypt, and, between July, 1920, and January, 1921, for short periods in England. From Jan. 23 to 28, 1921, they were together at Mentone in France, but since then had not been together, the husband having been employed on service in Mesopotamia, while the wife returned to England and resided there.

Bayford, K.C. (with him *D. Cotes-Preedy*) for the respondent, the husband.
J. B. Matthews, K.C. (with him *Acton Pile*), for the petitioner.

Cur. adv. vult.

Dec. 12. **HORRIDGE, J.**, read a judgment, in which, after stating the facts, he said: It was not contended before me that the respondent was resident in England at the time of the petition, or indeed that he had been in England at any time after Jan. 20, 1921, when he left for Mentone, but it was argued that the fact of the petitioner herself being resident in England entitled her to invoke the protection of the court, no matter where her husband was resident.

By s. 22 of the Matrimonial Causes Act, 1857 [replaced by Supreme Court of Judicature (Consolidation) Act, 1925, s. 32, s. 103 (1)], it is provided that in all suits and proceedings, other than proceedings to dissolve any marriage, the court shall proceed and act and give relief on principles and rules which, in the opinion of the court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief. It becomes necessary to consider, having regard to the above position, the matters which were in the ecclesiastical courts requisite to enable the court to grant a decree of divorce a mensâ et thoro.

The first matter to be looked at is the Statute of Citations (23 Hen. 8, c. 9). This statute provided that no manner of person shall be cited before any of the

A ecclesiastical courts mentioned out of the diocese where the person cited should be inhabiting and dwelling at the time of awarding or going forth of the citation. It was suggested on behalf of the petitioner that the passing of this statute showed there must have been jurisdiction prior to the statute to cite parties not resident within the jurisdiction. This, however, was not the view taken by DR. LUSHINGTON in *Collett v. Collett* (1), where he says (3 Curt. at p. 729) :

B “The court always looks on a question of jurisdiction to the statute of Hen. 8, c. 9, which was passed in affirmance of the common law and by which this court, among others, has local limits assigned to it.”

By the Matrimonial Causes Act, 1857, ss. 41, 42, this Act of Henry VIII, so far as regards service outside the jurisdiction of the particular court has been nullified, as any proceedings in the Divorce Court properly brought for judicial separation can now be served either within or without His Majesty's dominions.

C After the passing of the Matrimonial Causes Act, 1857, the question arose whether or not a suit for judicial separation could be brought in this court when the parties were not domiciled here, and it was decided in *Armytage v. Armytage* (2) and *Anghinelli v. Anghinelli* (3) that a suit for judicial separation could, according to the former practice of the ecclesiastical courts, and, therefore, under the provisions of s. 22 of the Matrimonial Causes Act, 1857, according to the procedure and practice of this court, be entertained when both the parties were resident within the jurisdiction of this court, but in neither of these two cases was it expressly decided whether the residence of the petitioner alone would be sufficient to give jurisdiction. In a passage in the judgment of SIR JAMES HANNER in *Firebrace v. Firebrace* (4) (4 P.D. at p. 67) referred to in the judgment of GORELL BARNES, J., in *Armytage v. Armytage* (2) ([1898] P., at p. 193) he used the following phrase :

E “It is not, however, inconsistent with this principle that a wife should be allowed to obtain relief against her husband in the tribunal of the country in which she is resident, though not domiciled.”

F But I do not think the learned President intended in using the phrase “in which she is resident” to mean “and in which the husband is not resident,” or to decide the question whether or not residence of the petitioner is sufficient.

Niboyet v. Niboyet (5) decided that residence and not domicile was necessary to give jurisdiction in divorce, and though this view, as pointed out by GORELL BARNES, J., in *Armytage v. Armytage* (2) (ibid. at p. 187), has now been overruled, the judgments of JAMES, L.J., and COTTON, L.J., in this case as to what residence was necessary to found jurisdiction in the ecclesiastical courts, were cited with approval by SWINFEN EADY, M.R., and WARRINGTON, L.J., in *Anghinelli v. Anghinelli* (3). In *Niboyet v. Niboyet* (5) COTTON, L.J., says (4 P.D. at p. 24) :

H “In *Yelverton v. Yelverton* (6), which was a case relied upon as supporting the judgment under appeal, the respondent was not domiciled in England or resident here, and the decision in effect was that the court had no jurisdiction to cite him—that is, no jurisdiction over him personally, he not being resident here, and that the fact of his not being resident here was pointedly before the learned judge when he gave his judgment, appears from a passage of the report (1 Sw. & Tr. at p. 590) :

I ‘Major Yelverton is not an Englishman; he never had a residence in England, nor was he ever guilty of any misconduct towards the plaintiff in England’;

and from the passage which I have read from the report of *Carden v. Carden* (7) I infer that DR. LUSHINGTON would have held that there was no jurisdiction unless evidence had been given of some residence in England. That foundation was laid in every case that was cited, and I cannot treat any one of them as an authority for overruling Major Yelverton's protest.”

I would also draw attention to the fact that *Carden v. Carden* (7) is also referred to by SWINFEN EADY, M.R., in *Anghinelli v. Anghinelli* (3), where he says ([1918] P. at p. 254):

"There is a case of *Carden v. Carden* (7), in which, as appears from the judgment, what the court was considering was the question of residence and not domicile, and it was held that it was residence within the diocese before the issue of citation, which gave the court jurisdiction."

On referring to *Carden v. Carden* (7) it seems clear that the court considered the residence or non-residence of the party proceeded against as vital, for these words occur in the judgment (1 Curt. at p. 559): "There is nothing here to show that the party proceeded against ever had any residence in the diocese," and it was only upon evidence subsequently filed as to the residence of the husband that the court pronounced decree.

On behalf of the petitioner stress was laid on *Dasent v. Dasent* (8), but in that case the court gave no reasons for thinking it was right to pronounce the decree, and this fact is dealt with and commented on in the judgment in *Yelverton v. Yelverton* (6) (1 Sw. & Tr. at p. 590). In *Manning v. Manning* (9) the Judge Ordinary says (L.R. 2 P. & D. at p. 225):

"It appears likely that the court would have to determine under what circumstances, and to what degree or extent residence, and nothing more than residence, may be sufficient to enable a petitioner to sue in this court, but I forbear to enter upon the investigation of this question."

In my view, the authorities referred to in the judgment of COTTON, L.J., in *Niboyet v. Niboyet* (5), and also *Donegal v. Donegal* (10), show that where residence is relied upon to found jurisdiction, it must be shown that the respondent is resident in the jurisdiction at the time of the citation being issued and the proceedings commenced. I was very much pressed on behalf of the petitioner with *Roberts v. Brennan* (11), in which SIR FRANCES JEUNE, P., stated that in his view residence and not domicile was the test of jurisdiction in a nullity suit, because it was said in the report that in that case there was no evidence of either party having been resident within the jurisdiction, but on production of the original citation, which I sent for, it appeared that the wife had given an address within the jurisdiction. The report in that case is not, to my mind, very satisfactory as to the evidence of residence before the court, and I cannot think I ought to rely on it if it is inconsistent with the authorities I have already referred to. It was further contended before me that because s. 42 of the Matrimonial Causes Act, 1857, provided for service within or without His Majesty's dominions, if service was in fact effected of process issued without jurisdiction, the very fact of service gave the court jurisdiction, but I cannot accede to this proposition, as it seems to me that s. 42 only applies to proceedings properly instituted. The prayer of the act on petition will be granted and the suit will be dismissed; the wife to have her costs up to the amount of security.

Solicitors: C. E. W. Ogilvie; Oldfields.

[Reported by J. A. C. SKINNER, Esq., Barrister-at-Law.]

A

R. v. ARMSTRONG

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Avory and Shearman, JJ.),
May 11, 12, 15, 16, 1922]

B

[Reported [1922] 2 K.B. 555; 91 L.J.K.B. 904; 127 L.T. 221; 86 J.P. 209;
38 T.L.R. 631; 66 Sol. Jo. 540; 27 Cox, C.C. 232; 16 Cr. App. Rep. 149]

*Criminal Law—Evidence—Evidence of similar offences—Charge of murder—
Evidence of attempt to murder another person by same means—Attempt
subsequent to the murder charged.*

C

On Dec. 31, 1921, the appellant was arrested on a charge of attempting to murder one M. by administering arsenic to him. Subsequently, the body of his wife, who had died on Feb. 22, 1921, was exhumed. The appellant was then charged with murdering her by poisoning her with arsenic, and at the trial it was admitted that her death was due to arsenic poisoning. No defence of accidental poisoning was raised, but the appellant explained his possession of arsenic at the material times by saying that he used it for killing weeds in his garden, and suggested that his wife committed suicide. The learned judge admitted evidence of the attempt to murder M.

D

Held: it was an essential part of the case for the prosecution to prove that arsenic was designedly administered by the appellant to his wife; as soon as the appellant stated that he had the poison for the innocent purpose of destroying weeds it was open to the prosecution to show by means of the evidence relating to M. that the appellant neither bought nor kept the poison for that innocent purpose; it was immaterial that this evidence related to an attempt after, and not before, the wife's death; and, therefore, it was rightly admitted.

E

Juror—Improper conduct—Communication after trial to newspaper about evidence in the case.

F

It is grossly improper for a member of a jury after a trial to comment on the evidence to a person employed by a newspaper, or otherwise to the public.

Notes. Considered: *Harris v. D.P.P.*, [1952] 1 All E.R. 1044. Referred to: *R. v. Sims*, [1946] 1 All E.R. 697.

As to the admissibility of evidence of similar offences in criminal cases see 10 HALSBURY'S LAWS (3rd Edn.) 442-445, and for cases see 14 DIGEST (Repl.) 420 et seq.

G

Cases referred to:

(1) *R. v. Geering* (1849), L.J.M.C. 215; 8 Cox, C.C. 450, n.; 14 Digest (Repl.) 422, 4112.

H

(2) *Makin v. A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 10 T.L.R. 155; 17 Cox, C.C. 704; 6 R. 373, P.C.; 14 Digest (Repl.) 420, 4094.

(3) *Thompson v. R.*, [1918] A.C. 221; 87 L.J.Q.B. 478; 118 L.T. 418; 82 J.P. 145; 34 T.L.R. 204; 62 Sol. Jo. 266; 26 Cox, C.C. 189; 13 Cr. App. Rep. 61, H.L.; 14 Digest (Repl.) 405, 3961.

I

(4) *Perkins v. Jeffery*, [1915] 2 K.B. 702; 84 L.J.K.B. 1554; 113 L.T. 456; 79 J.P. 425; 31 T.L.R. 444; 25 Cox, C.C. 59, D.C.; 14 Digest (Repl.) 423, 4116.

(5) *R. v. Boyle and Merchant*, [1914] 3 K.B. 339; 83 L.J.K.B. 1801; 111 L.T. 638; 24 Cox, C.C. 406; 10 Cr. App. Rep. 180; sub nom. *R. v. Boyle, R. v. Merchant*, 78 J.P. 390; 30 T.L.R. 521; 58 Sol. Jo. 673, C.C.A.; 14 Digest (Repl.) 437, 4237.

(6) *R. v. Garner* (1864), 3 F. & F. 681; 4 F. & F. 346, N.P.; 14 Digest (Repl.) 429, 4165.

Also referred to in argument :

- R. v. Winslow* (1860), 8 Cox, C.C. 397, N.P.; 14 Digest (Repl.) 429, 4164.
R. v. Cotton (1873), 12 Cox, C.C. 400; 14 Digest (Repl.) 429, 4166.
R. v. Heeson (1878), 14 Cox, C.C. 40; 14 Digest (Repl.) 415, 4051.
R. v. Flannagan and Higgins (1884), 15 Cox, C.C. 403; 14 Digest (Repl.) 423, 4113.
R. v. Hall (1887), 5 N.Z.L.R.C.A. 93; 14 Digest (Repl.) 425, *2642.
Shaffner v. The Commonwealth (1872), 13 American Rep. 649; 72 Pennsylvania State Rep. 60.
R. v. Rhodes, [1899] 1 Q.B. 77; 68 L.J.Q.B. 83; 79 L.T. 360; 62 J.P. 774; 47 W.R. 121; 15 T.L.R. 37; 43 Sol. Jo. 45; 19 Cox, C.C. 182, C.C.R.; 14 Digest (Repl.) 438, 4245.
R. v. Bond, [1906] 2 K.B. 389; 75 L.J.K.B. 693; 95 L.T. 296; 70 J.P. 424; 54 W.R. 586; 22 T.L.R. 633; 50 Sol. Jo. 542; 21 Cox, C.C. 252, C.C.R.; 14 Digest (Repl.) 420, 4091.
R. v. Ball, R. v. Ball, [1911] A.C. 47; 75 J.P. 180; sub nom. *D.P.P. v. Ball* (No. 2), 80 L.J.K.B. 691; 103 L.T. 738; 55 Sol. Jo. 139; 22 Cox, C.C. 366; 6 Cr. App. Rep. 31, H.L.; 14 Digest (Repl.) 426, 4138.
R. v. Rodley, [1913] 3 K.B. 468; 82 L.J.K.B. 1070; 109 L.T. 476; 77 J.P. 465; 29 T.L.R. 700; 58 Sol. Jo. 51; 23 Cox, C.C. 574; 9 Cr. App. Rep. 69, C.C.A.; 14 Digest (Repl.) 422, 4109.
R. v. Barron (1913), 110 L.T. 350; 78 J.P. 184; 30 T.L.R. 187; 24 Cox, C.C. 83; 9 Cr. App. Rep. 236, C.C.A.; 14 Digest (Repl.) 423, 4115.
R. v. Mason (1914), 111 L.T. 336; 78 J.P. 389; 24 Cox, C.C. 305; 10 Cr. App. Rep. 169, C.C.A.; 14 Digest (Repl.) 441, 4284.
R. v. Smith (1915), 84 L.J.K.B. 2153; 114 L.T. 239; 80 J.P. 31; 31 T.L.R. 617; 59 Sol. Jo. 704; 25 Cox, C.C. 271; 11 Cr. App. Rep. 229, C.C.A.; 14 Digest (Repl.) 429, 4173.
R. v. Fisher, [1910] 1 K.B. 149; 79 L.J.K.B. 187; 102 L.T. 111; 74 J.P. 104; 26 T.L.R. 122; 22 Cox, C.C. 270; 3 Cr. App. Rep. 176, C.C.A.; 14 Digest (Repl.) 420, 4095.
R. v. Lovegrove, [1920] 3 K.B. 643; 90 L.J.K.B. 285; 124 L.T. 288; 85 J.P. 75; 26 Cox, C.C. 683; 15 Cr. App. Rep. 50, C.C.A.; 14 Digest (Repl.) 428, 4151.

Appeal against conviction.

The appellant, a solicitor, was convicted on April 13, 1922, at the Hereford Assizes, before DARLING, J., of the murder of his wife on Feb. 22, 1921, by administering arsenic.

Sir Henry Curtis Bennett, K.C., (*S. R. C. Bosanquet* and *E. A. Godson* with him) for the appellant.

The Attorney-General (Sir Ernest M. Pollock, K.C.), (*C. F. Vachell, K.C.* and *St. John G. Micklethwait* with him), for the Crown.

The judgment of the court was delivered by

LORD HEWART, C.J.—The appellant was convicted before DARLING, J., at the Hereford Assizes on April 13, last, of the murder of his wife and was sentenced to death. He appeals against conviction, and the points of substance raised by the notice of appeal are :—(i) that evidence of an attempt to poison one Oswald Norman Martin, some eight months after the death of the appellant's wife, ought not to have been admitted; and (ii) that upon that evidence the learned judge misdirected the jury. There is no need to repeat the facts in detail. It is enough to say that, in the opinion of this court, the evidence was amply sufficient to justify the verdict of the jury, even though nothing relating to Martin was taken into consideration. That evidence proved among other things, that the appellant's wife died on Feb. 22,

- A 1921, of arsenical poisoning; that a fatal dose of arsenic was administered to her within twenty-four hours of her death; that she suffered from the same kind of poisoning both in Aug., 1920, before her removal to an asylum, and in Feb., 1921, soon after her return home; that the appellant purchased arsenic shortly before each of those occasions; that he was the only person who, on both occasions, had the opportunity of administering arsenic to his wife; and that his possession of arsenic, made up in small packets of fatal doses, including the packet found upon him at the time of his arrest, was not consistent with any legitimate purpose. The evidence further went to show that he had a twofold motive for murder, namely, the desire to obtain the benefit to be derived under a new will made by his wife in July, 1920, and the desire to contract another marriage. The suggestion that his wife committed suicide was refuted, not only by the words which she used on more than one occasion towards the end of her illness, but also by her physical condition, which, for a considerable time before her death, made it impossible for her to leave her bed.

- As to the question of the admissibility of the evidence relating to Martin, it is to be observed that the decision in *R. v. Geering* (1) was established as an unquestionable authority by the decision in *Makin v. A.-G. for New South Wales* (2). The only difference between *Geering's Case* (1) and the present case is that, while in *Geering's Case* (1) there was evidence of the actual administration of food which might have contained arsenic, in the present case there was evidence of the opportunity for such administration, strengthened by evidence of possession of arsenic by the appellant at the material times, a fact which does not appear in the report in *Geering's Case* (1). In the opinion of this court it would suffice to say that, upon the authority of *Geering's Case* (1) the evidence, which is here complained of, was admissible. But it is suggested that, in the absence of direct evidence of some act done by the appellant towards the commission of the crime with which he was charged, evidence as to the subsequent attempt on the life of Martin in October, 1921, was inadmissible, because at an early stage of the trial, counsel for the appellant intimated that the defence would be that the deceased committed suicide by taking arsenic, and that no defence of accidental poisoning would be raised. Counsel for the appellant, it may be added, in his argument before this court, very properly stated that he sought to make no point of the fact that the events relating to Martin were subsequent to the death of the appellant's wife, and, moreover, that the lapse of time between February and October, 1921, was immaterial. In the opinion of the court, an intimation given by counsel at an early stage of the case as to the defence upon which he proposes to rely cannot preclude the prosecution from offering any necessary evidence to show that the accused committed the crime. It was an essential part of the case for the prosecution here to prove that arsenic was designedly administered by the appellant to his wife, and any evidence that tended to prove design must of necessity tend to negative accident and suicide. A few days before her last illness began the appellant's wife had been brought home from the asylum at the request, and in consequence of the diligent negotiations, of the appellant himself. The evidence showed that those negotiations and requests began on or about Jan. 10, 1921, and that on Jan. 11 the appellant purchased a quarter of a pound of white arsenic and took it home.

- With what design did he make that purchase and provide himself at that particular time with that poison? Was it for the innocent purpose of destroying weeds, or for the felonious purpose of poisoning his wife? The fact that he was subsequently found, not merely in possession of, but actually using for a similar deadly purpose, the very kind of poison that caused the death of his wife, was evidence from which the jury might infer that that poison was not in his possession at the earlier date for an innocent purpose, and such use of the same poison is more cogent than the mere fact of death from the same poison as in *Geering's Case* (1): see *Thompson v. R.* (3) and the illustrations there given. Reference was made

in the argument in the present case to *Perkins v. Jeffery* (4), but the decision in that case was not inconsistent with the decision in *R. v. Boyle and Merchant* (5). LORD READING was a party to both decisions, and the decision in *R. v. Boyle and Merchant* (5) was cited in support of the later decision. The distinction is that in *Perkins v. Jeffery* (4) identity was in dispute, and, until that was established, evidence of design or intention was not relevant. In the opinion of the court *Geering's Case* (1) and *Garner's Case* (6) are not so strong as the present case, and the facts of the present case are stronger in favour of the admission of the evidence complained of. There was the clearest possible evidence that the appellant, on Jan. 11, 1921, purchased a quarter of a pound of white arsenic, and that when he was arrested on Dec. 31, 1921, he had in his pocket a packet containing a fatal dose of white arsenic. In these circumstances, so soon as he stated the defence, as he at once did, that he bought and was keeping the poison for the innocent purpose of destroying weeds, it was open to the prosecution to show by means of the evidence relating to Martin that the appellant neither bought nor kept the poison for that pretended innocent purpose. The question which is involved here, as LORD SUMNER said in *Thompson's Case* (3), raises no new principles of law; it elucidates no new aspect of familiar principles; it is a mere question of the application of the rules of evidence to this particular case.

As to the summing-up of the learned judge, exception was taken to the passage:

"I came to the conclusion that Martin's case has a bearing upon this. What is the bearing? The bearing is this—that it is of value as showing that the defendant had arsenic in his possession, and that he would use it to poison a human being. Let me say at once, if he is not proved to have given arsenic to Mr. Martin with intent to injure him and kill him, if you come to the conclusion he did not do that, then all the evidence in Martin's case has no bearing whatever upon this case, none at all. But if you come to the conclusion that he did give it, why then it has a bearing as showing what he had got in the way of poison and what he was prepared to do with it, as showing that he was prepared, not merely to use it on dandelions and things of that kind, but that he was prepared to use it on a human being if he had what to him appeared sufficient reason to do so."

If that passage meant, or, in the circumstances, was likely to be understood to mean, that the appellant was a man who was in the habit of committing and might be expected to commit this particular crime, then it would obviously be a misdirection and the proviso to s. 4 of the Criminal Appeal Act would have to be considered, but it is difficult to imagine that the learned judge, with or without the authorities before him, intended to convey any such thing. To any intelligent person who was present at the trial or who has read the transcript of the evidence, the speeches of counsel and the summing-up, it must be obvious that the particular passage was directed to the plain question that had emerged, namely, did the appellant buy and keep this poison, as he alleged, for the innocent purpose of destroying weeds, or did he buy and keep it, as the prosecution alleged, for a felonious purpose? Nothing is less useful in such a controversy than to take a particular sentence from the whole of a voluminous context and to approach its examination for the purpose of establishing a certain criticism. The proviso to s. 4 of the Criminal Appeal Act does not, in the opinion of the court, arise, but in any event it was the evidence and not the reason for its admission that must have influenced the jury, and we are clearly of the opinion that the jury in this case would certainly have returned the same verdict even if the summing-up had not contained the passage to which reference has been made. In these circumstances this appeal is dismissed.

It remains to mention a separate matter. Reference has been made in the course of the argument to the fact that, after verdict, there appeared in some newspapers an account of what the writer said was said to him about the evidence, with a

A complete lack of reserve, by a member of the jury. Whether what was published was in fact said is not certain, but it is at least certain that it was published. In the opinion of this court, nothing could be more improper, deplorable and dangerous. It may be that some jurymen are not aware that the inestimable value of their verdict is created only by its unanimity, and does not depend upon the process by which they believe that they arrived at it. It follows that every jurymen ought to observe the obligation of secrecy which is comprised in and imposed by the oath of the grand juror. If one jurymen might communicate with the public upon the evidence and the verdict, so might his colleagues also, and if they all took this dangerous course, differences of individual opinion might be made manifest which, at the least, could not fail to diminish the confidence that the public rightly has in the general propriety of criminal verdicts. Whatever the composition of a jury may be, experience shows that its unanimous judgment is entitled to respect. That respect, with all that it involves, is not lightly to be thrown away, and it is a matter of supreme importance that no newspaper and no jurymen should again commit the blunder, to use no harsher word, which has disfigured some of the reports relating to matters connected with the trial of this case.

Appeal dismissed.

Solicitors: *T. A. Matthews; Director of Public Prosecutions.*

[Reported by J. N. FLETCHER, Esq., Barrister-at-Law.]

WOODHEAD v. PUTNAM

[KING'S BENCH DIVISION (Darling and Salter, JJ.), November 15, 30, 1922]

[Reported [1923] 1 K.B. 252; 92 L.J.K.B. 137; 128 L.T. 281;
67 Sol. Jo. 228; 21 L.G.R. 85]

Rent Restriction—Apportionment—Comprising property not within Rent Restriction Acts—Right to apportionment of tenant of comprised dwelling-house—Question for court—Date at which rent of applicant's dwelling-house to be taken to determine its standard rent—Need of apportionment—Ascertainment of standard rent of comprised dwelling-house—House let as whole on Aug. 4, 1914—Four rooms let in 1919—No structural alteration—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12 (3).

To entitle a tenant to an apportionment of the standard rent of the property in which the dwelling-house occupied by him is comprised in order to determine the standard rent of that dwelling-house, it is not necessary that the property in which the tenant's dwelling-house is comprised should itself be a dwelling-house or subject to the Rent Restriction Acts.

The question for the court on an application by a tenant for apportionment is: What is the date at which the actual rent of the tenant's dwelling-house is to be taken to determine its standard rent.

A house was let as a whole on Aug. 4, 1914, at a rent and with a rateable value that rendered it free from restriction under the Rent Restriction Acts [see s. 2 (2) of the Act of 1915]. In 1919 four rooms on the second floor were let to a tenant at a rent within the Act, there being no structural alteration which could support a contention that a new and different dwelling-house had been created.

Held: the standard rent of the tenant's dwelling-house was the actual rent on Aug. 4, 1914, of the four rooms comprising it, and that actual rent could only be ascertained by apportionment of the standard rent of the whole house.

Notes. The words relating to standard rent in s. 12 (3) of the Increase of Rent, &c. (Restrictions) Act, 1920, were repealed by the Rent Act, 1957. Section 12 (3) now applies only to apportionment of rateable value.

Distinguished: *Lelyveld v. Peppercorn*, [1924] 2 K.B. 638. Considered: *Barrett v. Hardy Bros. (Alnwick), Ltd.*, [1925] All E.R. Rep. 139. Referred to: *Phillips v. Potter* (1925), 94 L.J.K.B. 819; *Lindop v. Quaipe*, [1949] 1 All E.R. 456; *Capital and Provincial Property Trust, Ltd. v. Rice*, *Rice v. Capital and Provincial Property Trust, Ltd.*, [1950] 2 All E.R. 174; *Capital and Provincial Property Trust, Ltd. v. Rice*, [1951] 2 All E.R. 600.

As to apportionment, see 23 HALSBURY'S LAWS (3rd Edn.) 724-726, and for cases see 31 DIGEST (Repl.) 685-688. For Increase of Rent &c. (Restrictions) Act, 1920, see 13 HALSBURY'S STATUTES (2nd Edn.) 981.

Case referred to:

- (1) *Sinclair v. Powell*, [1922] 1 K.B. 393; 91 L.J.K.B. 220; 126 L.T. 210; 38 T.L.R. 239; 66 Sol. Jo. 235; 20 L.G.R. 73, C.A.; 31 Digest (Repl.) 673, 7691.

Appeal by the landlord from Weston-super-Mare County Court.

The facts are stated in the judgment of the court.

E. H. C. Wethered for the landlord.

R. P. Croom-Johnson for the tenant.

Cur. adv. vult.

Nov. 30, **SALTER, J.**, read the following judgment of the court. In this case a dwelling-house was let as a whole on Aug. 3, 1914, at a rent of £60 a year. On May 19, 1919, the four rooms on the second floor were let to the present tenant for three years at a rent of £55 a year. On July 2, 1920, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, came into force, and both the original house and the tenant's flat became subject to it. The flat had never been separately rated. On Mar. 28, 1922, the landlord served a notice to increase the rent of the flat from £55 to £59 a year. The tenant then applied in the Weston-super-Mare County Court for an apportionment of the rent of the whole house to ascertain the standard rent of the flat. The application was granted and the landlord appealed.

We have to determine whether upon the facts the county court judge was right in law in making an apportionment. I think that s. 12 (3) of the Act empowers the tenant of any tenement to apply for and to obtain apportionment if (a) his tenement is a "dwelling-house" to which the Act applies, and (b) apportionment is necessary for the purpose of determining the standard rent of the applicant's "dwelling-house." Where the applicant's dwelling-house is separately rated its rateable value may bring it within the Act; the only question then will be the necessity for apportionment. But where, as in this case, the applicant's dwelling-house has never been separately rated, both questions have to be determined. It matters not which of the two the judge considers first. If he considers first whether the applicant's dwelling-house comes within the Act, that depends on its standard rent. The standard rent is the actual rent at a fixed date, and the question, therefore, is: What is the date at which the actual rent of the applicant's dwelling-house must be taken to determine its standard rent? If the judge considers first whether apportionment is necessary to determine the standard rent of the applicant's dwelling-house, that depends on whether the actual rent of the applicant's dwelling-house is to be taken at the date when it had a separate rent of its own, or at a date when it had no separate rent and was let as part of a whole.

The question in each case is the same: What is the date at which the actual rent of the applicant's dwelling-house is to be taken? In this case the judge had to determine whether the applicant's rooms were let on Aug. 3, 1914, or were first let on May 19, 1919. If the former, apportionment was necessary; if the latter, it

A was unnecessary. The question is one of fact. He found that these four rooms were let on Aug. 3, 1914. It is not necessary in this case to consider whether, if there had been substantial structural alteration, the county court judge could have been justified in finding that the applicant's rooms were first let on May 19, 1919. It is admitted not only that there was no reconstruction within s. 12 (9), but also that there was no structural alteration which could support a contention
B that a new and different dwelling-house had in fact been created. On the facts before the court, not only was there evidence that the applicant's rooms were let on Aug. 3, 1914, but there was no evidence on which any other conclusion could have been properly reached. The standard rent of the applicant's dwelling-house—her four rooms—was, therefore, the actual rent of those rooms on Aug. 3, 1914. This could only be ascertained by apportionment. The decision was, therefore,
C right.

It was urged on us that on May 19, 1919, when these rooms were let to the applicant, the house was not subject to any Rent Restriction Act, and this is so. This point was relied on by the Divisional Court in *Sinclair v. Powell* (1). With great respect, the fact seems to me to be irrelevant. It is no doubt reasonable to suggest that where, at the time of the division, the whole house is free from
D restriction, the landlord should be allowed to base the standard rents of the dwelling-houses he then creates on the actual rents then obtained for them. The statute, however, does not seem to me so to have provided. The question is: Were the applicant's four rooms in fact let on Aug. 3, 1914, or were they in fact first let on May 19, 1919? I think that the answer to this question cannot depend on when the whole house became, or whether it ever became, subject to restriction. To
E entitle a tenant to apportionment under s. 12 (3) it is not necessary that the "property" in which the applicant's dwelling-house is "comprised" should itself be a dwelling-house or should be subject to the Act. It may or may not be the case that, in view of the notice to increase the rent, the fixing of the standard rent of the applicant's dwelling-house may show that a part of the actual rent is irrecoverable by the landlord or may enable the tenant to claim repayment of sums
F overpaid. This seems to me immaterial. The question whether claims can be based on the standard rent, when determined, does not seem to me to affect the method of determining the standard rent nor the right of the tenant or of the landlord to have the standard rent determined and to have an apportionment made when apportionment is shown to be necessary for the purpose of determining the standard rent. The appeal must be dismissed.
G

Appeal dismissed.

Solicitors: *Robins, Hay, Waters & Hay*, for *Tyrrell & Barnes*, Weston-super-Mare; *Cameron, Kemm & Co.*, for *John Hodge & Co.*, Weston-super-Mare.

[*Reported by T. W. MORGAN, Esq., Barrister-at-Law.*]

HANSON v. RADCLIFFE URBAN DISTRICT COUNCIL

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.J.J.), May 22, 1922]

[Reported [1922] 2 Ch. 490; 91 L.J.Ch. 829; 127 L.T. 509; 86 J.P. 144; 38 T.L.R. 667; 66 Sol. Jo. 556; 20 L.G.R. 541]

Education—Teacher—Dismissal—“Educational grounds”—Refusal to accept lower salary.

Declaratory Judgment—Contract—Rights of parties—Discretion of court—“Party”—Local authority intervening in contract between other parties in execution of statutory power—Education Act, 1902 (2 Edw. 7, c. 42), s. 7 (1) (a).

The managers of a non-provided school, with the consent of the defendants, the local education authority, appointed the plaintiff a teacher in the school. The defendants subsequently directed the managers to give notice to terminate the agreements of all teachers, among whom was the plaintiff, who would be adversely affected by and refused to accept the Burnham scale of salaries, but to permit them to accept re-employment at a lower rate. The managers refused to give the notices, and the defendants, acting under s. 7 (1) (a) of the Education Act, 1902, which gave them power in such circumstances to dismiss a teacher “on educational grounds,” sent to the plaintiff a notice to terminate her engagement together with a form of undertaking to be signed by her if she should desire re-appointment on the revised terms. The plaintiff did not sign the undertaking. In an action by the plaintiff against the defendants for a declaration that the notice was invalid and did not terminate her engagement,

Held: (i) an “educational” ground must be one connected, for instance, with the qualifications of the teacher or class of teacher to impart instruction, or with a desire on the part of the education authority that certain instruction should or should not be given, and a desire to re-employ a teacher at a lower salary could not be said to be such a ground; (ii) although the plaintiff’s contract of employment was with the managers of the school, when the defendants acted under the powers given them by s. 7 (1) (a) of the Act of 1902 they became, in effect, parties to the contract; the power of the court to make a declaration determining the rights of parties to a contract was limited only by the discretion of the court; and, therefore, the court had jurisdiction to grant the plaintiff the declaration she claimed.

Notes. The Education Act, 1902, was repealed by the Education Act, 1921, itself repealed by the Education Act, 1944 (see 8 HALSBURY’S STATUTES (2nd Edn.) 145). As to appointment and dismissal of teachers in maintained schools see now s. 24 of the Act of 1944, and as to dismissal on “educational grounds” see Schools Grant Regulations, 1951 (S.I., 1951, No. 1743, Sch. 2, para. 6).

As to the appointment and dismissal of teachers see 13 HALSBURY’S LAWS (3rd Edn.) 663–672, and as to declaratory judgment see *ibid.*, vol. 22, 746–752. For cases see 19 DIGEST 603–606, 30 DIGEST (Repl.) 165 et seq.

Cases referred to :

- (1) *Mitchell v. East Sussex County Council* (1913), 109 L.T. 778; 78 J.P. 41; 58 Sol. Jo. 66; 12 L.G.R. 1, C.A.; 19 Digest 562, 47.
- (2) *Martin v. Eccles Corpn.*, [1919] 1 Ch. 387; 88 L.J.Ch. 195; 120 L.T. 505; 83 J.P. 129; 35 T.L.R. 262; 63 Sol. Jo. 354; 19 Digest 603, 296.

Also referred to in argument :

- Young v. Cuthbert*, [1906] 1 Ch. 451; 75 L.J.Ch. 217; 94 L.T. 191; 70 J.P. 130; 54 W.R. 296; 22 T.L.R. 251; 4 L.G.R. 356; 19 Digest 555, 13.

A *Crocker v. Plymouth Corpn.*, [1906] 1 K.B. 494; 75 L.J.K.B. 375; 94 L.T. 734; 70 J.P. 204; 54 W.R. 391; 22 T.L.R. 336; 50 Sol. Jo. 292; 4 L.G.R. 571; 19 Digest 602, 289.

Smith v. Macnally, [1912] 1 Ch. 816; 81 L.J.Ch. 483; 106 L.T. 945; 76 J.P. 466; 28 T.L.R. 332; 56 Sol. Jo. 397; 10 L.G.R. 434; 19 Digest 605, 305.

B *Blanchard v. Dunlop*, [1917] 1 Ch. 165; 85 L.J.Ch. 791; 115 L.T. 467; 81 J.P. 9; 15 L.G.R. 25, C.A.; 19 Digest 562, 48.

Harries v. Crawfurd, [1918] 2 Ch. 158; 87 L.J.Ch. 465; 119 L.T. 200; 34 T.L.R. 448; 62 Sol. Jo. 621; 16 L.G.R. 663, C.A.; affirmed [1919] A.C. 717; 88 L.J.Ch. 477; 121 L.T. 398; 83 J.P. 197; 35 T.L.R. 543; 63 Sol. Jo. 589; 17 L.G.R. 509, H.L.; 19 Digest 562, 45.

C **Appeal** by defendants from an order of RUSSELL, J.

In January, 1917, the managers of St. Andrew's Church of England School at Radcliffe, Lancashire, with the consent of the defendant authority, appointed the plaintiff, Mrs. Mabel Florence Hanson, a teacher. In 1921 the defendants directed the managers to give notice to terminate the agreements of all teachers adversely affected by the Burnham scale of salaries, among whom was the plaintiff, but to permit them to accept re-employment at a lower rate. The managers refused to give the notices, and on Dec. 30, 1921, the clerk to the defendant council sent to the plaintiff a notice to terminate her engagement, together with a form of undertaking to be signed by her if she should desire to accept re-appointment on the revised terms. The plaintiff refused to accept re-appointment on those terms, and did not sign the undertaking. She brought this action against the defendants, and moved (the motion being treated as the trial of the action) for a declaration that the notice of dismissal was invalid.

E By s. 7 (1) (a) of the Education Act, 1902 :

"The managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions with respect to the number and educational qualifications of the teachers to be employed for such instruction, and for the dismissal of any teacher on educational grounds, and if the managers fail to carry out any such direction the local education authority shall, in addition to their other powers, have the power themselves to carry out the direction in question as if they were the managers . . ."

G RUSSELL, J., granted the plaintiff a declaration that the notice served by the defendants upon the plaintiff, dated Dec. 30, 1921, purporting to determine her engagement with the managers, was invalid and inoperative and that the engagement of the plaintiff under her contract with such managers was unaffected thereby. The defendants appealed.

Clauson, K.C. and G. E. Timmins for the defendants.

H *Preston, K.C. and W. G. Hart*, for the plaintiff, were not called on to argue.

I **LORD STERNDALE, M.R.** [after stating the facts]—I do not wish to express any opinion whether the action of the plaintiff and others in refusing to accept the Burnham scale of salaries was reasonable or not. With that question I have nothing to do. Nor do I ignore the suggestion which was made that the defendants may not be forced by our decision to pay the higher salary. They may be able to shift that burden on to the managers; that is a matter for them to consider. But, having regard to the provisions of s. 7 of the Education Act, 1902, I cannot follow the contention of the defendants that they dismissed the plaintiff "upon educational grounds." It is true that it has been suggested, on the reading of the section, that there are two grounds laid down for the management of these schools, grounds connected with the giving of religious instruction, and educational grounds, and it was said that where action was taken upon grounds not connected with religious instruction, it must be upon educational grounds. It was also said

that finance was not an unimportant factor in education, as in other things, and that it is very important upon educational grounds that the same scale of salaries should prevail all round. But, in my opinion, the matter can hardly be better expressed than it was by RUSSELL, J., in the court below when, after referring to *Mitchell v. East Sussex County Council* (1) he said:

"I know of no other case where one gets any assistance as to the meaning or trend of those words 'educational grounds,' but it does appear to me that it is not an educational ground when the sole desire is to reduce the salary. It appears to me that an educational ground must be a ground connected in some way with the qualifications, either of the individual or the class of teacher, to impart instruction, or a desire on the part of the local education authority that certain instruction ought or ought not be imparted—something of that kind—but the mere desire to economise does not, in my opinion, entitle the local education authority to terminate the employment of a teacher, alleging that to be an educational ground."

I am in complete agreement with those words, and, therefore, the appeal upon that point fails.

Then it was said that, although the education authority had exceeded their powers, yet the plaintiff had no right to come to the court under s. 7 inasmuch as it only applied to the position as between the education authority and the managers, but an examination of the section shows that it also defines the rights of the teachers, and it is difficult to imagine that a teacher who has had notice to determine her engagement given wrongfully should not have the right to come to the court for relief, and to have it declared that the persons dismissing her have acted wrongly. Presumably s. 7 was framed in order to regulate the position as between the local education authority and the managers, but incidentally teachers have rights under it too, for the section lays down the conditions under which they can be dismissed. The language of YOUNGER, L.J., in *Martin v. Eccles Corpn.* (2) when he stated that a person receiving such a wrongful notice was entitled to challenge its validity, seems an accurate description of the position, and if so, in my view it is hopeless to argue that the plaintiff had no right to come to the court. It may or may not be that she would have an action for wrongful dismissal, but it seems clear that she can come to the court and ask whether the defendants have done right in dismissing her. The power of the court to make declarations, when it is a question of determining the rights of two parties to a contract, is now almost unlimited, or limited only by the discretion of the court. I think that the plaintiff was quite entitled to ask the court to determine her rights, and this appeal, therefore, fails.

WARRINGTON, L.J.—I am of the same opinion. Section 7 provides that the managers of a school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions for the dismissal of any teacher on educational grounds, and that if the managers fail to carry out any such direction, the local education authority shall have the power themselves to carry out the direction as if they were the managers. In the present case, the local education authority have purported to act under that power. They directed the managers to give notice to a number of teachers, including the plaintiff, but to permit them to accept re-employment at a lower rate. The managers did not comply with those directions, and thereupon the education authority determined the plaintiff's contract. Was that a dismissal of the plaintiff "on educational grounds"? Because, if not, the power of the education authority to dismiss her never arose. Upon that point I have nothing to add to what was said by RUSSELL, J., which has been read by the Master of the Rolls. For the reasons given, I think that the grounds put forward for the plaintiff's dismissal were not "educational grounds." The second point

A is whether the court has any jurisdiction to interfere. There has been much discussion upon this question, but it seems to me that this is a case of a local education authority believing themselves to be clothed, by virtue of s. 7, with the personality of the school managers, and purporting to determine a contract made by the latter. When clothed with that personality, they became in effect parties to the contract, and, in my view, it is a case in which the court unquestionably

B has a right to make a declaration as to the rights of the parties. Here was a public body empowered by statute in certain circumstances to interfere with the contractual rights of others, and set aside a contract made by others. They have purported to do so in circumstances which gave them no authority to set aside the contract. RUSSELL, J., has made a declaration. It would, in my opinion, be a disaster if the court, in such a case, had no power to make a declaration

C upholding the rights of the parties. I think that the appeal fails.

YOUNGER, L.J., concurred.

Appeal dismissed.

Solicitors: *Shaen, Roscoe, Massey & Co.; Hamlins, Grammer & Hamlin*, for **D** *R. Clayton, Radcliffe.*

[*Reported by FITZROY COWPER, Esq., Barrister-at-Law.*]

E Re PETTIT. LE FEVRE v. PETTIT

[CHANCERY DIVISION (Romer, J.), June 15, 29, 1922]

[Reported [1922] 2 Ch. 765; 91 L.J.Ch. 732; 127 L.T. 491; 38 T.L.R. 787; 66 Sol. Jo. 667]

F *Income Tax—Annuity—Annuity “free of income tax”—Payment out of residuary estate—Recovery by annuitant of overpaid tax—Right of residuary estate to such proportion of sum repaid as annuity bore to total income of annuitant.*

G Where the trustees of a will are directed to pay out of the income of the residuary estate an annuity free of income tax, and the annuitant recovers under the provisions for relief in the Income Tax Acts income tax overpaid, the annuitant is not entitled to retain so much of the sum recovered in any year as is referable to the amount of the annuity, but must pay to the trustees for the benefit of the residuary estate such proportion of the total sum repaid as the annuity bears to the total income of the annuitant.

I **Notes.** Distinguished: *Re Jones, Jones v. Jones*, [1933] All E.R. Rep. 830. Considered: *Re Kingcome's Will Trusts, Hickley v. Kingcome*, [1936] 1 All E.R. 173. Followed: *Re Maclellan, Few v. Byrne*, [1939] 3 All E.R. 81; *Re Eves, Midland Bank Executor and Trustee Co. v. Eves*, [1939] Ch. 969. Applied: *Re Bates' Will Trust, Jenks v. Bates*, [1945] 2 All E.R. 688. Considered: *Re Tatham, National Bank, Ltd., and Mathews v. Mackenzie*, [1945] 1 All E.R. 29; *Re Williams, Midland Bank Executor and Trustee Co. v. Williams*, [1945] 2 All E.R. 102; *Re Thomas, Public Trustee v. Falconer*, [1945] 2 All E.R. 586; *Re Arno, Healey v. Arno*, [1947] 1 All E.R. 64; *I.R. Comrs. v. Duncanson*, [1949] 2 All E.R. 846; *Re Batley, Public Trustee v. Hert*, [1951] Ch. 558. Applied: *Re Lyons, Barclays Bank, Ltd. v. Lyons*, [1951] 2 All E.R. 507. Considered: *Re Batley, Public Trustee v. Hert*, [1952] 2 All E.R. 562; *Re Lyons, Barclays Bank, Ltd. v. Lyons*, [1952] 1 All E.R. 34. Referred to: *Re Hill, Westminster Bank, Ltd. v. Wilson*, [1944] 1 All E.R. 502; *I.R. Comrs. v. Cook*, [1945] 2 All E.R. 377; *Jaworski v. Institution of Polish Engineers in Great Britain, Ltd.* [1950] 2 All E.R. 1191.

As to payment of annuities free of income tax see 28 HALSBURY'S LAWS (2nd A Edn.) 215, 217. For cases see 39 DIGEST 166-168.

Case referred to :

(1) *Re Hatty, Davis v. Robinson* (1922), unreported.

Also referred to in argument :

Burroughes v. Abbott, [1922] 1 Ch. 86; 91 L.J.Ch. 157; 126 L.T. 354; 38 B T.L.R. 167; 66 Sol. Jo. 141; 28 Digest (Repl.) 178, 718.

Re Cain's Settlement, Cain v. Cain, [1919] 2 Ch. 364; 88 L.J.Ch. 513; 121 L.T. 496; 28 Digest (Repl.) 172, 695.

Re Bowring, Wimble v. Bowring (1918), 34 T.L.R. 575; 62 Sol. Jo. 729; 39 Digest 168, 593.

Re Doxat, Doxat v. Doxat (1920), 125 L.T. 60; 64 Sol. Jo. 651; 39 Digest 168, 590. C

Originating Summons to determine the rights of annuitants.

The testator, who died on July 11, 1917, by his will gave his residuary real and personal estate to trustees upon the usual trusts for sale and conversion, and directed them, after paying and providing for his funeral and testamentary expenses, death duties, debts, and legacies, to invest the residue of the money arising from such sale and conversion in manner therein mentioned and to stand possessed of the trust premises and the annual income thereof upon trust to pay an annuity of £1,000 free of duty and income tax to the defendant, Jane Pettit, for life, and an annuity of £400 free of duty and income tax to the defendant, Eliza Elizabeth Tusting, for her life without power of anticipation, such annuities to commence from the testator's death and to be paid by equal quarterly payments, and the testator directed that his trustees should set apart and invest such a sum of money as would, when invested, produce by the income thereof an annual sum equal to the amount of the two annuities, and, until such sum should be so appropriated, he charged his residuary personal estate with the annuities. He then directed that his trustees should, subject thereto, stand possessed of the trust premises upon certain trusts for the benefit of the issue of the defendant, E. E. Tusting. It did not appear that the trustees made any appropriation to meet the two annuities, but, as from the death of the testator, they paid to the defendants, Jane Pettit and E. E. Tusting, out of the income of the residuary estate the yearly sums of £1,000 and £400 without any deduction. These sums were wholly paid out of profits which had been brought into charge to income tax. Claims were made by or on behalf of these two defendants under the provisions of the Income Tax Acts for relief by way of repayment of income tax paid by them or on their behalf respectively for the financial years 1917-18, 1918-19, 1919-20, and 1920-21 in excess of the amount properly payable by them respectively for those several years. As the result of these claims, the Special Commissioners of Income Tax repaid the several sums of £27 13s. 2d., £81 9s. 10d., £67 14s. 10d., and £66 9s. 1d. in respect of the claim of the defendant, Jane Pettit, and the several sums of £17 13s. 3d., £22 5s. 8d., £92 8s. 2d., and £101 5s. in respect of the claim of the defendant, E. E. Tusting. By arrangement and without prejudice to any question, those sums were paid to the trustees of the will after a small deduction for the fees of the accountant who was acting for the two annuitants in making their claim. The trustees issued this summons to determine whether the sums recovered belonged wholly to the two annuitants or whether such sums or any part of them formed part of the residuary estate of the testator. D E F G H I

Bryan Farrer for the trustees.

Stamp for Jane Pettit.

F. K. Archer for the residuary legatees.

Cur. adv. vult.

A June 29. **ROMER, J.**, read a judgment in which he stated the facts and continued: The trustees are now applying to the court for the determination of the question whether the sums recovered in the years 1918, 1919, 1920, and 1921, belong wholly to the two annuitants respectively, or whether such sums, or any part thereof, form part of the residuary estate of the testator. This is the question that I now have to decide. The precise question came recently before
B **SARGANT, J.**, in an action of *Re Huttly* (1), but I am informed that in that case the question whether the annuitants were, in such circumstances, entitled to retain for their own benefit the whole sum repaid by the Special Commissioners was not argued, and that the only question discussed was what proportion of the total sum repaid should be treated as referable to the annuities (the annuities forming part only of the annuitants' taxable income), the annuitants not disputing that
C the amount properly referable to their respective annuities could not be retained by them. In those circumstances it was decided by **SARGANT, J.**, that the trustees were entitled, in each case, to such proportion of the total sum repaid as the annuity bore to the total income of the annuitant. In the present case the annuitants admit that, if they are not entitled to retain for their own benefit the whole of the sums so repaid by the special commissioners, this is the proper proportion of
D such sums to be paid to the trustees, but they have argued before me that they are so entitled.

For the purpose of deciding this point, it will be convenient to consider the position and rights of the defendant, Jane Pettit, alone, and as though hers were the only annuity given by the will. The considerations that apply to her will
E apply equally to the other annuitant. As has been stated, the £1,000 was paid out of income that had already been brought into charge to tax, the tax having been deducted at source before the income was received by the trustees. But as has often been pointed out, payment at the source is nothing more than the machinery by which the revenue collects the tax from the person ultimately liable to pay, and the rights of the parties are, as between themselves, precisely the
F same as though the trustees received the gross income and had themselves to pay the tax to the revenue. In that case, and treating the annuity of the defendant, Jane Pettit, as the only one payable, the trustees would in each year have had to set aside in respect of her annuity such a sum as, after payment of the tax properly payable thereon, would leave a clear sum of £1,000. Out of this sum
G the trustees would pay the tax to the revenue, and the £1,000 to the annuitant. The remainder of the gross income after payment of tax thereon would belong to the residuary legatees. It would, however, be impossible for the trustees to ascertain what rate of tax was ultimately payable in respect of the annuitant's income, and in any case they would, under the provisions of the Income Tax Acts, be bound, in the first instance, to treat that income as liable to the ordinary rate.
H In the year 1918-19, for instance, when the ordinary rate of income tax was 6s. in the £, the trustees would have had, in the first instance, to set aside £1,428 11s. 5d., and to pay £428 11s. 5d. to the revenue and the balance to the annuitant. But this sum might in the end prove to be too little or too much. If the annuitant were liable to pay super tax it would be too little, and the proper proportion of her super tax referable to her annuity would, when ascertained, have
I to be paid to her by the trustees, and would so go to reduce the income payable to the residuary legatees. It might, on the other hand, turn out that the circumstances of the annuitant were such that she was not liable in respect of her income to the full rate of income tax—that, in my opinion, being the true effect of the provisions for relief and abatement contained in the relevant taxing Acts. In that case the sum so set aside and the £428 11s. 5d. paid in the first instance to the revenue would be too much, and if, in consequence of this, the annuitant is repaid the excess by the Special Commissioners, I cannot understand on what

ground it can be suggested that such excess should be retained by the annuitant who has not paid it, and not handed back to the residuary legatees who have. A

If the annuitant were to retain the excess, she would in the end have received out of the estate more than 20s. in the £ on the £1,000 given to her by the will. The total income of the annuitant for the year 1917-18 was £1,106 6s. in respect of which income tax at 5s. in the £, amounting to £276 11s. 6d. had been deducted at source. Having regard, however, to the provisions of s. 26 of the Finance Act, 1916, which, in effect, provided that a lower and graduated rate of tax should be payable in case of incomes not exceeding £2,000, she was only liable to tax amounting to £248 18s. 4d., and the difference between this sum and the tax actually deducted was £27 13s. 2d., being the first of the eight sums with which I have to deal. Of her net income for this year, amounting to £829 14s. 6d., £750 represented the annuity, and I, accordingly, hold that a proportion of the £27 13s. 2d. equivalent to the proportion that £750 bears to £829 14s. 6d. should be retained by the trustees as part of the testator's residuary estate. The balance, of course, will be paid to the annuitant. It is unnecessary to refer in detail to the other sums with which I have to deal, as the same principle will apply to them. B

Solicitors: *Crossman, Block, Matthews & Crossman*, for *Sharman & Trethewey*, Bedford. D

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

Re FOORD. FOORD v. CONDOR

[CHANCERY DIVISION (Sargant, J.), May 31, 1922]

[Reported [1922] 2 Ch. 519; 92 L.J.Ch. 46; 128 L.T. 501]

Will—Bequest—Bequest on trust to pay annuity—Trust not exhaustive—Disposition of surplus. F

By his will a testator made the following bequest: "All my effects including rubber and all other shares I leave absolutely to my sister M. J. on trust to pay to my wife per annum £300." The bequest was amply sufficient to satisfy the annuity. G

Held: the testator's sister was entitled to the beneficial interest of the balance of the bequest, and was not a trustee thereof for the next of kin of the testator.

Notes. Considered: *Re Rees, Williams v. Hopkins*, [1950] Ch. 204.

As to the quantity of interest given in a will, see 34 HALSBURY'S LAWS (2nd Edn.) 327 et seq.; and for cases see 44 DIGEST 965 et seq. H

Cases referred to:

- (1) *King v. Denison* (1813), 1 Ves. & B. 260; 35 E.R. 102, L.C.; 43 Digest 558, 93.
- (2) *Hill v. Bishop of London* (1738), 1 Atk. 618; 26 E.R. 388, L.C.; 43 Digest 584, 327.
- (3) *Croome v. Croome* (1889), 61 L.T. 814, H.L.; affirming 59 L.T. 582; 44 Digest 967, 8203. I

Also referred to in argument:

Williams v. Roberts (1857), 27 L.J.Ch. 177; 30 L.T.O.S. 364; 4 Jur. N.S. 18; 6 W.R. 33; 44 Digest 967, 8202.

Irvine v. Sullivan (1869), L.R. 8 Eq. 673; 38 L.J.Ch. 635; 17 W.R. 1083; 44 Digest 620, 4496.

A Adjourned Summons.

By his will, dated May 22, 1919, the testator, Herbert Taynton Foord, provided :

B

"I will and bequeath to Selim Awad Khim \$2,000 as well as all my effects and furniture in China but all the valuable things are to be sent to my sister Miss Foord and \$500 is to be allowed from my estate for the cost of packing and sending them home. Selim knows what things are to be sent home. All my effects including rubber and all other shares I leave absolutely to my sister Margaret Juliet on trust to pay to my wife per annum £300 (three hundred pounds) with income tax, £100 (one hundred pounds) to be free of income tax."

C

The testator was an engineer and had been for many years in China. He made his will on the day before his death by dictating it, as he lay ill, to his servant Selim. The bequest to the testator's sister Margaret Juliet Foord was more than sufficient to satisfy the wife's annuity. This summons was taken out by the sister, who was administratrix with the will annexed, asking (inter alia) whether, on the true construction of the will, the gift to her was for her own benefit subject to and charged with payment of the annuity, or was given her, subject to the

D

Alfred Adams for the plaintiff.
Cohen for the next of kin.

E

SARGANT, J.—This is a difficult case and on the border line. The question is whether the gift to the testator's sister is a gift merely for the particular purpose of providing an annuity for the testator's wife, in which case there is a resulting trust of the balance of the estate for the testator's next of kin, or is not merely for that purpose, but as regards any balance belongs to the testator's sister beneficially. [His Lordship stated the facts, and continued:] The principles applicable to the decision of this question are stated in what LORD BOWEN called the classic judgment of LORD ELDON, in *King v. Denison* (1) in these terms (1 Ves. & B. at p. 272):

F

"The principles applicable to this case are very well settled. I adopt those expressed in *Hill v. Bishop of London* (2), as affording the grounds upon which LORD HARDWICKE proceeded; but I will here point out the nicety of distinction, as it appears to me, upon which this court has gone. If I give to A. and his heirs all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more; and the effect of those two modes admits just this difference. The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest."

G**H**

And according as the one view or the other is adopted of the construction of each particular bequest, the legatee takes or does not take the surplus for his own benefit.

I

I have felt some doubt as to the effect of the direction to send "the valuable things" to the testator's sister; and the question arises on the construction of the will whether that is a mere direction that they are to be sent to her by the attendant Selim, leaving the beneficial ownership to be determined by the subsequent clause, or is in itself a gift to the sister Miss Foord. At first I thought it was more than a mere direction and that it was intended as a gift, and the only gift, of these valuable things. On the whole, I have come to the conclusion that this is not so, and that the subsequent gift of "all my effects including rubber and all other shares" operates on the valuable part of the Chinese effects which were to be sent to the testator's sister.

That being so, I have to deal with the main question of the effect of the gift to the sister on trust to pay the wife's annuity. While a gift to A. on trust for the provision of a certain interest for B., without more, must, I think, be construed as a gift to A. merely to fulfil the beneficial interest of B. and must not be construed as a gift to A. of all that is not required to satisfy B.'s interest, yet looking at *Croome v. Croome* (3), which I employ for the purpose of seeing the general spirit in which the court deals with cases of this character, I find that the court is prepared to hold that there is a beneficial gift to the first taker on slight expressions and indications of intention. The indications there were so slight that the judges of the Court of Appeal confessed that it was difficult to state in words reasons for the impression produced on their minds by the language of the testator's will. Here there are several indications which tend to show that the gift to Margaret Juliet the testator's sister was not a mere gift on trust. First, there is the use of the word "absolutely." No doubt it might, especially if used by someone acquainted with legal language, be construed as describing the extent of the interest in the property given—namely, the fee simple in freehold property and the absolute interest in personal property. But I think in this extremely untechnical will the testator must have used it to mean out and out, and that it, therefore, carried not merely the full legal interest, but the beneficial interest also. Another indication is that the beneficiary is described by the testator as "my sister," so that the testator was recognising the relationship existing between them and was, perhaps, founding his generosity on the existence of that relationship. There was no particular reason to describe her as his sister if he was only going to make her a bare trustee. Moreover, he refers to her as "my sister Margaret Juliet," and not as Miss Foord, as he did in the earlier part of the will. Thirdly, some indication is to be drawn from the words by which he commences the gift "All my effects including rubber and all other shares." That gift includes the testator's effects, so that he was giving property some of which would and some of which would not produce income. That is some indication that the trust only applies to a portion of the property given out and out to the testator's sister. No doubt the effects could be sold in case of need and the proceeds invested and the income so increased. But I do not think that is the sort of thing a testator making his will at the last moment in a foreign land would have in contemplation.

I feel here the difficulty expressed by BOWEN and FRY, L.JJ., in *Croome v. Croome* (3). As FRY, L.J., said (59 L.T. at p. 586):

"It is difficult, no doubt, to express in words the exact impression which the language of a testator often produces on the mind; but the result of the language of the testator in this case is to convince me that he had given the real estate to his brother for a purpose which he does not contemplate as exhausting the whole."

Here also I find it difficult to express the effect produced on my mind by the language of the testator; but I have become convinced, as the argument went on, contrary to the view I took at first, that the beneficial interest was given to the sister, and I will so declare.

Solicitors: *Stephenson, Harwood & Tatham.*

[Reported by L. MORGAN MAY, ESQ., Barrister-at-Law.]

A
MURPHY AND OTHERS v. HURLY

[HOUSE OF LORDS (Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Parmoor and Lord Carson), January 27, 30, February 20, 1922]

[Reported [1922] 1 A.C. 369; 91 L.J.P.C. 116; 127 L.T. 49; 38 T.L.R. 386; 66 Sol. Jo. 314]

Landlord and Tenant—Repair—Landlord's obligation—Notice by tenant of need of repair—Landlord's knowledge of condition of property equal to tenant's—Sea-wall—Access by landlord to side facing sea—Periodic inspection and repair of wall by landlord's servant.

C The application of the rule that a covenant by a landlord to repair the demised premises is to be construed as a covenant to repair only on notice depends on the existence of the fact that in the ordinary case of the demise of premises the tenant is in occupation and the landlord is not, and, therefore, the tenant has the means of knowing of the need of repair, while the landlord has no right of access and no means of knowing the condition of the structure from time to time. Where, therefore, the element of exclusive knowledge in the tenant is absent the rule will not apply.

D The appellants were tenants of holdings to protect which from the incursions of the sea the landlord had built a sea-wall which he repaired when necessary. The agreements on which the holdings were let did not contain any covenant by the landlord to maintain the wall, but the Irish Land Commission, in fixing fair rents for the holdings under the Irish Land Act, 1881, inserted in each order a condition that the rent had been "fixed on the basis that it is a condition of the tenancy that the landlord keeps in repair the sea-wall" in question, and the House expressed the opinion that, as the landlord had accepted rent on that basis, he must be taken to have agreed to that condition. The landlord employed a man to look after and repair the wall, and he and his servants and agents had the same right as had the appellants of access to a track which ran between the wall and the foreshore, of passing along the track, and inspecting that side, the vulnerable side of the wall.

G **Held:** it was clear that the landlord, by his agent employed for the purpose, had access to the wall at all times and for all purposes connected with his obligations, that his means of knowledge of the condition of the wall were at least as ample and timely as those of the tenants, and that he knew long before the occurrence of the matters complained of that the wall was so constructed and so exposed to damage from spring tides and storms as to require constant examination and repair; and, therefore, he was bound to keep the wall in a proper state of repair whether or not he received from the tenants notice of its need of repair.

H Per LORD PARMOOR: The conditions which attach to the repair of a sea-wall, erected to keep out high tides, over an area occupied by several tenants, some of whose tenancies do not abut on the sea-wall, are essentially dissimilar from those which attach to covenants between a tenant in occupation of buildings and his landlord.

I **Notes.** See also *Granada Theatres, Ltd. v. Freehold Investment, Ltd.*, [1959] 2 All E.R. 178, at p. 184.

Considered: *Fisher v. Walters*, [1926] 2 K.B. 315; *Morgan v. Liverpool Corpn.*, [1926] All E.R. Rep. 25; *McCarrick v. Liverpool Corpn.*, [1946] 2 All E.R. 646; *Uniproducs (Manchester), Ltd. v. Rose Furnishers, Ltd.*, [1956] 1 All E.R. 146. Referred to *Griffin v. Pillet*, [1926] 1 K.B. 17.

As to requirement of notice to landlord of want of repair see 23 HALSBURY'S LAWS (3rd Edn.) 587, and for cases see 31 DIGEST (Repl.) 345, 346.

Cases referred to :

- (1) *Vyse v. Wakefield* (1840), 6 M. & W. 442; 8 Dowl. 377; 9 L.J.Ex. 274; 4 Jur. 509; 151 E.R. 491; affirmed, 7 M. & W. 126, Ex.Ch.; 29 Digest 364, 2938.
- (2) *Makin v. Watkinson* (1870), L.R. 6 Exch. 25; 40 L.J.Ex. 33; 23 L.T. 592; 19 W.R. 286; 31 Digest (Repl.) 346, 4768.
- (3) *Hugall v. M'Lean* (1885), 53 L.T. 94; 33 W.R. 588; 1 T.L.R. 445, C.A.; 31 Digest (Repl.) 346, 4770.
- (4) *London and South Western Rail. Co. v. Flower* (1875), 1 C.P.D. 77; 45 L.J.Q.B. 54; 33 L.T. 687; 7 Digest 387, 222.
- (5) *Manchester Bonded Warehouse Co. v. Carr* (1880), 5 C.P.D. 507; 49 L.J.Q.B. 809; 43 L.T. 476; 45 J.P. 7; 29 W.R. 354; 31 Digest (Repl.) 281, 4156.
- (6) *Tredway v. Machin* (1904), 91 L.T. 310; 53 W.R. 136; 20 T.L.R. 726; 48 Sol. Jo. 671, C.A.; 31 Digest (Repl.) 383, 5105.
- (7) *Torrens v. Walker*, [1906] 2 Ch. 166; 75 L.J.Ch. 645; 95 L.T. 406; 54 W.R. 584; 31 Digest (Repl.) 344, 4752.
- (8) *Melles & Co. v. Holme*, [1918] 2 K.B. 100; 87 L.J.K.B. 942; 119 L.T. 191; 62 Sol. Jo. 704, D.C.; 31 Digest (Repl.) 346, 4776.
- (9) *Miller v. Hancock*, [1893] 2 Q.B. 177; 69 L.T. 214; 57 J.P. 758; 41 W.R. 578; 9 T.L.R. 512; 37 Sol. Jo. 558; 4 R. 478, C.A.; 31 Digest 100, 2471.
- (10) *Huggett v. Miers*, [1908] 2 K.B. 278; 77 L.J.K.B. 710; 99 L.T. 326; 24 T.L.R. 582; 52 Sol. Jo. 481, C.A.; 31 Digest (Repl.) 102, 2477.
- (11) *Lucy v. Bawden*, [1914] 2 K.B. 318; 83 L.J.K.B. 523; 110 L.T. 580; 30 T.L.R. 321; 31 Digest (Repl.) 101, 2473.
- (12) *Dobson v. Horsley*, [1915] 1 K.B. 634; 84 L.J.K.B. 399; 112 L.T. 101; 31 T.L.R. 12, C.A.; 31 Digest (Repl.) 101, 2474.
- (13) *Hart v. Rogers*, [1916] 1 K.B. 646; 85 L.J.K.B. 273; 114 L.T. 329; 32 T.L.R. 150; 31 Digest (Repl.) 104, 2483.
- (14) *Dunster v. Hollis*, [1918] 2 K.B. 795; 88 L.J.K.B. 331; 120 L.T. 109; 17 L.G.R. 42; 31 Digest (Repl.) 101, 2476.
- (15) *Henning's Case* (1617), Cro. Jac. 432; 79 E.R. 370; sub nom. *Haul. v. Heming*, 1 Roll. Rep. 285; 39 Digest 407, 419.

Appeal by the tenants from an order of the Court of Appeal in Ireland.

The tenants occupied several small holdings on the coast of Kerry as tenants of the respondent landlord. In 1899 the landlord erected a seawall about three-quarters of a mile in length along the front of the holdings to protect them from the incursions of the sea, and from time to time he repaired the wall when it appeared necessary. The Irish Land Commission, in fixing fair rents for the holdings under the Irish Land Act, 1881, inserted into each order a condition :

"The rent has been fixed on the basis that it is a condition of the tenancy that the landlord keeps in repair as heretofore the sea-wall on the western side of The Townland."

The rent was in fact paid and received for the holdings on that footing. The landlord employed a man to look after the wall. In September, 1918, a very high tide and strong westerly wind caused the wall to give way in several places, and the holdings of the tenants were flooded with sea-water and damaged. The tenants brought actions against the landlord to recover damages for the breach of his alleged obligation to keep the wall in repair. The actions were consolidated, and tried before J. O'CONNOR, L.J., without a jury. He found that there was an obligation undertaken by the landlord to repair the wall, that there was evidence that the damage complained of had been caused by the non-repair of the wall, and that notice to the landlord of the condition of the wall was not a condition precedent to his liability on the agreement. He, therefore, gave judgment for the plaintiffs, but the Court of Appeal (SIR JAMES CAMPBELL, L.C., and MOLONY, C.J., C. A. O'CONNOR, M.R., dissenting) reversed his decision on the ground

A that notice to the landlord of the condition of the wall was necessary in order to render him liable. The tenants appealed to the House of Lords.

Sir C. J. Mathew, K.C., P. Lynch, K.C. and J. M. Fitzgerald (the two latter of the Irish Bar) for the appellants.

B *Serjeant Sullivan, K.C., H. D. Conner, K.C. and B. Roche* (the two latter of the Irish Bar) for the respondent.

Their Lordships took time for consideration.

Feb. 20. The following opinions were read.

C **LORD BUCKMASTER.**—The appellants in this case are tenants of adjoining holdings at Fenit Island in the county of Kerry. The respondent is their landlord. The holdings originally ran down to the foreshore and were exposed to the incursions of the Atlantic. To provide against this danger the landlord in 1899 erected a sea-wall. Whether the wall was actually built in whole or in part on portions of the tenants' holding is not material, for there can be no doubt that it was intended to be within the control of the landlord, and if its site was upon property which the appellants originally held that site was relinquished for the purpose of its construction. The wall was built during the currency of a statutory term during which a fair rent had been fixed by the Lands Commissioners. Since the date of the construction of the wall two further orders have been made fixing the fair rent—the first in March, 1906, and the second in May, 1916. The earlier of these orders contained the statement that the rent was fixed on the basis of the landlord keeping the sea-wall on the western side of the holding in repair, and in the latter this was varied by the provision securing that the landlord should keep the sea-wall in repair as set forth in the schedule, and the schedule contained the statement that:

E “The rent has been fixed on the basis that it is a condition of the tenancy that the landlord keeps in repair as heretofore the sea-wall on the western side of the townland from ‘A to B’ on the recorded map.”

F In 1914 there was a breach in the wall due to heavy weather, damage resulted to the holdings, and the tenants recovered from the landlord in respect thereof. In September, 1919, there was a strong westerly wind and the Atlantic rolled with violence against the wall, breaking it down in nine places, with considerable resultant injury to the crops and holdings of the appellants.

G Three questions arise for determination. (i) Was there any, and if so what, obligation undertaken by the landlord to the tenants in respect of the wall? (ii) Was notice of the condition of the wall to the landlord a condition precedent to his liability on any agreement? (iii) Was there evidence of damage due to the non-repair of the wall on which the learned trial judge could properly act? The first question hardly appears to merit the very elaborate argument which it received. H It may, indeed, be accepted that the Court of Land Commission had no power to impose new conditions of tenancy and so far as they attempted to effect such an alteration their order would be inoperative, but none the less the rent was fixed upon the basis that an agreement with regard to the sea-wall existed or should be made, and the rent was accepted upon that footing. Repairs, some extensive and some trivial, were continuously made from the erection of the wall down to the date of the disaster. No attempt was made to challenge the authority of the court with regard to the stated condition, and no evidence whatever was tendered to negative what such circumstances would reasonably imply—that an agreement was in fact existing between the parties. I I am not, therefore, surprised to find that such agreement was admitted, and, although it is said that this statement is due to a misapprehension of the true position, their Lordships think that the admission would only give effect to the clear result of the circumstances to which reference has been made. The agreement, therefore, is an agreement to keep in

repair the sea-wall between the points "A" and "B." In order to see that the wall was kept in proper condition it appears that the defendant appointed a representative named Kelly whose business it was to keep a watch upon the wall, but neither from him nor from any other person is there evidence that the landlord received notice that the wall needed attention until it was overthrown by the tide. A

I am unable to think that any such notice was necessary. The principle upon which notice is required to be given to a lessor requiring him to repair demised premises in accordance with his covenant before proceedings are taken to obtain damages for the breach, is due to no peculiar relationship arising out of a covenant between landlord and tenant. It depends upon the actual facts existing in each case and upon the consideration whether the circumstances are such that knowledge of what may be required to be done to comply with the covenant cannot reasonably be supposed to be within the knowledge of one party while it is within the knowledge of the other. If these are the conditions, it is not fair to render the ignorant party liable for something which the party with knowledge has never asked him to do. The earliest case referred to, that of *Vyse v. Wakefield* (1), had nothing to do with landlord and tenant at all. The next case, that of *Makin v. Watkinson* (2), to which the subsequent cases constantly refer as a guiding authority, was a case of landlord and tenant, the covenant was to repair the walls, timbers, and roofs of the property. CHANNELL, B., and BRAMWELL, B., held that notice was necessary before proceedings were taken upon such a covenant, because, to use their language: B C D

"We are irresistibly driven to say that the parties cannot have intended so preposterous a covenant as that the defendant shall keep in repair that of which he has no means of ascertaining the condition." E

There are a number of authorities that have followed this principle, but there is none that affects the central underlying idea that justice requires in a covenant to repair an implication that knowledge possessed by one party which, in the position of the parties, would not be possessed by the other, must be communicated before proceedings can be taken for breach of the covenant. The strongest case in favour of the respondent is *Hugall v. M'Lean* (3). It was an action on a covenant by a landlord to keep in repair the drains of a house, and the jury found that the plaintiff, who was tenant, had not the means of knowing that the drains were defective, whilst the landlord had, although he did not in fact know. The Master of the Rolls held notice was necessary to establish liability and followed *Makin v. Watkinson* (2). The case does not appear to have been very fully reported, and it is difficult to reconcile the decision with the findings of fact on the part of the jury, but it is easy to understand the case if it be regarded, as the Master of the Rolls appears to have thought it should be, as an ordinary case of a covenant to repair part of the demised structure that was in fact in the occupation of the tenant. F G H

None of these cases, in my opinion, has any application to the present. The wall in question stretches over a half or three-quarters of a mile, and abuts on the boundaries of various holdings, and the landlord could have, and by his agent in fact had, access to the whole. A breach in one part of the wall might cause damage affecting every holding, and a breach of any part not abutting on the holding of a particular tenant might be just as much removed from his notice or means of knowledge as from that of the landlord. There is none of the circumstances here that render it necessary to imply conditions which have never been expressed and the covenant to keep in repair must be enforced without regard to any special limitations on its operation. Upon the question whether the covenant was broken, and the damage was due to the breach, I have had the opportunity of reading the opinion of LORD ATKINSON and I agree with his conclusions and with the reasons which he gives. I

A LORD ATKINSON.—I concur. It is, I think, much to be regretted that the trial in this case was conducted in such a manner that much has been left uncertain and obscure which would have been helpful had it been clearly and distinctly elicited and put in issue. I propose to consider the main questions involved, in my view, in this case in the following order: (i) Was there evidence given at the trial sufficient to sustain a finding that the respondent had agreed with each of the appellants on May 31, 1916, to keep in repair, as theretofore, the sea-wall on the western side of the townland of which their respective holdings form part, from the points A to B on the map referred to by the order of the Irish Land Commissioners of that date? (ii) If so, was there evidence given at the trial sufficient to sustain a finding that the respondent had been guilty of a breach of this contract, injuriously affecting the respective holdings of the appellants? (iii) If so, were the appellants respectively disabled from suing the respondent to recover damages in respect of this breach by reason of his not having had, before action brought, notice or knowledge that this sea-wall was out of repair and needed to be repaired? (iv) Are the damages awarded excessive in amount, or have they been measured upon an improper principle?

D It has been well established in the Irish courts that the Irish Land Commission, when making orders fixing fair rents for holdings in the occupation of tenants, have no jurisdiction to introduce into an order conditions collateral to, or unconnected with, the contract of tenancy under which the holding is, in fact, held; but it is, I think clear that if in any given case they should introduce an unauthorised condition, of such a nature as to be burdensome to the landlord, **E** beneficial to the tenant, calculated to increase the value of the holding, and, therefore, presumably causing the rent to be fixed at a higher figure than it would have been fixed at had the condition not been introduced, the receipt by the landlord of the enhanced rent would amount to strong evidence that he had agreed to be bound by the conditions on which that enhancement was based. It would be very unjust to the tenant to permit the landlord to at the same moment **F** approbate and reprobate, to receive the enhanced rent and repudiate the condition leading to its augmentation.

The appellants had three successive statutory terms fixed for their respective holdings. This sea-wall was built by the respondent in the year 1899-1900, during the currency of the first of these statutory terms. On the expiration of this term the appellants, in the year 1906, applied to the Land Commissioners to have **G** fair rents fixed for their respective holdings for a second term of fifteen years. On Mar. 10, 1906, the commissioners made orders in the case of each of the appellants fixing the rents of their respective holdings, and introduced into each order a condition worded as follows:—"The rent has been fixed on the basis of the landlord keeping the sea-wall in repair." This condition was repeated **H** in the pink schedule required to be framed under the first section of the Irish Land Act, 1896. It is not stated, either in the order or schedule, that this sea-wall is built upon, or bounds, the holdings of the appellants or any of them. It is not pretended that the rents so fixed on the basis of this condition were not paid to and received by the respondent during the continuance of the statutory term. In March, 1914, the three appellants applied to the Land Commissioners to make **I** an order fixing the fair rents for their respective holdings for a third term, to run from Mar. 25, 1914. On Oct. 26 in that year that application was acceded to; but into the pink schedule attached to the orders was in each case introduced a condition somewhat different in form from that introduced into the previous orders. It ran thus:—"The rent has been fixed on the basis of the landlord keeping the sea-wall on the west side of the town land in repair." Parts of the sea-wall have been broken down by a storm, but these have been re-built and the whole repaired during the present summer by the landlord.

When a statutory term has expired the tenant's obligation to pay the rent fixed when the term was created expires, but the contract of tenancy does not expire. The new rent and the conditions attached to it must be re-fixed and re-created by a new order. If this new order contains anything in excess of jurisdiction the landlord can, by proper proceedings, impeach it as being made ultra vires and void in whole or, possibly, in part. The respondent did not take proceedings of that kind, but on Dec. 10 and 11, 1914, both the appellants and the respondent served notice on the Land Commissioners requiring the applications of the former to be re-heard. These applications were acceded to, and on May 16, 1916, the Land Commissioners made an order reciting that the aforesaid notices had been served, that the case had been re-heard, and that, after hearing what was offered on behalf of the landlord and tenant respectively, they had fixed the rent on the basis of the landlord's keeping the sea-wall in repair as set out in the schedule of even date therewith. On referring to the schedules one finds the following statement:

"The rent has been fixed on the basis that it is a condition of the tenancy that the landlord keeps in repair as heretofore the sea-wall on the western side of The Townland from A to B on the map recorded."

The object of introducing the word "heretofore" was to bring back things to the condition in which they stood during the preceding statutory term. The sea-wall was broken down to a serious extent in the month of September, 1918. It has not been suggested that the respondent did not receive up to that date the rent fixed by the order of May 16, 1916. There was, therefore, in my opinion, abundant evidence, to establish that the respondent had agreed with each of the appellants to repair the sea-wall as provided by the condition introduced into these several fair-rent orders of the latter date.

On the second question HIS LORDSHIP examined the evidence and concluded: In the face of this testimony it would appear to me to be hopeless to contend that there was not evidence before J. O'CONNOR, L.J., on which he might legitimately come to the conclusion that this wall was, on Sept. 21, 1918, in bad repair, and that the want of the proper repair of it, though not the sole cause of the breaches having been made in it, with the resulting damage, was a potent contributing cause to these disasters.

As to the third question, the necessity for giving notice before an action for breach of contract to repair could be instituted, I desire to refer to a few of the many authorities cited, with a view to consider whether the principle upon which this alleged rule of law is based can apply to a work such as this sea wall. Though covenants to repair premises are more frequently entered into by landlords and tenants than between others, the rule of law is equally applicable to the contracts of other classes of the community. In *Makin v. Watkinson* (2), which is subsequently treated as more or less a leading case, the lessors of a mill covenanted with the lessees that they would at all times during the demise keep the main walls, main timbers, and roof of the buildings in good and substantial order, repair, and condition. The lessors failed to do so. The lessees sued them to recover damages for this breach. The lessor pleaded that he received from the lessees no notice of the breach, and this plea was demurred to. The plea was held good. CHANNELL, B., in delivering judgment, said:

"Where a covenant would, according to its letter, be an unreasonable one, words not inconsistent with the words used may be interpolated to give it a reasonable construction. This proceeds upon the assumption that the contracting parties were reasonable men and intended what was reasonable. If, however, the language of the covenant is clearly inconsistent with the words sought to be added, I agree that, however absurd the covenant may be, it cannot be varied."

A He then proceeds to show why it would be unreasonable in the case under consideration to enforce the unqualified covenant. He said :

“Now, here repairs are to be done to the exterior of the premises as to which it is just possible that the lessors might, by observation, acquire a knowledge of their necessity. But the main timbers of the building, which must be in its carcase, and the roof, are to be kept in repair, and of the repairs required for them he could have no knowledge without notice.”

He then proceeds to show why he could have no such knowledge. He says :

“He [the lessor] could not enter to see the condition of these parts even though independently of his obligation under the covenant it might be of the greatest importance to him to be acquainted with it.”

The justice and reasonableness of modifying the covenant in the lease, so, as to require notice to be given to the lessor is mainly, if not entirely, based on the lessor's inability to enter upon the demised premises and ascertain for himself the actual condition of the things he had bound himself to repair. This is even more strongly brought out by BRAMWELL, B. In his judgment he said :

“I think we are irresistibly driven to say that the parties could not have intended so preposterous a covenant as that the defendant should keep in repair that of which he has no means of ascertaining the condition. The lessee is in possession. He can say to the lessor : ‘You shall not come on the premises without lawful cause.’ And to come on them for the purpose of looking into the state of the premises would not be lawful cause, and if the lessor comes to repair the premises when no repairs are needed he will be a trespasser. If he does not come he will, according to the plaintiff's contention, be liable not only to the cost of repairs but to consequential damage for injury to chattels caused by the want of repairs he had no opportunity of effecting. This is so preposterous that we ought to hold that the parties intended the covenant to be read [as a covenant to repair on notice]. If we look at the reason of this rule it is that when a thing is in the knowledge of the plaintiff but cannot be in the knowledge of the defendant, and the defendant can only guess or speculate about the matter then notice is necessary.”

I have quoted from these two judgments at such length because almost all the later authorities rely upon them. In *London and South Western Rail. Co. v. Flower* (4) the bridge which the undertakers were bound to repair was in the exclusive possession of the plaintiffs. The want of repairs to it was known to them, and the defendant had no notice nor any knowledge or means of ascertaining that repairs to it were necessary. LORD LINDLEY based his judgment on *Makin v. Watkinson* (2), but was careful to exclude the case of the inability of the defendants to ascertain whether or not the bridge was defective, and also to exclude the case of the mutual ignorance of the parties of the existence of the defects—a most important qualification, not without a bearing on the present case. In *Manchester Bonded Warehouse Co. v. Carr* (5), the lessee who sought to sue the lessor on his covenant to repair the premises was himself in possession of them, and, though bound by covenant not to sublet them without the consent of the lessor, did sublet some of the floors in the building without consent. The lessor had no notice of any want of repair. It was held that he was not liable on his covenant. *Hugall v. M'Lean* (3) is a somewhat peculiar case. The report of it in the Court of Appeal in 53 L.T. 94 would appear to me very imperfect. The report in 33 W.R. 588 is somewhat fuller. The defendant had let to the plaintiff (a lady) a house and covenanted to keep it in repair during the tenancy, among, other things the drains and sewers upon the premises demised. The plaintiff, on her side, covenanted that she would allow the defendant and the agents and surveyors appointed by him to enter any part of the demised premises to do any act which might be necessary in order to comply with the terms of the lease.

During the tenancy the premises were flooded with sewage by reason of the drains being out of repair. The plaintiff without giving any notice to the defendant, did the necessary repairs and sued the defendant to recover the sum expended by her on the repairs. The defendant pleaded that he had received no notice of the want of repairs. At the trial the jury found that the plaintiff did not know and had not the means of knowing the state of the drains, thus rebutting the ordinary presumption that would arise in the case of any occupying tenant; and they also found that the defendant did not know, but had the means of knowing, that the drains were in a bad condition prior to the date of the flooding. The landlord was held not to be liable owing to the absence of notice. In *Tredway v. Machin* (6), decided in the Court of Appeal in 1904, COLLINS, M.R., states in very clear and simple language the principle upon which the foregoing decisions rest. In giving judgment he said :

"Now the law upon this subject has been frequently laid down and stated. The landlord is not liable unless there is a contract by him to keep the premises in repair, and he is not liable even in that case unless he has express notice of the want of repair. That rule rests upon the principle that the landlord is not the occupier of the premises, and has no means of knowing what is the condition of the premises unless he is told, because he has no right of access to the demised premises, whereas the occupier has the best means of knowing of any want of repair."

These authorities, I think, establish that the duty of the tenant to give notice springs from the special knowledge of the need of repairs which his occupancy of the demised premises is presumed to give him, coupled with the state of ignorance of that need in which the absence of such occupancy is presumed to leave the landlord.

Torrens v. Walker (7), is to the same effect. In every one of the cases cited the plaintiff was in occupation of the premises to which the covenant to repair applied. I utterly fail to see how the principle upon which they have been decided can possibly apply to such a thing as this sea-wall. The wall, though three-quarters of a mile in length, is for the purpose it is meant to serve, a unit. It is not clear whether it actually rests on, or merely bounds, the holdings of the respondents' tenants. Along the sea side of it—obviously the vulnerable side—runs a track along the foreshore to which access can be gained by three or four bohereens or lanes. The landlord and his agents had the same right as had the appellants and their agents, to pass along that track, to examine carefully that side of the wall, to ascertain its condition and to see whether it needed repair at any particular place or places. The levels of the appellants' holdings have not been proved with the accuracy with which they should, and might, have been proved, but this fact is, I think, clear from what has occurred, that lands some distance from any breach that might be made in the wall, or situated on the north, south or east of that breach, may be flooded by the tidal water which flows through the breach, as well as the holding immediately in front of the breach, so that the protection of the tenants' lands from flooding depends on each and every part of the wall through its entire length being staunch. Each of the appellants had, therefore, an interest, as, indeed, the respondent had, in each and every part of the wall being in such a condition that it would effectually resist the action of the tide. It is obvious, however, that an examination of the sea side of the wall alone would not be sufficient to ascertain whether it required repairs or not. It is here that the remarks of BRAMWELL, B., in *Makin v. Watkinson* (2) apply with such force: a tenant may be able to examine the inner side of the part of the wall bounding his own holding, but he has no legal right to trespass on the holding of his neighbour for the purpose of examining another part of the wall; and as I have already pointed out, an examination confined to the portion of it fronting one holding would be insufficient. The landlord, too, would be in precisely the position of the lessor, as pointed out by BRAMWELL, B., in *Makin v. Watkinson* (2). He would have no legal right to go on the holdings of

A any of his tenants for the purpose of inspecting the wall if that tenant objected to his doing so, neither would the respondents' agent, so that the presumption upon which the right to notice is stated to depend, namely, that the tenant, being in occupation, has a full opportunity of seeing and knowing the condition of the premises he occupies and their need of repair, while the landlord has no such opportunity is plainly negatived by the facts.

B I think this case resembles much more closely a case in which a landlord made a road as a means of approach to the houses of several of his tenants, and covenanted to keep it in repair, than any of the cases dealt with in the authorities relied upon. If, for instances, this road was carried over a bridge constructed by the landlord and was covered by his covenant, it would, in my view, be little less than ridiculous to contend that he was not liable to be sued for the breach of his

C covenant to repair the bridge unless he first received notice from one of the tenants who he invites to use it, but who is not in occupation of it. The reason upon which the right to receive such notice is based would not exist in such a case, and the rule of law mentioned by COLLINS, M.R., would not apply to it. I am, therefore, clearly of opinion that the respondent was bound to keep this sea-wall in a proper state of repair, whether he received or did not receive notice of its need of repair, and was not entitled to receive such a notice before he was sued for the breach of his agreement.

D With regard to the damages, I think there is no evidence whatever to show they were excessive in amount. The appeal, therefore, in my opinion, succeeds, with costs here and in the Court of Appeal.

E **LORD SUMNER.**—In this case, which has already twice been the subject of review, I think, your Lordships cannot reasonably be expected to take a view of the facts different from that which has been adopted throughout. Partly on an admission made by the landlord's counsel, partly on evidence called before him, partly, I daresay, on the footing of matters which were tacitly treated as common knowledge and common ground, O'CONNOR, L.J., arrived at conclusions of fact, from which I, for one, can feel no security in departing, and I propose to assume them to be correct without further discussion. For convenience, all six actions were tried together, but this cannot affect the separate rights of the parties or the construction to be put on the several contracts between each tenant and his landlord. Each had the benefit of the landlord's obligation to keep in repair a specific part of this sea-wall, which, like the whole wall of which it was a part, was a common protection to all

F six tenants. The obligation is not otherwise evidence in writing than by the words in the "pink schedule" and the marking of the map. No part of the wall abutted on the holdings of two of the appellants. In the case of each of them it is plain that the obligation to repair extended beyond that part of the wall which abutted on the particular holding, and arose irrespective of the particular holding to which the defective part of the wall might be adjacent. The reason for this is, that the wall

G was a common safeguard against a common enemy, the sea. Such is the configuration of the ground, that a breach, effected in one part of the wall, might lead to damage resulting, from the advance of the sea, to another and comparatively distant part of the land in question. It follows, that the obligation to repair might well arise in favour of a particular tenant, who had neither possession

H of nor control over the particular part of the wall, whose want of repair placed his land in jeopardy. For this reason I think it is of small importance, if of any, to decide whether the site of any part of the sea-wall had ever been itself demised to any tenant as part of his holding. In two cases, at any rate, it clearly was not so. If the landlord retained possession and control, which for certain purposes he clearly did, *Melles & Co. v. Holme* (8) is authority for saying, that he would not be entitled to notice of want of repair. In any case the point was one which the defendant should have proved, since it was material only to his defence. The oral evidence does not deal with it, and I can draw no satisfactory inference from a

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composite map of the different holdings, photographically reduced to so small a scale, that it is difficult to read the natural features and still more so to say where the coloured boundaries of the holdings actually run with reference to them. A

This being so, the next point in the case is whether *Makin v. Watkinson* (2) and similar cases have any application here. The rule requiring a notice of want of repair by the tenant to the landlord, in the case of an ordinary landlord's repairing covenant for dwelling-houses, warehouses, and similar structures, is well settled, and no one proposes to alter or restrict it. The nature and the conditions of this rule are, however, equally well settled. As a rule of construction, which reads into the covenant words—namely “upon notice”—which are not there, its application naturally depends on the existence of those strong circumstances of necessity, which alone justify the implication of a condition upon an obligation, which is expressed unconditionally. Those circumstances are (i) that the tenant is in occupation and the landlord is not; (ii) that the tenant, therefore, has the means of knowledge peculiarly in his possession, while the landlord has no right of access and no means of knowing the condition of the structure from time to time: (see per COLLINS, M.R., in *Tredway v. Machin* (6) (91 L.T. at p. 311); and (iii) perhaps I may add that the repairs of dwelling houses, however frequently required, are still casual and occasional, and not such as to demand of the landlord incessant vigilance and almost daily care. In the present case two of the plaintiffs were not in possession of any part of the wall; none were in possession of all those sections of the wall, which collectively the landlord had undertaken to repair. The agreement is one to be inferred, partly from the language used in the “pink schedule” on the basis of which the landlord has, from time to time, accepted the rents reserved in it; partly from the evidence of what was done under the agreement; partly from the description of the wall and the nature of the locality. It is not necessary to decide who was in occupation, for it is clear that the landlord, by his agent employed for the purpose, had access to the whole wall at all times and for all purposes connected with his obligations; that his means of knowledge of the condition of the wall were at least as ample and as timely as those of the tenants; and that, as he well knew long before the occurrence of the matters complained of, the wall was so constructed and was so exposed to regular periodic damage from spring tides and frequent storms as to require constant examination and constant small repairs. Not only were landlord and tenant on equal terms, to say the least of it, both as to knowledge and as to access, but the landlord, by his agent, was constantly visiting and repairing the wall in discharge of his duty to repair. The inference from the evidence would be that by his agent's examination, as well as by his own knowledge of the way in which he had himself built the wall in the first instance, the landlord had knowledge, and not merely the means of knowledge, of the defects in the wall, which led to its giving way at the equinoctial spring tide in question. I think it advisable to make this observation, because in *Tredway v. Machin* (6) the Court of Appeal held, following *Hugall v. M'Lean* (3) that means of knowledge are equivalent to actual knowledge for the purpose of charging the landlord. Furthermore, if the cases to repairing covenants applied, each single tenant might fail in his action, because, a break having occurred in a part of the wall which was not in his proximity and to which he had no access as of right, he had not given the landlord notice to repair it, because he was ignorant of the need of it, or again he might fail, because he could not show at the trial that the water, which destroyed his crops, had not entered through defects in the wall of which he had given no notice, having, in fact, no knowledge of them. I think the rule laid down in *Makin v. Watkinson* (2) has no application to such a case. The further point to which this rule has hitherto been carried is *Hugall v. M'Lean* (3), a decision of the Court of Appeal. There the tenant had neither knowledge of the want of repair nor means of knowledge, yet she failed to make the landlord liable, because she had not given him a notice, which she could not have given. The covenant was, however,

A an ordinary repairing covenant in an agreement for a lease of a dwelling-house, and the court felt bound to adhere to the established rule of construction, on the faith of which, no doubt, numbers of leases had been entered into, the maxim *lex non cogit ad impossibilia* notwithstanding. It is enough for to-day to point out that the present is not a case of a covenant in common form in an agreement for a lease of a dwelling-house, and that the defect complained of in that case was a defect in the drains of the particular house of which the tenant was in sole occupation. It would appear from the report in 1 T.L.R. 445 that the court felt that it was carrying the rule to its extreme limit.

There is a class of cases much more akin to the present, as to which the application of the rule would have been more nearly an authority than those above referred to. It must have been a matter of frequent occurrence that, in connection with building schemes for the development of urban land, or with the erection of cottages by manufacturers or colliery proprietors for their work-people, the landlord has constructed and bound himself to maintain some private road, or bridge, or drain, common to all the houses and close to them but not in the occupation of any of their inhabitants. The condition, on which such an obligation is performable must frequently have been considered, but the industry of counsel has failed, and mine, such as it is, has failed equally, to discover any case, in which it has been suggested that such tenants cannot enforce their landlord's obligation, unless they have previously given him notice of the want of repair. The fact that no such contention appears to have been raised is significant. In *Miller v. Hancock* (9), where a landlord of a building let out in flats was held liable to keep in repair the common stairway, which he had not demised, there was no suggestion that he was entitled to notice. The fact that the liability of the landlord has since been declared to have rested on other grounds (*Huggett v. Miers* (10), *Lucy v. Bawden* (11), *Dobson v. Horsley* (12), *Hart v. Rogers* (13), *Dunster v. Hollis* (14)), does not affect the value of this point, such as it is. For my own part, I think that the peculiar necessities, which led to the implication of the condition of notice in the reported cases do not exist here, and therefore that this defence ought to have been rejected in the courts below. In my opinion, the appeal should be allowed.

LORD PARMOOR (read by LORD CARSON).—The appellants are tenants to the respondent, and on the passing of the Irish Land Act, 1881, held their respective farms as tenants from year to year. Judicial rents were fixed in the year 1883. During the currency of the first statutory terms, the respondent borrowed £350 from the Board of Works, and built a sea-wall on the western side of Fenit Island, as a protection against flooding by the sea. A second term of fair rents was fixed in 1906 by the Land Commission Court of Appeal. In each of the orders of the court, a clause was introduced :

H “The said rent has been fixed on the basis of the landlord keeping the sea-wall on the western side of holding, in repair.”

The appellants applied to have the third term rent fixed, and in the order a clause was inserted :

I “The rent has been fixed on the basis that it is a condition of the tenancy that the landlord keeps in repair, as heretofore, the sea-wall on the western side of the townland from ‘A’ to ‘B’ on the map as recorded.”

I will assume for the purposes of the appeal that the Land Commission had no jurisdiction to compulsorily impose a new condition on the landlord. It was argued on behalf of the respondent that a new condition had been so imposed, and that consequently the order was invalid. I think that this contention cannot be maintained, but it is not necessary further to consider it, since the liability of the respondent to repair was admitted at the hearing, and O’CONNOR, L.J., accepted the contention on behalf of the respondent, that the measures of his obligation was to

be read: "reasonable repair according to the nature and quality of the wall." In A
the judgment of the Master of the Rolls it is also stated:

"The defendant did not originally assume any liability to maintain the wall, but, subsequently, when the plaintiffs applied to the Land Commission to have fair rents fixed, they were fixed by the court on the basis that the landlord should keep the wall in repair. It was admitted that this threw on the land- B
lord the same obligation as he would have incurred if he had entered into covenant with each of his tenants to keep the wall in repair. It was for a breach of this obligation that the actions were brought."

Although in these circumstances it is not necessary to refer to the evidence, in my opinion, that evidence amply supports the admission which, no doubt, was prudently made after consideration. In September, 1918, the wall was breached C
by the sea. The holdings of the appellants were flooded, partly through the breaches so made, partly by inrushes of water to the south of the wall and through roadways in the wall, and there is evidence that the sea in places came over the wall. The terms of the order on which the obligation of the respondent rests contains no provision that the tenants should give notice to the landlord that the wall was out of repair or required work to be executed in order to keep D
it in repair.

The main question argued before their Lordships was that, although there was no provision for notice, yet an obligation to give notice should be implied as a term in the covenant, and that in the absence of such notice the respondent was not liable. In the Court of Appeal, the Lord Chancellor and MALONY, L.C.J., held E
that notice was required, but the Master of the Rolls gave a dissenting judgment. The rule in the construction of a written contract is that the intention of the parties is to be found in the document or documents containing the terms of the contract. It is not generally permissible either to add to, or to detract from, such terms; but there are recognised cases which allow conditions to be implied as a term in a written contract if not inconsistent with the expressed terms. It is said that the present case comes within this principle, and that the plaintiffs cannot recover, F
because notice was not given to the respondent. The principle is well expressed by LORD ABINGER in *Vyse v. Wakefield* (1) (6 M. & W. at p. 452).

"The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not G
entitled to any notice unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the other party, this notice ought to be given."

The respondent fails to bring himself within the protection of the principle as stated by LORD ABINGER. He might have known the condition of the sea-wall as a whole, and certainly could have made himself acquainted therewith. As a matter of H
fact, he had appointed an inspector to make observations, and to report to him from time to time, and on information so delivered had from time to time carried out repairs. On the other hand, the conditions of the sea-wall were not within the peculiar knowledge of the other parties, some of whose tenancies did not abut upon it. The sea-wall must be considered as a whole and not merely in reference to the special tenancies on which it abuts. It is a structure of which no part can be breached without the risk of general damage. In my opinion, the principle of *Vyse v. Wakefield* as applied to the present case, decides both that if notice was required a stipulation for notice should have been inserted, and, also, that the damage was not caused by neglect which was in any sense within the peculiar I
knowledge of the appellants. In *Vyse v. Wakefield* (1), both PARK, B., and ALDERSON, B., passed their decision on *Haul v. Heming* (15), 5 Vin. Abr. (2nd Edn.), Condition (A.d.), p. 271, pl. 15.

A The next case referred to is *Makin v. Watkinson* (2). In this case it was held by BRAMWELL and CHANNELL, B.B., MARTIN, B., dissenting, that the lessor cannot be sued for non-repair on a covenant to keep in repair the main walls, main timbers, and roofs of the demised premises unless he has received notice of want of repair. The reason of the rule and its limitations are well stated by BRAMWELL, B.:

B "If we look to the reason of the rule, it is, that when a thing is in the knowledge of the plaintiff, but cannot be in the knowledge of the defendant, but the defendant can only guess or speculate about the matter, then notice is necessary."

The respondent cannot, in my opinion, bring himself within this rule, since it is impossible to say that the want of repair could not be in his knowledge, or that he could only guess or speculate about the matter. The next case to which reference is made is *London and South Western Rail Co. v. Flower* (4). In this case a bridge was constructed under statutory powers, in a form not unusual in private Acts of Parliament. It was a condition that it should be executed, and thereafter maintained, by the defendants at their sole expense in all things, according to such approved plans, &c., under the superintendence and to the reasonable satisfaction of the engineer of the company. It was further provided that the undertakers should from time to time be responsible and make good to the company all costs, losses, damages, and expenses which might be occasioned to the company by reason of the execution or failure of any of the intended works or of any act or omission of the undertakers, &c. Certain repairs became necessary to the superstructure of the bridge, which were executed by the company, who claimed to be reimbursed their outlay in so doing from the defendants although the defendants had no notice that the repairs were necessary. It was held that the plaintiffs were not entitled to recover the expenses so incurred. The case mainly depended on the terms of the special statutory provision, and does not affect the question of the liability of the respondent in the present appeal. LINDLEY, J., says in his judgment:

F "I cannot read the eleventh section of the Act without seeing that the minds of both parties are to be consulted with regard to the repairs. The defendants are only bound in a qualified manner to maintain the works, viz., according to plans, drawings, and specifications approved by the principal engineer of the company, and under his superintendence. The defendants could not do this without consulting the plaintiffs; still less could the company repair the bridge without giving notice to the defendants that it required repair, and calling upon them to repair it."

G
H
I
The *Manchester Bonded Warehouse Co. v. Carr* (5), *Hugall v. M'Lean* (3), and *Torrens v. Walker* (7), are all cases of the construction of covenants between tenants in occupation of buildings and their landlords. It is sufficient, in my opinion, to say that the conditions which attach to the repair of a sea-wall, erected to keep out high tides, over an area occupied by several tenants, some of whose tenancies do not abut on the sea-wall, are essentially dissimilar from those which attach to covenants between a tenant in occupation of buildings and his landlord. The latest case is *Melles & Co. v. Holme* (8). In that case damage was caused through a defect in the roof, which was in the possession and control of the defendant and not of the plaintiff. It was held that there was no justification for contending that the plaintiff could not enforce the covenant in the absence of notice. I agree in the statement of the principle that where a covenant does not require notice to be given, the necessity of notice, as a preliminary to the recovery of damages, cannot be imported into a covenant where the plaintiffs have not possession and control of the buildings affected. There is no evidence that the sea-wall was in the possession or control of any of the plaintiffs, and certainly it was not in the possession or control of those who held tenancies which did not abut upon it. In *Tredway v. Machin* (6), referred to in the above case, COLLINS, M.R., states as follows the limitation

of the principle that notice is required, although no provision for notice is to be found in the covenant between the occupier of the premises and his landlord. A

"That rule rests upon the principle that the landlord is not the occupier of the premises, and has no means of knowing what is the condition of the premises unless he is told, because he has no right of access to the demised premises, where as the occupier has the best means of knowing of any want of repair." B

There is no justification in the present case for reading into the terms of the covenant the requirement of notice, or for departing from the ordinary principle, as stated by MARTIN, B., in *Makin v. Watkinson* (2):

"I think that when we are construing a contract we ought to adhere to its words, and not insert words not to be found in it; otherwise it is impossible for the parties to know what are the obligations they have bound themselves to, or for counsel to advise with certainty." C

On the question whether there was evidence that the defendant did, in fact, allow the wall to get into disrepair I agree with the judgment of the Master of the Rolls, and desire to add nothing to it. I think that the appeal should be allowed with costs here and below, and that the order in favour of the appellants should be restored. D

LORD CARSON.—I agree with the conclusions arrived at by the noble and learned Lords who have already given their opinions.

Appeal allowed.

Solicitors: *H. Z. Deane*, for *J. O'Connell*, Tralee, and *T. J. Liston*, Tralee; *Young, Jones & Co.*, for *M. J. Byrne*, Dublin. E

[Reported by W. C. SANDFORD, Esq., Barrister-at-Law.]

MORRIS v. TOLMAN

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Sankey, JJ.), October 23, 24, 1922] F

[Reported [1923] 1 K.B. 166; 92 L.J.K.B. 215; 128 L.T. 118; 86 J.P. 221; 39 T.L.R. 39; 67 Sol. Jo. 169; 20 L.G.R. 803; 27 Cox, C.C. 345]

Criminal Law—Aiding and abetting—Acquittal of principal offender—Liability of aider and abettor to conviction—Road traffic—Offence under Roads Act, 1920 (10 & 11 Geo. 5, c. 72), s. 8 (3). H

By the Roads Act, 1920, s. 8 (3): "Where a licence has been taken out as for a vehicle to be used solely for a certain purpose and the vehicle is at any time during the period for which the licence is in force used for some other purpose, the person so using the vehicle shall, if the rate of duty chargeable in respect of a licence for a vehicle used for that other purpose is higher than the rate chargeable in respect of the licence held by him, be liable to an excise penalty" I

The owner of a motor vehicle held a licence to use the vehicle solely for the conveyance of goods in the course of trade. With his permission his driver took a party of friends for a ride in the vehicle. The owner was charged with using the vehicle for an unlicensed purpose contrary to s. 8 (3), and the driver was charged with aiding and abetting the offence, the rate of duty of the vehicle if used for private purposes being higher than if it were used for

- A trade. The owner was acquitted, and the justices, being of the opinion that they could not proceed against the driver, acquitted him also.

Held: in general a person can be convicted as an aider and abettor of the commission of a misdemeanour even though the person charged as principal is acquitted, but in the present case, on the construction of s. 8 (3), only a person who held a licence could be convicted of the offence created by the section; the driver was not the holder of the licence; and, therefore, he could not be convicted of aiding and abetting.

Notes. *Gough v. Rees* (1929), 46 T.L.R. 103. Considered: *Thornton v. Mitchell*, [1940] 1 All E.R. 339. Referred to: *Williamson v. O'Keefe*, [1947] 1 All E.R. 307.

C As to aiding and abetting in misdemeanours see 10 HALSBURY'S LAWS (3rd Edn.) 306; and for cases see 14 DIGEST (Repl.) 99 et seq.

Cases referred to:

- (1) *R. v. Wood, Ex parte Anderson*, [1922] 1 K.B. 674; 91 L.J.K.B. 573; 126 L.T. 522; 86 J.P. 64; 38 T.L.R. 269; 66 Sol. Jo. 453; 20 L.G.R. 189, D.C.; 39 Digest 239, 142.
 D (2) *R. v. Burton* (1875), 32 L.T. 539; 39 J.P. 532; 13 Cox, C.C. 71, C.C.R.; 14 Digest (Repl.) 81, 453.

Case Stated by justices for Chichester.

At a court of summary jurisdiction sitting at the Court House, Chichester, an information was preferred by Stanley Morris, selected officer of the council of West Sussex, who prosecuted for the council in that behalf by order of the council (hereinafter called "the appellant"), under the Roads Act, 1920, against Frederick Jefferies, and against Reginald Walter Tolman (hereinafter called "the respondent") for that Frederick Jefferies on April 17, 1922, in the city of Chichester did unlawfully use a motor vehicle for a purpose other than that for which it was licensed, the purpose for which such vehicle was then used being chargeable at a higher rate of duty, and that Reginald Walter Tolman was then and there present aiding and abetting Frederick Jefferies to do and commit the offence, which information was heard on June 10, 1922, when the justices dismissed it.

Upon the hearing of the said information the following facts were proved. Frederick Jefferies was the registered owner of a mechanically propelled commercial goods vehicle, to wit, a Ford van, to which a registered mark and the No. C.D. 2900 had been allotted, and Reginald Walter Tolman was a driver in his employ. Frederick Jefferies held a licence for the vehicle, and he had declared that such vehicle would be used solely for the conveyance of goods in the course of trade; and he had paid the duty, namely, £16, for such licence. The licence duty for the vehicle if used for private purposes would be £23. On Apr. 17, 1922, Reginald Walter Tolman was driving the vehicle in the city of Chichester, and was there stopped by Ernest Morris Savage, a police constable of the West Sussex constabulary. In the vehicle were three children, two women, and two men, including Reginald Walter Tolman. Reginald Walter Tolman was questioned by the police constable, and his attention drawn to the fact that the vehicle was licensed for commercial use only, and Reginald Walter Tolman then made and signed the following statement, namely: "Mr. Jefferies said I could take the car to have a ride round, and we are out on a joy ride just to see some relations." I Frederick Jefferies was not present when this statement was made. No evidence was called for the defence.

The justices, being of opinion there was not sufficient evidence to prove that Frederick Jefferies used the vehicle for a purpose other than that for which it was licensed, dismissed the information against him.

On behalf of the appellant it was contended that although the case had been dismissed against Frederick Jefferies, the respondent, Reginald Walter Tolman, could be convicted either as a principal or as an aider and abettor.

On the part of the respondent it was contended that in law it was impossible to convict him of aiding and abetting when the case against the principal, Frederick Jefferies, had already been dismissed. The justices, being of opinion that when they had dismissed the information against the principal it was impossible to convict the aider and abettor, dismissed the information against the respondent, Tolman. A

By the Roads Act, 1920, s. 8 (3) [replaced by Vehicles (Excise) Act, 1949, s. 13 (1)]: B

"Where a licence has been taken out as for a vehicle to be used solely for a certain purpose and the vehicle is at any time during the period for which the licence is in force used for some other purpose, the person so using the vehicle shall, if the rate of duty chargeable in respect of a licence for a vehicle used for that other purpose is higher than the rate chargeable in respect of the licence held by him, be liable to an excise penalty . . ." C

Norman Birkett for the appellant.

F. W. Gentle for the respondent.

LORD HEWART, C.J.—The justices have found as a fact, not that Jefferies made the statement that the respondent could take the car out for a ride, but they have found that the respondent said that Jefferies had made the statement. That statement was not made in the presence of Jefferies, but was given in evidence. In those circumstances, the justices dismissed the information against Jefferies, and we are not called on to express an opinion whether they were right in doing so. But the opinion of the justices was that when they had dismissed the information against the principal it was impossible to convict the aider and abettor. D

I need hardly say that if this was intended to be a general opinion it could not be supported. It does not in the least follow that because a principal is acquitted another person cannot be convicted as aider and abettor. There are many cases in which an aider and abettor may be convicted, though the principal is acquitted and even before the principal is tried. But I think we need not so read the opinion of the justices. It is an express finding with reference to this particular case, and in considering whether this case should be dealt with on the footing that directions should be given to the justices to convict, we must have regard to the wider question whether, on this particular charge, if the holder of the licence is acquitted, a person who was never the holder of a licence can be convicted. No doubt, in general, in cases of misdemeanour, an aider and abettor may be convicted either as aider and abettor or as principal, but in considering whether the justices might have convicted the respondent as aider and abettor the question is whether, on this particular charge, where the licence holder is acquitted, a person who is not the holder of the licence can be convicted as aider and abettor. The wording of this section is peculiar, and we have to construe it not as it might have been drafted but as it is drafted. It says: E

" . . . the person so using the vehicle shall, if the rate of duty chargeable in respect of a licence for a vehicle used for that other purpose is higher than the rate chargeable in respect of the licence held by him, be liable to an excise penalty, . . ." F

If the aider and abettor were convicted after the dismissal of the information against the principal, he must be convicted as a principal. Is it possible that he should be convicted as a principal here? The words "the person so using the vehicle" are wide enough to cover use by another person than the holder of the licence, but when one looks at the section one sees that it is restricted, not once, but throughout, by the holding of the licence. This respondent did not hold the licence. Again, if he had been convicted, to what penalty would he have been liable? The only penalty imposed by the section is an excise penalty G

A to be calculated with reference to the difference in the rate of duty paid by the offender and that which ought to have been paid by the offender. Therefore, if the respondent had been charged as a principal offender, he could not have been convicted. No doubt he was using this vehicle for a purpose for which it was not licensed, but there was no licence held by him. In my view, as he could not have been convicted as a principal, he could not be convicted as an
B aider and abettor.

No doubt another question might in a different case arise, as was pointed out by AVORY, J., in *R. v. Wood* (1), under s. 13 (1), if an information were preferred for using a vehicle for which a licence is not in force. If a vehicle has only a commercial licence and is used for a private purpose, it might be argued that that is using an unlicensed vehicle, but it is not necessary for us to express a
C final opinion on that point in this case. In these circumstances, I have, with regret, come to the conclusion that the justices were right, and that this appeal must be dismissed.

AVORY, J.—I have come to the same conclusion. The justices came to the conclusion that a man charged as aider and abettor cannot be convicted if the
D person charged as principal is acquitted. As an abstract proposition that cannot be supported. In all offences below felony, any person aiding and abetting or counselling and procuring the commission of the offence may be convicted and punished as principal [s. 8 of the Accessories and Abettors Act, 1861]. It has long ago been held that since all persons concerned in a misdemeanour are
E principals in law, the acquittal of the person charged as principal is of itself no bar to the conviction of a person charged as aider and abettor (*R. v. Burton* (2)).

But in this case the words of s. 8 (3) support the contention that it is only the person holding the licence who can commit the offence. Here it is clear that the vehicle was being used for a purpose other than that for which it was licensed, and one in respect of which the rate of duty was higher; but for the
F respondent to be convicted it would be necessary to substitute the words "the licence which has been taken out" for the words, "the licence held by him." It is a penal statute and there is no justification for substituting other words for those of the Act. In order to convict the respondent it was necessary to show either that he was aiding and abetting the principal to commit the offence, or that he as a principal was committing it. He cannot aid and abet the principal
G in what the principal is not doing, and he cannot be convicted as a principal for reasons which I have stated. It is also necessary to add that in order to convict the respondent it would have been necessary to show that the respondent knew the purpose for which the licence was taken out. I think the justices have unconsciously come to the right conclusion.

As to s. 13 (1), I only add one word on *R. v. Wood* (1). In that case LORD
H TREVETHIN, C.J., said :

"I am by no means prepared to say that the licence taken out was the right licence to take out, if it was intended to use this vehicle at any time as a hackney carriage, and it may be that the appellant would be liable under s. 13 of the Roads Act. But that is not the question we have to decide."

I And I myself said :

"I think it is open to argument that a person who has taken out a licence under para. 6, and who, during its currency, uses the vehicle as a hackney carriage, does not hold a licence under the Finance Act, 1920, and is therefore a person using a vehicle 'for which a licence under the Finance Act, 1920 . . . is not in force.' "

I only repeat that I think that point is open to argument.

SANKEY, J.—I agree. I reach the same conclusion as my Lord, for the same reasons and with the same regret. A

Appeal dismissed.

Solicitors: *Walmsley & Stansbury*, for *J. E. Dell & Loader*, Southwick; *H. Clifton*, for *Plumbridge & Meaden*, Brighton.

[Reported by J. F. WALKER, Esq., Barrister-at-Law.] B

ATTORNEY-GENERAL AND ANOTHER v. HODGSON C

[CHANCERY DIVISION (Peterson, J.), April 12, 1922]

[Reported [1922] 2 Ch. 429; 91 L.J.Ch. 426; 127 L.T. 329; 87 J.P. 121; 38 T.L.R. 601; 66 Sol. Jo. 538; 20 L.G.R. 425] D

Easement—Right of way—"Carriage" way—Inclusion of motor vehicle.

Local Government—Bye-law—Validity—Reasonableness—Safety—Prohibition of motor vehicles in park.

By a conveyance, in 1861, of land adjoining a public park and having an entrance thereto, the purchaser was given a right of carriage, horse and foot way to the land through the park, "subject to such bye-laws rules and regulations as should from time to time be made by those having the control of the park for the purpose of preserving order and decorum [and] promoting safety . . ." In 1921 the B. corporation, who then had such control, in view of the number of persons using the park, especially children, and the limited width of the roads, 21 or 22 feet, made by a bye-law, expressed to be for the purpose of promoting safety, that no motor car, or other similarly mechanically driven vehicle, should be allowed at any time to pass through any part of the park to or from, *inter alia*, the house built on the land conveyed in 1861. The corporation had considered the imposition of a speed limit in the park, but decided that it would not meet the requirements of the case. In an action by the Attorney-General and the corporation for an injunction to restrain the owner of the house in question from driving motors on the roads in the park to and from the house, E

Held: (i) there was nothing in the conveyance of 1861 which showed that the right of way was restricted to carriages drawn by horses, and a motor car was a "carriage" within the meaning of the grant of the right; but (ii) the court ought not to interfere with a bye-law made by a local authority if it could be supported on reasonable grounds; it was not unreasonable for the corporation to take the view that the use of motor vehicles might be attended with serious danger in a park frequented by young children and having rather narrow roads; and, therefore, the bye-law was valid, and the plaintiffs were entitled to the injunction they claimed. F

Notes. Applied: *Kair v. Norfolk*, [1949] 1 All E.R. 176. G

As to the easement of a right of way see 12 HALSBURY'S LAWS (3rd Edn.) 569 et seq., and as to validity of bye-laws see *ibid.*, vol. 24, p. 515 et seq. For cases see 19 DIGEST 93 et seq., and 13 DIGEST (Repl.) 237 et seq. H

Cases referred to:

- (1) *Re Hall, Watson v. Hall*, [1912] W.N. 175; 107 L.T. 196; 28 T.L.R. 480; 56 Sol. Jo. 615; 44 Digest 736, 5905.
- (2) *Re Ashburnham, Gaby v. Ashburnham* (1912), 107 L.T. 601; 57 Sol. Jo. 28; 44 Digest 648, 4875. I

- A (3) *Re White, White v. White*, [1916] 1 Ch. 172; 85 L.J.Ch. 368; 114 L.T. 353; 60 Sol. Jo. 210; 44 Digest 714, 5625.
- (4) *Re Fortlage, Ross v. Fortlage* (1916), 60 Sol. Jo. 527; 44 Digest 735, 5900.
- (5) *Heap v. Burnley Union Sanitary Authority* (1884), 12 Q.B.D. 617; 53 L.J.M.C. 76; 48 J.P. 359; 32 W.R. 661; 2 Digest (Repl.) 336, 256.
- B (6) *Strickland v. Hayes*, [1896] 1 Q.B. 290; 65 L.J.M.C. 55; 74 L.T. 137; 60 J.P. 164; 44 W.R. 398; 12 T.L.R. 199; 40 Sol. Jo. 316; 18 Cox, C.C. 244, D.C.; 38 Digest 164, 97.
- (7) *Alty v. Farrell*, [1896] 1 Q.B. 636; 65 L.J.M.C. 115; 74 L.T. 492; 60 J.P. 373; 12 T.L.R. 346; 40 Sol. Jo. 460; 18 Cox, C.C. 321, D.C.; 38 Digest 164, 98.
- C (8) *Scott v. Pilliner*, [1904] 2 K.B. 855; 73 L.J.K.B. 998; 91 L.T. 658; 68 J.P. 518; 53 W.R. 284; 20 T.L.R. 662; 2 L.G.R. 1018; 20 Cox, C.C. 731, D.C.; 25 Digest 436, 333.
- (9) *Kruse v. Johnson*, [1892] 2 Q.B. 91; 67 L.J.Q.B. 782; 79 L.T. 647; 62 J.P. 469; 46 W.R. 630; 14 T.L.R. 416; 42 Sol. Jo. 509; 19 Cox, C.C. 103, D.C.; 13 Digest (Repl.) 239, 639.
- D (10) *Slattery v. Naylor* (1888), 13 App. Cas. 446; 57 L.J.P.C. 73; 59 L.T. 41; 36 W.R. 897; 4 T.L.R. 426, P.C.; 13 Digest (Repl.) 239, 640.

Also referred to in argument :

White v. Grand Hotel, Eastbourne, Ltd., [1913] 1 Ch. 113; 82 L.J.Ch. 57; 107 L.T. 695; 57 Sol. Jo. 58, C.A.; affirmed sub nom. *Grand Hotel, Eastbourne, Ltd. v. White*, [1913] W.N. 306; 84 L.J.Ch. 938; 110 L.T. 209; 58 Sol. Jo. 117, H.L.; 19 Digest 114, 738.

E *United Land Co. v. Great Eastern Rail. Co.* (1875), 10 Ch. App. 586; 44 L.J.Ch. 685; 33 L.T. 292; 40 J.P. 37; 23 W.R. 896, L.J.J.; *Cannon v. Villars* (1878), 8 Ch.D. 415; 47 L.J.Ch. 597; 38 L.T. 939; 42 J.P. 516; 26 W.R. 751; 19 Digest 108, 685.

F **Witness Action** in which the Attorney-General, on the relation of the corporation of Bradford, and the corporation, sought to prevent the defendant from driving motor cars or other similar mechanically driven vehicles to or from his residence known as Park House on the roads in Peel Park, Bradford.

In 1850 the land which was later known as Peel Park was purchased by means of public subscription in order that a park might be provided for the benefit of the inhabitants of Bradford, and in 1863 it was conveyed by the purchasers to G Bradford Corporation for use as a public park and playground "subject to such orders and regulations as should from time to time be made by the corporation for regulating the use and enjoyment of the park." The property which was acquired included land which it was decided to sell in five lots. In May, 1853, these five lots were put up for sale by public auction. Particulars of sale stated that the purchasers would be allowed to have private gates of access to Peel H Park, and limited rights of carriage road through the park. The conditions stated that it was the vendor's intention to lay out the land to the south of the lots as a public park and pleasure ground "with roads drives and promenades" and that the purchasers of the five lots should have "rights of carriage horse and I foot way through the park when so laid out (but not for carts wagons or drays or for persons bearing burdens or carrying parcels) at such hours as the park should be open to the public, but subject to such bye-laws rules and regulations as should from time to time be made by those having the control of the park for the purpose of preserving order and decorum promoting safety and for establishing and maintaining the character of the park as a place of public recreation and at other times subject to such payments bye-laws rules and regulations as should from time to time be required and made by those having such control aforesaid." Lots 1, 3, 4, and 5 were sold at the auction. In 1861 lot 2 was sold to one William Milnes, and this lot was conveyed to Mr. Milnes by a deed of Dec. 30,

1861, which contained the conditions set out above. Park House, which was erected A
on the lot, had a carriage drive from the roadway in Peel Park.

The park consisted of about fifty-eight acres. It had two main entrances, one at the north-west corner from Bolton Road, the other at the south-east corner from Cliffe Road, and Otley Road. From the Bolton Road entrance a carriage drive ran in curves along the southern boundary and then swept round and emerged at the Otley Road gate. That carriage drive had not any footpath. Its width B
varied between a little over 20ft. and a little over 22ft. At a short distance from the Bolton Road entrance there was, on the south side of the drive, a flight of steps leading down to the conservatory, the lake and "children's corner." Further along the drive there was another path leading down to the lake. There was a difference of opinion as to the number of persons who resorted to the park, but, on the evidence, the learned judge formed the view that the number of C
persons including children, often unattended, who frequented the park, and particularly that part of it in which were the conservatory, the lake and the children's corner, was considerable. In 1907 there was an agitation in Bradford against the use of the parks by motor cars. Complaints were made to various members of the council. Very narrow escapes were reported and the local Press took up the question. The matter was considered by the council, who ultimately D
came to the conclusion, after rejecting the suggestion, that the imposition of a speed limit would meet the requirements of the case, that the parks were not safe for the public owing to the action of motor drivers, and that the only way to protect the public was to stop cars from going into the park. On July 9, 1907, the council, in pursuance of the powers contained in the Bradford Corporation and Improvement Act, 1871, made two bye-laws in reference to regulating or preventing the E
admission of horses and vehicles into the parks of the corporation. The first dealt with the admission to the park of horses and carriages, and the second was in these terms :

"No motor car, motor carriage, motor bicycle, or motor tricycle, or other F
similar mechanically driven vehicle shall be allowed at any time to enter or pass through . . . the . . . park."

In coming to the conclusion that the use of motor vehicles in the parks ought to be prohibited the council did not specially consider the position of the owners of the houses on the north side of Peel Park. The bye-laws were in due course approved, and allowed by the Home Secretary. Section 54 of the Act of 1871, under which those bye-laws were made, enacted that the corporation might, in G
manner prescribed by the municipal Corporation Acts, make bye-laws

"for all or any of the following purposes relating to any park or place of public resort or recreation to be hereafter acquired and formed under this Act, or relating to any park or public place of resort at present held by the corporation or under their control." H

One of these purposes was "for regulating or preventing the admission of horses and vehicles thereto." The defendant purchased Park House in 1920 and entered into occupation towards the end of that year. He then asserted his right to pass along the carriage ways of the park to and from Park House in a motor car, and disputed the validity of the bye-law so far as it affected the owners of lots 1, 2, 3, 4, and 5. It then occurred to the advisers of the corporation that it might I
possibly be objected that the bye-law of 1907 had been made under the provisions of the Bradford Gas and Improvement Act, 1871, and was not a bye-law made under the powers reserved in the conveyances to the purchasers of lots 1, 2, 3, 4, and 5. The council, accordingly, on Apr. 12, 1921, as "the body having the control of Peel Park" made the following regulation :

"For the purpose of promoting safety and for establishing and maintaining the character of the said park as a place of public recreation, no motor car, motor

A carriage, motor bicycle, motor tricycle, or other similar mechanically driven vehicle, shall be allowed at any time to pass through any part of Peel Park to or from any of the houses situate next Lister Lane and adjoining Peel Park on the northern boundary thereof, or the grounds of any of the said houses."

Before they resolved to recommend the council to pass this bye-law the parks committee considered the question whether it was necessary in the interests of public safety to prevent the owners of the houses on the north side of the park which had access to the carriage drive from driving motor vehicles over the roadways of the park, and determined that it was. The committee did not, on this occasion, consider whether the imposition of a speed limit would suffice.

J. H. Cunliffe, K.C. and J. G. Wood for the plaintiffs.

T. R. Hughes, K.C. and F. Whinney for the defendant.

PETERSON, J.—The plaintiffs' first contention was that the conveyance to Mr. Milnes did not grant a right of way for motor vehicles, but was confined to carriages to which was applied the kind of traction known in 1861. In support of this argument reference was made to various cases, such as *Re Hall, Watson v. Hall* (1), *Re Ashburnham, Gaby v. Ashburnham* (2), *Re White, White v. White* (3), and *Re Fortlage, Ross v. Fortlage* (4). These were cases in which the court in construing wills came to the conclusion that, having regard to the context, the word "carriage" did not include a motor car. But authorities of this kind have not any bearing on the present case.

The question which I have to consider is what is meant by a "carriage way" in the conveyance of 1861. The right which was granted was a right to pass along the road on foot or on horse or in carriages. There is not, I think, anything in the deed which shows that the right of carriage way is restricted to carriages which are impelled by any particular kind of traction; nor is there, in my opinion, any ground for saying that the word "carriage" ought to be restricted to a carriage drawn by horses. A motor car is, I think, a "carriage" within the meaning of this grant. The real question is whether the bye-laws which have been made are so unreasonable as to be invalid. There are many cases in which bye-laws made by local authorities have been declared by the courts to be invalid. Instances of the exercise of this jurisdiction are to be found in *Heap v. Burnley Union Sanitary Authority* (5), *Strickland v. Hayes* (6), *Alty v. Farrell* (7), and *Scott v. Pilliner* (8). But it has been laid down by very high authority that bye-laws made by public representative bodies ought to be supported if possible, and that the courts ought to be slow to condemn as invalid such bye-laws on the ground of supposed unreasonableness; and it has been pointed out that a bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to have been made: see *Kruse v. Johnson* (9), *Slattery v. Naylor* (10) (13 App. Cas. at pp. 451 and 452). In *Scott v. Pilliner* (8) where the bye-law was held to be unreasonable, LORD ALVERSTONE accepted the principle that the court ought not to interfere with a bye-law made by a local authority if it can be supported on reasonable grounds. In *Kruse v. Johnson* (9), LORD RUSSELL, C.J., explained the grounds on which such bye-laws might be declared invalid as being unreasonable. If, for instance, they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say: "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires."

But it is in this sense, and in this sense only, I conceive, that the question of unreasonableness can properly be regarded. In the present case the council

came to the conclusion that it was dangerous to persons resorting to the parks of Bradford that motor vehicles should be allowed inside the parks. To think that the use of motor vehicles may be attended with serious danger in a park frequented by young children and having roadways of 21ft. or 22ft. in width, cannot be said to be unreasonable. Some persons may think that the necessary degree of safety might have been secured by the imposition of a speed limit. But this suggestion was considered and rejected by the council, and having regard to the observations in *Kruse v. Johnson* (9), I am not prepared to say that the bye-law is unreasonable because it prohibited the use of motor vehicles in the park instead of attempting to limit their speed. The council may well have thought that the imposition of a speed limit does not necessarily ensure its observance. But it is said that, while this may be sound so far as the bye-law applies to the use of motor vehicles in general, it is not so where the bye-law affects the special rights conferred upon the owners of the houses on the north side of Peel Park. It is to be remembered that the owners of these houses did not obtain grants of unrestricted rights of way. The conveyance to the defendant's predecessor granted a right of carriage way through the park, subject to such bye-laws, rules, and regulations as should from time to time be made by the persons having the control of the park for the purpose, inter alia, of promoting safety. It was a right which was liable to be restricted and curtailed by the persons having control of the park. Nor do I think that the bye-laws which are contemplated by the conveyance are bye-laws dealing specifically and separately with the right of way of the particular grantee, or with the rights of the owners of the houses on the north side of the park. The conveyance contemplates that the persons having the control of the park may find it desirable to make bye-laws for the purpose of regulating the conduct of all persons who resort to the park. Bye-laws for the purpose of preserving order and decorum, or establishing and maintaining the character of the park as a place of public recreation, are obviously bye-laws which are intended to apply to all persons who resort to the park. The defendant's predecessor thus agreed that his right of way should be subject to such bye-laws of general application as the persons having control of the park might think it proper or desirable to make with the object of attaining the specified purposes. Section 54 of the Bradford Corporation and Improvement Act, 1871, expressly gave the corporation power to make bye-laws for the purposes specified in the section in respect of any park then held by the corporation or under its control; and one of the authorised purposes was regulating or preventing the admission of vehicles to the park.

The corporation had thus a twofold power, under the conveyance and under this section. It has considered the question of the use of motor vehicles in the park, both with respect to the users of such vehicles generally and with respect to the owners of the houses on the north side of Peel Park, and it has come to the conclusion that in all cases it is expedient in the interests of public safety to prohibit the use of motor vehicles in the park. It may well be that there are difficulties in the way of differentiating between motor cars belonging to the owners of the houses on the north side of the park or persons who visit those houses and motor cars which belong to other members of the public. If a speed limit were imposed in the former case and the present absolute prohibition were applied to all other motor vehicles, it might not be easy to maintain the prohibition; for if the imposition of a speed limit sufficed in one case it might well be contended that it would be sufficient in the other case. Moreover, it would be difficult for the police constable who had charge of Peel Park to know whether a motor car which was found in the park was or was not taking visitors to one of the privileged houses, and uncertainty on this subject might lead in practice to the use of the park by motor vehicles generally. I am not able to say that this determination of the council was partial or unequal as between different

A classes, or was manifestly unjust or was such an oppressive or gratuitous interference as could find no justification in the minds of reasonable men. It was not and could not be suggested that the council did not act honestly in its consideration of the question. In my opinion, the plaintiffs are entitled to an injunction restraining the defendant from driving motor vehicles over the roads in Peel Park in contravention of the bye-laws.

B Solicitors: *Torr & Co.*, for *N. L. Fleming*, Town Clerk, Bradford; *Johnson, Weatherall, Sturt & Hardy*, for *Wade, Tetley, Wade & Co.*, Bradford.

[Reported by G. P. LANGWORTHY, ESQ., Barrister-at-Law.]

POPLAR METROPOLITAN BOROUGH ASSESSMENT COMMITTEE v. ROBERTS

D [HOUSE OF LORDS (Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Parmoor and Lord Carson), March 20, 1922]

[Reported [1922] 2 A.C. 93; 91 L.J.K.B. 449; 127 L.T. 99; 86 J.P. 137; 38 T.L.R. 499; 66 Sol. Jo. 386; 20 L.G.R. 317; 2 B.R.A. 858]

Rates—Assessment—Gross value—Hereditament subject to Rent Restriction Acts—Effect of statutory limitation of rent on ascertainment of gross value—Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 4—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17).

In arriving, under s. 4 of the Valuation (Metropolis) Act, 1869, at the "annual rent" (and, therefore, the gross value for rating purposes) of a hereditament which a hypothetical tenant might be expected to pay no account is to be taken of any condition affecting or limiting the receipt of the rent in the hands of the landlord whether such a condition results from an agreement between the landlord and the tenant contained in the tenancy agreement or from the provisions of a statute. The ratepayer is rated solely in respect of the beneficial occupation of the hereditament, to which matter any condition regulating the value of the hereditament to the landlord is irrelevant. The "annual rent" mentioned in s. 4 is as hypothetical as the tenant, and is not to be confounded with the actual rent paid by the tenant.

Per LORD PARMOOR: It has long been recognised as a matter of principle in rating law that to make actual rentals the basis of rateable value would contravene the fundamental principle of equality, both between the rate contributions from individual ratepayers, and between the totals of rate contributions levied in different contributory rating areas. In effect, the result would be to make the amount on which the occupier of property is liable to pay rates dependent in many cases on the contractual relationship between a particular landlord and tenant, whereas it is dependent in all cases on a statutory direction applicable on the same principle to all hereditaments, and intended to insure equality of treatment as between the occupiers of rateable property and the rating authority.

Held, accordingly, by LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER and LORD PARMOOR, LORD CARSON dissenting, that the gross value to be placed on the hereditament in question in the present case was not limited to the amount of the standard rent applicable to the hereditament under the Increase of Rent &c. (Restrictions) Act, 1920.

Notes. As to the method of the ascertainment of rateable values of hereditaments outside London see now the Rating and Valuation Act, 1925, s. 22 (1)

(b), the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 5, and the Rating and Valuation Act, 1957, s. 1 (8). As to the present valuation and rating procedure see Local Government Act, 1948, Part III. A

Considered: *St. James' and Pall Mall Electric Light Co. v. City of Westminster Assessment Committee*, [1933] 1 K.B. 605; *Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee*, [1936] 1 K.B. 585. Distinguished: *Rawlence v. Croydon Corpn.*, [1952] 2 All E.R. 535. Considered: *Port of Spain Corpn. v. Gordon Grant & Co.* (1955) 99 Sol. Jo. 233. Referred to: *Ladies Hosiery and Underwear, Ltd. v. West Middlesex Assessment Committee*, [1932] All E.R. Rep. 427; *Simpson v. Charrington & Co.* [1934] 1 K.B. 64; *Re Southern Rail. Co. Appeals* (1935), 152 L.T. 299. B

As to the ascertainment of net annual values see 27 HALSBURY'S STATUTES (2nd Edn.) 383 et seq., and for cases see 38 DIGEST 518 et seq. For Valuation (Metropolis) Act, 1869, see 20 HALSBURY'S STATUTES (2nd Edn.) 62, and for Increase of Rent, &c., (Restrictions) Act, 1920, see *ibid.*, vol. 13, p. 981. C

Cases referred to:

- (1) *Port of London Authority v. Orsett Union Assessment Committee*, [1920] A.C. 273; 89 L.J.K.B. 481; 122 L.T. 722; 84 J.P. 69; 36 T.L.R. 233; 18 L.G.R. 153; 2 B.R.A. 709, H.L.; 38 Digest 563, 1017. D
- (2) *R. v. Catt* (1795), 6 Term Rep. 332; 1 Bott. 186; 101 E.R. 580; 38 Digest 454, 207.
- (3) *R. v. Munday* (1801), 1 East, 584; 1 Bott. 191; 102 E.R. 226; 38 Digest 452, 184.
- (4) *R. v. Green* (1829) 9 B. & C. 203; 4 Man. & Ry. K.B. 164; 7 L.J.O.S.M.C. 94; 109 E.R. 76; 38 Digest 452, 185. E
- (5) *Great Western and Metropolitan Rail. Cos. v. Kensington Assessment Committee, Same v. Hammersmith Assessment Committee*, [1916] 1 A.C. 23; 85 L.J.K.B. 63; 113 L.T. 1074; 80 J.P. 81; 31 T.L.R. 608; 59 Sol. Jo. 744; 14 L.G.R. 1; 1 B.R.A. 333, H.L.; 38 Digest 543, 877. F
- (6) *L.C.C. v. Erith Parish (Churchwardens, etc.) and Dartford Union Assessment Committee, West Ham Parish (Churchwardens, etc.) v. L.C.C., St. George's Union Assessment Committee v. L.C.C.*, [1893] A.C. 562; 63 L.J.M.C. 9; 69 L.T. 725; 57 J.P. 821; 42 W.R. 330; 10 T.L.R. 1; 6 R. 22; Ryde, Rat. App. (1891-93) 382, H.L.; 38 Digest 429, 42.
- (7) *Winstanley v. North Manchester Overseers*, [1910] A.C. 7; 79 L.J.K.B. 95; 101 L.T. 616; 74 J.P. 49; 26 T.L.R. 90; 54 Sol. Jo. 80; 8 L.G.R. 75, H.L.; 38 Digest 452, 189. G
- (8) *Owens College v. Chorlton-upon-Medlock Overseers* (1887), 18 Q.B.D. 403; 56 L.J.M.C. 29; 56 L.T. 373; 35 W.R. 236; 51 J.P. 356, C.A.; 38 Digest 522, 711.
- (9) *R. v. London School Board* (1886), 17 Q.B.D. 738; 55 L.J.M.C. 169; 55 L.T. 384; 50 J.P. 419; 2 T.L.R. 633; Ryde, Rat. App. (1886-90) 235; sub nom. *London School Board v. St. Leonard, Shoreditch Assessment Committee*, 34 W.R. 583, C.A.; 38 Digest 522, 713. H
- (10) *Sunderland Overseers v. Sunderland Union* (1865), 18 C.B.N.S. 531; 34 L.J.M.C. 121; 13 L.T. 239; 11 Jur. N.S. 688; 13 W.R. 943; 144 E.R. 551; 38 Digest 566, 1048. I
- (11) *R. v. Skingle* (1798), 7 Term Rep. 549; 1 Bott. 189; 101 E.R. 1126; 38 Digest 520, 699.
- (12) *Staley v. Castleton Overseers* (1864), 5 B. & S. 505; 4 New Rep. 361; 33 L.J.M.C. 178; 28 J.P. 710; 10 Jur. N.S. 1147; 12 W.R. 911; 122 E.R. 920; sub nom. *R. v. Castleton Overseers*, 10 L.T. 606; 38 Digest 525, 725.
- (13) *Altrincham Union Assessment Committee v. Cheshire Lines Committee* (1885), 15 Q.B.D. 597; 50 J.P. 85, C.A.; 38 Digest 536, 812.

- A (14) *Sculcoates Union v. Kingston-upon-Hull Dock Co.*, [1895] A.C. 136; 64 L.J.M.C. 49; 71 L.T. 642; 59 J.P. 612; 43 W.R. 623; 11 R. 74, H.L.; 38 Digest 562, 1001.

Appeal from an order of the Court of Appeal dismissing an appeal from the Divisional Court (DARLING, AVORY, and SALTER, JJ.), reported [1922] 1 K.B. 25.

- B The appellants were the assessment committee of the metropolitan borough of Poplar. The respondent was the occupier of a hereditament known as The Cobden's Head beerhouse in the borough. The questions on the appeal were: (i) Whether the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, was to be taken into account in arriving at the valuation of the hereditament for the purposes of the Valuation (Metropolis) Act, 1869? (ii) Whether the highest gross value which could be placed on the hereditament in the valuation list for the year 1920 was the "standard rent" within the meaning of the Act of 1920 applicable to the hereditament plus the highest increase or increases of rent provided for and set out in s. 2 (1) (c) and (d) of the Act? (iii) Whether in calculating the gross value of the hereditament the capital sum paid on the assignment of the lease could be taken into account?

- D By the Valuation (Metropolis) Act, 1869, s. 4:

- E "In this Act, unless the context otherwise requires. . . . The term gross value means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent: The term 'rateable value' means the gross value after deducting therefrom the probable annual average cost of the repairs, insurance, and other expenses as aforesaid."

- F The Divisional Court held that the Increase of Rent, &c. (Restrictions) Act, 1920, applied to the beerhouse and was to be taken into account in arriving at the valuation, and that the highest gross value that could be placed upon the beerhouse in the valuation list for 1920 was the standard rent within the meaning of the Act of 1920 plus the highest increase of rent provided for and set out in s. 2 (1) (c) and (d) of that Act [repealed by Rent Act, 1957]. The assessment committee appealed. The Court of Appeal (BANKES, SCRUTTON, and ATKIN, L.JJ., BANKES, L.J., dissenting, and SCRUTTON, L.J., doubting) dismissed the appeal.

- G The assessment committee appealed to the House of Lords.

Talbot, K.C. (*S. G. Turner* with him) for the assessment committee.

Konstam, K.C. (*Wootten, K.C.* and *R. M. Banks* with him) for the respondent ratepayer.

Their Lordships took time for consideration.

- H Mar. 20. The following opinions were read.

- I **LORD BUCKMASTER.**—The question in this case can be readily stated, though it is not so easy to answer. It is simply whether the Rent Restrictions Act, 1920, affects the rateable value of the hereditaments to which it applies. The appellants say that it does not, and the respondent, fortified by the judgment of the Divisional Court and of two out of the three learned judges of the Court of Appeal asserts that it does. The statute applies to a house or part of a house let as a separate dwelling where either the annual amount of the standard rent or the rateable value does not exceed, in the metropolitan police district £105. [The words relating to the annual amount of the standard rent were repealed by the Rent Act, 1957.] The property in question is a licensed beerhouse obviously within that limit. To all houses so included it is enacted by s. 1 [repealed, Rent Act, 1957] that any increase of rent after Mar. 25, 1920, and during the continuance of the statute by more than the amount permitted under the statute beyond the standard

rent shall be recoverable by the tenant. The standard rent is, by s. 12 (1) (a) [repealed, Rent Act, 1957] declared to be the rent at which the house was let on Aug. 3, 1914, or, if the rent on that date was less than the rateable value, the rateable value should be regarded as the standard rent. A

The respondent is the occupier of a house licensed for the sale of beer either on or off the premises, known as the Cobden's Head, Bromley-by-Bow, in the metropolitan borough of Poplar. The house was leased by the brewers on Feb. 16, 1909, for twenty-one years from Mar. 21 of that year, at a rent of £40, with provision compelling the lessee to buy malt liquor from the lessors, and a condition that if that covenant were broken they could at their option obtain a further rent of £80. A premium of £850 was paid for this lease. On Nov. 26, 1919, the respondent paid £1,800 for the lease. The rateable value of the hereditament on Aug. 3, 1914, was £48. For the quinquennial year 1920 the appellants, who are the assessment committee of the metropolitan borough of Poplar, assessed the property at £112 gross and £94 as the rateable value. The respondent claims that by virtue of the statute these valuations should be reduced to £67 gross and £56 as the rateable value. If the limitations imposed by the Rent Restriction Act upon the power of the landlord to increase the rent be properly taken into account in determining the assessable value, the appellants are wrong; but if it should be disregarded they are right, and no other question arises on this appeal. B C D

For the appellants it is contended that the underlying principle of the Valuation (Metropolis) Act, 1869, is that the value of the hereditament to the occupier should be the basis of assessment to the rates, and that there should be equality as between each occupier holding similar property so that the burden of local taxation may be equitably distributed and borne. If these assumptions be accepted, the appellants must succeed. The difficulty lies in seeing whether that really is the basis upon which the Act of 1869 depends. The statute, although its preamble dwells on the expediency of establishing a common basis of value and promoting uniformity of assessment, does not in terms say that it is the value of the occupation that has to be fixed. What it does provide is that the gross value means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for a hereditament on the assumption that he undertook to pay rates, taxes and tithe, and the landlord undertook the cost of repairs and insurance. It is round the true meaning of this section that the dispute centres. The tenant referred to is, by common consent, an imaginary person; the actual rent paid is no criterion, unless, indeed, it happens to be the rent that the imaginary tenant might reasonably be expected to pay in the circumstances mentioned in the section. But although the tenant is imaginary, the conditions in which his rent is to be determined cannot be imaginary. They are the actual conditions affecting the hereditament at the time when the valuation is made. This was stated by this House in *Port of London Authority v. Orsett Union Assessment Committee* (1) ([1920] A.C. at p. 305), and I do not think that the language there used needs to be modified or explained; but those words related entirely to determining the value of the occupation to the occupier, excluding, of course, any element due to his skill, industry, or other strictly personal qualifications. In the present case the respondent seeks to introduce into these words the conditions which regulate the value of the hereditament to the landlord. So far as the occupier is concerned, the provisions of the Rent Restriction Act have not in any way made his occupation less beneficial. It is the landlord who is affected, and he, the landlord, is not the subject of assessment, nor can his interest in the property be considered for the purpose of determining what that assessment should be. If, however, the rent which has to be ascertained under the section is the real rent, then the fact that that cannot be increased will have a material effect upon the valuation. I agree, however, with what was said by counsel for the appellants that so to interpret the statute would be to deal with something which was really E F G H I

A nothing but a measure of value in such a manner as completely to destroy the very object for which that measure was set up. Just as the tenant is hypothetical, so also is the rent; it is only used as a standard which must be examined without regard to the actual limitation of the rent paid by virtue of covenant as between landlord and tenant, and also, as I regard it, to statutory restrictions that may be imposed upon its receipt. From the earliest time it is the inhabitant who has to be taxed. It is in respect of his occupation that the rate is levied, and the standard in the Act is nothing but a means of finding out what the value of that occupation is for the purposes of assessment. In my opinion, the rent that the tenant might reasonably be expected to pay is the rent which, apart from all conditions affecting or limiting its receipt in the hands of the landlord, would be regarded as a reasonable rent for the tenant who occupied under the conditions which the statute of 1869 imposes.

This, my lords, is my opinion as to the meaning of the Act itself; but I find that a series of authorities, which have not been questioned and are now of considerable antiquity, support this view. The earliest was *R. v. Catt* (2). In that case the master of a free school appointed by the minister and inhabitants of a parish under a charitable trust, who occupied the house and garden belonging to the school, was held rateable, the ground of his liability being that he was in beneficial occupation. It appears that the terms of the charity in that case would have prevented the receipt of any rent by the trustees of the charity, the whole object of which was to provide a house and garden for the use of the master of the school. In *R. v. Mundy* (3), the officials of a charitable foundation in actual occupation of an almshouse were all held to be rateable, although, again, the almshouse could not have been let under the terms of the trust. Again, it was the actual beneficial occupation that was the subject of the rating, and the question as to what rent the actual landlord was capable of exacting did not enter into the calculation. In *R. v. Green* (4), the inhabitants of almshouses were rated, although the property was the subject of a charity, but the case did not say in terms whether the patrons of the charity—who were the Merchant Taylors' Corporation—were at liberty to have let the houses to other people. This latter case, therefore, cannot be regarded as affording much assistance in the present dispute, but the earlier authorities are directly in point. In both cases the property was incapable of being let at a rent, and was dedicated to and only capable of being used by persons who paid no rent at all.

Although these authorities were long antecedent both to the Parochial Assessment Act, 1836, and the Act of 1869, yet these statutes have not affected the principle upon which occupation is made the test of liability for assessment, and I cannot find that anything in the subsequent authorities has impeached or ignored the principle upon which these cases rest.

The case of *Great Western and Metropolitan Rail. Cos. v. Kensington Assessment Committee* (5) has, I think, been subject to misunderstanding. In that case the question that arose was the old and difficult problem of determining upon what principle the portion of a railway running through a parish should be the subject of assessment. The whole principle of rating in such a case really depends upon a refined abstraction. Tenancy of a small fraction of a railway line forming part of an entire system and cut off by the boundaries of a parish, can hardly be made the subject of a tenancy at all; but if it were to be regarded in the ordinary way as being let and hired, it is obvious that the question of who can hire it might be brought into account as a means of determining value on the basis of competition for its use; but if it be found that by Act of Parliament the only possible tenant is excluded, other methods of determining the value remain to be used; and it was this, and no more, that was referred to in the opinion expressed in that case. It is, however, a different proposition to assert that the limited right of the owner to receive rent is the same thing as limiting the number

of people who can occupy and will pay. If there is only one such occupier possible, the method of assessment is then to discover what is the value of the occupation to him of that tenement, disregarding the profits that arise from the special quality of individual enterprise and skill; and it was this method that was adopted in the case mentioned. *Erith Parish (Churchwardens, etc.) and Dartford Union Assessment Committee* (6) does not appear to me of much assistance. The real effect of the decision there was that the owner must himself be regarded as a possible tenant; but the respondent argues, and I think with reason, that as it is only in the nature of hypothesis that he can be so considered, it follows that he enters the field subject to the advantages and drawbacks attaching to the tenancy, and his position as landlord must be disregarded. The conclusion I have reached is independent of the view put forward by BANKES, L.J., that in fact there is no restriction imposed on the tenant to prevent him paying rent; he can pay it if he pleases without any breach of the statute, but this fact would, in my opinion, be fatal to the respondent even if the opinion I have expressed did not commend itself to your Lordships' approval.

LORD ATKINSON.—I concur. I think the decision appealed from was wrong, and that this appeal should be allowed. I come to this conclusion on the broad ground that this temporary [sic] statute of 1920, expiring on June 24, 1923, dealing only with one class of hereditament, dwelling-houses, is not, and was not, intended to be a valuation Act interfering with the system of valuation set up by the Valuation (Metropolis) Act, 1869, which is practically identical in its terms with the Parochial Assessment Act, 1836. Its title reveals its true object. Its abbreviated title is: *The Increase of Rent and Mortgage Interest (Restriction) Act, 1920*, and its fuller title is: *An Act to consolidate and amend the law—(not with respect to valuation or rating, but)—with respect to the increase of rent and the recovery of possession of premises in certain cases, and the increase of the rate of interest on and the calling in of securities of such premises and for other purposes*. These are the things which are alone within its scope and reach.

What the ratepayer is, under both the Act of 1836 and that of 1869, rated in respect of is decided, by many cases in this House, to be the beneficial occupation of a hereditament. And if he is in enjoyment of this species of occupation, he must be rated, even though he should not be a tenant of the hereditament, and, though no person can be made the re-tenant of it, and though no rent is or could be received in respect of it. The statutory measure of the rateable value of this occupation is the annual rent which a tenant might be reasonably expected to pay, one year with another, for the hereditament occupied if the tenant undertook to pay all the usual tenant's rates and taxes and tithe commutation rentcharge, if any, and if the landlord undertook the other expenses, if any, necessary to maintain the hereditament in a state to command the rent, after deducting therefrom the probable average cost of the repairs, insurance and other expenses, as aforesaid. That is the measure, and the only measure of the rateable value which is provided. It is to be applied to the hereditament, no doubt, *rebus sic stantibus*, but this rent is merely a notional or speculative thing. The tenant who is expected to be ready and willing to pay it, in many cases, if not all, has not, and cannot have, any real existence, and the payment of any rent for the hereditament by any person may, in fact, as I shall presently show, be absolutely prohibited by law, statutory or other. This tenant has been, therefore, appropriately styled the "hypothetical tenant," and so unreal may his existence be that the owner-in-fee of the hereditament, who is in beneficial occupation, may play the part of the hypothetical tenant, ready to pay the annual rent mentioned in the statute for his own property. This imaginary rent is not to be confounded with the rent which an actual tenant in possession in fact pays. It may naturally be assumed that the hypothetical tenant would take this latter into consideration, along with many other things, including the capacity of the hereditament and its adaptabilities, in calculating

A the amount of the rent he might be expected to pay, but the actual rent paid by the actual tenant is not, and cannot be, treated as a measure of, or a substitute for, the hypothetical rent which conceivably might be expected from a hypothetical tenant. It, therefore, appears to me that where you find a statute dealing exclusively with actual rent paid by actual tenants, actual increases of such rent, evictions from the hereditament in respect of which the actual rent is paid, and the interest paid by the mortgagors of such a hereditament, the natural conclusion to arrive at is that this statute was not designed or intended to deal with the rating of hereditaments at all.

That, in my view, is precisely what this statute of 1920 is. From beginning to end of it there is not an allusion to the hypothetical tenant, or to the rent he might be expected to pay. Annual rent paid by actual tenants and the increases of it, actual interest paid on actual securities, are the subjects with which it exclusively deals. Save the provision of s. 12 (9) [the relevant words were repealed by the Rent &c. Restrictions (Amendment) Act, 1933] it does not contain a single provision that I can find containing a direction to rating authorities as to how they are to rate, or referring to any enactment relating to rating, or as to the means by which the rental or gross value of hereditaments is to be determined. It is plain, I think, from the provision of the Act, that the evil it was designed to cure was not excessive or defective rating. The evil it was obviously designed to prevent was the exploiting by landlords of the great demand for dwelling-houses, of which the supply was inadequate, in order to exact excessive rents for the dwelling-houses they owned. And yet the main effort of the respondent in this case appears to be to substitute the "standard rent" plus its possible increases for the sum at which the beneficial occupation would be rated under the former systems. But, there again, this can only apply to the case of actual tenants in possession, because standard rent is by s. 12 defined to be the rent at which the dwelling-house was let on the 3rd day of Aug., 1914, or in the case of a dwelling-house not let at that date, the rent at which it was first let. All the cases in which no tenancy exists, or can exist, though the occupation of them may be most beneficial, are left untouched by the Act. These latter, however, are not the only dwelling-houses left untouched by the Act. Section 12 (7), provides that where the rent payable in respect of a dwelling is less than two-thirds of the rateable value thereof, which apparently means the rateable value fixed under the old system, the statute is not to apply to the rent or that tenancy or to any mortgage taken by the landlord under whom the tenancy is held. For instance, if the rateable value of a dwelling as fixed under the old system was £126 per annum, two-thirds of this would be £84. If the annual rent was a low one, say £40, and it was by an arrangement doubled, i.e., increased 100 per cent., and raised to £80, the tenant could get no redress, and the old mode of valuation would continue to apply to it; but if the rent was increased to £85, which would exceed two-thirds of the rateable value by £1 the old standard of rateable value would be superseded, and, as I understand the contention, the rent would be fixed at the standard rate plus its possible increases. Results such as these seem to show that it was never designed to supersede by this Act the old system of rating dwelling-houses. Again, it cannot, I think, be disputed that equality of rating is and should be one of the main objects of all rating systems. Well, if one takes the case of a man who built four dwelling-houses all of the same rateable value as fixed under the old system at £100 per annum. If he should let one in the open market at a rent of £100 per annum, lived in another, let the third to his son at £65 per annum, and the fourth to his daughter at £70 per annum, the rateable value under No. 1 will be fixed at the standard rent plus the possible increase. No. 2 cannot be dealt with under the Act of 1920 at all as there is no tenant. No. 3 will be left untouched by the Act as the rent is less than two-thirds of the rateable value, and the rateable value of No. 4 will be fixed under the Act at the standard rent plus the possible increases.

It is unnecessary to refer at length to all the well-known cases which have established that a private person or a public body in occupation of his or its own property can be treated under the old system of rating as a possible hypothetical tenant, and be rated in respect of the beneficial occupation of his or its property whether he or it has or has not power to let it or to receive rent for it. The *Erith Case* (6), *Winstanley v. North Manchester Overseers* (7), and the *Port of London v. Orsett Assessment Committee* (1) are sufficient examples of this; but *Owens College v. Chorlton-upon-Medlock Overseers* (8) is such a remarkable and convincing authority that it may be permissible to refer to it at much greater length than would otherwise be pardonable, establishing as it does that the realities of a case may, when necessary, be ignored when one comes to determine what rent the hypothetic tenant may be presumed to be willing to pay to become tenant of the premises whose rateable value is to be determined. There the trustees of the college were incorporated under an Act of Parliament. They were by this Act empowered to acquire and hold land as a site for a college, and to erect buildings upon it for a college; but they had no power to sell or to let this land. In pursuance of this statute they purchased land in fee simple and erected upon it buildings which they used for the purpose of the contemplated college. The college could not be carried on at a profit, situated where it was, inasmuch as the expenses would always exceed the amount derived from students' fees. The college premises having been rated to the poor rate on a gross estimated rental of £3,833, it was found in a Case Stated on appeal against the rate that it could not (without considerable structural alteration) be let for any purpose to which it was capable of being devoted for more than £1,300 per annum, which would fix the rateable value, after the proper deductions, at £1,083 6s. 8d. This the trustees were willing to be rated at, but they contended that they were not liable to be rated at a larger sum than this because, being unable under the provisions of their statute to let the college premises, they were themselves to be excluded as possible hypothetical tenants for them. The Court of Appeal, consisting of LORD ESHER, M.R., BOWEN, L.J., and FRY, L.J., upheld this contention, and decided that (assuming the trustees to be rateable at more than a nominal amount) they, being themselves unable to rent the premises by virtue of the applicable statutory provisions, must be excluded from consideration as possible tenants, and, therefore, that the rateable value must be reduced to £1,083 6s. 8d. In other words, the court had regard to the realities of the case, and decided that the trustees should be put aside and disregarded as imaginary hypothetic tenants. They, accordingly, declined to assume that the trustees should, even notionally, be treated as persons anxious to become tenants from year to year at a rent of their own premises since their statute enacted that they could not become tenants of those premises, in fact, at all. In the judgment of this House in the *Erith Case* (6) the judgment of the Court of Appeal in this case of *Owens College* (8) was dealt with and it was held that the assumption on which that judgment was founded was erroneous. One finds this passage in LORD HERSCHELL's judgment ([1893] A.C. at p. 593):

"The point was first glanced at in the judgment of the Master of the Rolls in *R. v. London School Board* (9). If (said the learned judge) by the terms of a statute it (the school board) could not legally be tenant it would be excluded from calculation. . . . The view thus suggested was adopted by the Court of Appeal in the case of *Owens College v. Chorlton-upon-Medlock Overseers* (8). . . . I have stated fully the reasons which led the learned judges to the conclusion that the governors of Owen's College were left out of account as possible tenants when determining the annual value of premises occupied by them, and I have most carefully considered those reasons with all the respect that is justly due to the views of the learned judges who concurred in them, but I am unable to share the opinion they expressed. The conclusion they arrived at is in its results sufficiently startling. Two public bodies might have

A erected buildings, similar in all respects, erected upon lands similar in situation, and of equal value, and these buildings might be occupied in the same way and applied to the same purposes, and yet, if one of these bodies had power under the statute constituting it to hire such buildings, and the other had no such power, the rateable value of the buildings might, and almost certainly would, be different—that is to say, the buildings would have a

B different value, for the words of the statute of William IV, [i.e., the Parochial Assessment Act, 1836] which follow the expression ‘annual value’ only provide a means of arriving at what is the annual value of the premises. Why should the annual value, or the rateable value for the purpose of the poor law depend on the statutory power of the owner to take them supposing he had not been owner? I am unable to discover any satisfactory reason for this

C difference, and none seems to me to be suggested by the judgments in the *Owens College Case* (8). I do not think the distinction drawn can be confined to premises belonging to and occupied by public bodies for public purposes. A private individual might receive money under an obligation to erect with it a building upon a particular site to be occupied by him during his life, with a prohibition against letting it to anyone else. If the principle adopted in the

D *Owens College Case* (8) be a sound one, such an owner would, I presume, be equally excluded from consideration.”

Counsel for the appellants cited several cases (in argument referred to as charity cases) to show that the principles embodied in the Act of 1836 were, in fact, applied to the rating of hereditaments long before the passing of that Act. They

E are interesting and instructive. *R. v. Catt* (2) is the first of these. In that case the master of a free school was appointed by the minister and inhabitants of the parish under a charitable trust whereby a house, garden, &c., were assigned for the habitation and use of the master and his family freely and without payment of any rent or income, gifts, sum of money or other allowance whatever for the teaching of ten poor boys of the parish. The master was held to be rateable as he was in

F beneficial occupation of the premises though he was not, in fact, a tenant of them himself, and could not let them to a tenant, and though no rent could be reserved to anyone in respect of them. The next of these cases was *R. v. Mundy* (3), decided in 1801. There certain persons who were objects of a charitable foundation were for their own benefit put into the actual occupation, in a manner prescribed by the rules of the institution, of the almshouse and lands belonging to it, but liable to

G be dismissed for any breach of the rules. They were held to be rateable under the Poor Relief Act, 1601, which provided that the rate should be imposed upon any occupation of land, because they were in beneficial occupation of the premises and were therefore within the statute. The last case was *R. v. Green* (4). There persons who were objects of a charitable foundation were in actual occupation of almshouses, paying no rent for the same and removable at the pleasure of the

H patron of the charity. They were held to be rateable. BAYLEY, J., in giving judgment, said: “They are occupiers of this property from which they derive a benefit, and are therefore rateable.” Rateability did not depend on tenancy, or on the possession of any estate or interest in the property under consideration, or on the receipt of any rent from it, but solely on the beneficial occupation of it. This is in exact conformity with the principle of the decision in the modern cases

I above-mentioned. To make rateability depend on the fact that the person to be rated is, in fact, an actual tenant, or to make the rent payable by an actual tenant the measure of the rateable value of premises out of which the rent issues would be an absolute innovation, in direct conflict with the principles of the law of rating as established for over a century. No provision is, in my view, to be found in this Act of 1920 which would justify such an innovation. Its introduction in the case of the dwelling-houses mentioned in this Act of 1920 should not take place in the absence of a clear statutory provision requiring it.

I now turn to the only provision I can find in the Act of 1920, amounting to a direction to a rating authority as to how they are to rate any class of premises. It is contained in s. 12 (9) which refers to the rating of houses erected after or in course of erection on April 2, 1919. [This provision was repealed by the Rent &c. Restrictions (Amendment) Act, 1933, and, as to Scotland, from May 16, 1961, by the Valuation and Rating (Scotland) Act, 1956.] This provision in no way affects houses of the class the subject of this appeal. In my opinion, therefore, the proper subject-matter with which this Act of 1920 deals is mainly the increase of the rents of dwelling-houses and the increase of the interest on mortgages affecting them. It is not a rating Act, and does not, save in the case mentioned, in any way affect the system of the rating of such houses established by the Acts of 1836 and 1869. Nor does it provide any substitute for the rateable value of such houses as fixed by those statutes. It does not provide any measure by which the rateable value of dwelling-houses can be determined. I, therefore, am of opinion that question (ii) should be answered in the negative. With regard to question (i), that, I think, should also be answered in the negative, because it deals with rent not the value of beneficial occupation which is alone the subject of rating. Question (iii) should, I think, be also answered in the negative, because the sum paid was paid in respect of getting the advantage of a tied house. This advantage, it has been decided, must be disregarded: *Sunderland Overseers v. Sunderland Guardians* (10). Yet it is taken into account in fixing the standard rent under this Act. On the whole, I think this appeal should be allowed with costs here and below.

LORD SUMNER.—It is not disputed that the formula, “the rent which a tenant would pay from year to year,” refers to a hypothetical tenant. It is too late to dispute the decisions, by which this has been established. The practical question in this case is whether the rent is as hypothetical as the tenant. The formula is prescribed for the purpose of measuring the annual value of the hereditament for rating purposes, and the rating authority is entitled to the advantage of conceiving the offers that would be made by the owner of the hereditament, if he were not the owner but wished to be the tenant of the owner, even though by law disqualified from being a tenant, and also the increased sum that would be offered by an occupier, though, in fact, legally entitled under a lease or otherwise to occupy at a less sum. Does this involve that the rent, which either of such persons would pay, is no less divorced from reality than is the person who wishes to rent his own house, to occupy beneficially that which is legally incapable of beneficial occupation, or to pay more than the sum, for which the law entitled him to occupy? The hypothetical tenant of the decisions is an abstraction. Is the rent, which he hypothetically pays, nevertheless, limited by legal considerations, which only apply between a real tenant and a real landlord?

In an able argument, counsel for the ratepayer contends, that it is. The statutory word “rent,” he says, can only mean rent, and no case has decided that it means anything else. An hereditament has no absolute annual value and the rent that it would command means nothing apart from the law and the bargain under which rent would be paid. Rent is something which the law will make a tenant pay and for which a landlord can distrain. A payment, even if actually made, which exceeds the payment legally compellable as rent, would to that extent not be rent, but would be a gift. Even a hypothetical tenant is a tenant; and when he is conceived as paying rent, he is conceived as doing so under the conditions which the statute law imposes. Decisions which extend imaginatively the area of possible tenants to infinity do not thereby convert the statutory word “rent,” which is a term of art, into a mere economic measure of value. Logic does not require that, in order to measure annual value, the hypothetical tenant should be conceived as being indifferent to a statute in his favour, which says that the landlord cannot make him pay more than a certain sum.

A I am afraid that this argument must fail. I agree that the mere decision that an owner may be conceived to offer a rent for his own hereditament does not formally involve the consequence, which is in debate, but as the decision would be irrational if it did not rest on the assumption that the whole formula is only a way of getting at rateable value on principles applicable to all hereditaments, however owned and however occupied, I think that the word "rent" must now be held to mean something which at any rate is not conditioned by the legal relations which exist between an actual landlord and an actual tenant. An occupier under a beneficial lease cannot require the annual value to be cut down to the rent actually reserved. Equally a hypothetical occupier, although he will occupy, if he occupies at all, under a beneficial statute, must not be supposed to limit what he is prepared to give in order to get the occupation of the hereditament merely to the amount, the giving of which will enable him to retain it in the face of anything that an actual landlord could legally do against him. Rating is a process between an occupier and a rating authority, to the determination of which the landlord and the lessee are strangers. It may be observed that the phrase is "might be expected to pay"; it does not go on to say "and the landlord might be able to exact." If, as is contended, rent is throughout rigidly restricted to its meaning as a term of art, and the measure of value thus applied by hypothetical hands is the real thing, the result would be that the occupier, who already has been enriched under the rent restrictions legislation by receiving a statutory present of part of the value of his landlord's property, would profit still further and equally unmeritoriously by escaping from the rates which the hereditament ought to bear, to the prejudice of other less fortunate occupiers. I say "ought to bear" because the only justification for the Act is that the hereditament is really worth more by the year in the market than the landlord is allowed to charge, but that it is inexpedient that he should have the benefit of it. As a matter of fact, not only does the Act not deal with rating expressly except in another connection and for another purpose, but it actually (s. 2 (1) (b) [repealed, Rent Act, 1957]) enables the landlord to pass on to the tenant an enhanced burden of rates falling on himself without discriminating between an enhancement due to increased rateable value and one due only to increased poundage.

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As a negative answer to the question whether the rateable value is limited by the maximum rent payable under the Act disposes of the appeal in favour of the appellants, I do not think it advisable to deal with any other question, and am not at present prepared to say that the conditions created by the Act can have no relevance to the determination of rateable value. In some circumstances, it may be, the existence of the Act and its practical effect may be evidence bearing on the ultimate answer to the question, what rent a tenant might be expected to pay, though not conclusive, of it, and I think it better that no opinion should be expressed to that effect till a concrete case arises which requires its determination. I think that this appeal succeeds.

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H **LORD PARMOOR.**—The appellants are the rating authority, and the respondent has been rated as the occupier of the Cobden's Head, a hereditament which comes within the operation of the Rent Restrictions Act, 1920. The questions raised in the appeal are whether the maximum standard rent which is recoverable under the Act of 1920 is (i) to be taken into account in arriving at the valuation of the hereditament under the Valuation (Metropolis) Act, 1869, and (ii) whether the amount of such standard rent fixes the highest gross value which can be placed on the said hereditament for the year 1920. In my opinion, the answer to these two questions depends on the same considerations, but it will be sufficient to consider whether the standard rent is the highest gross value which can be placed upon the said hereditament in the valuation list for the year 1920. Apart from the operation of the Act of 1920, the Cobden's Head would be properly entered in the valuation list at £112 gross value and £94 rateable value. If, however, the maximum standard rent fixed in the Rent Restrictions Act, 1920, concludes the rateable

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value then the above valuation should be reduced to £87 gross value and £56 rateable value. A

In my opinion, the decision of the appeal depends on the consideration of one or two of the fundamental principles which permeate the whole system of our rating law. Under the Poor Relief Act, 1601, rates are to be levied upon every occupier of lands, houses, &c. The distinction between occupier and owner in this connection is of primary importance. The operation value of property may be, and often is, distinct from its value to the owner. This distinction would probably be emphasised where an artificial statutory maximum is fixed, and a statutory restriction prevents an owner from recovering from any tenant a greater amount as rent than the statutory maximum. It has long been recognised that actual rents based on the contractual relationship between tenant and landlord, or on trust conditions, are not the test of the value of a property for rating purposes. I do not think that there is any difference in this respect between a contractual or a statutory rental. In either case the same objections apply, and in either case the rateable value must be assessed in accordance with statutory directions. B C

In *R. v. Skingle* (11) quarter sessions had held that the actual rentals reserved in leases were conclusive evidence of the value of lands for the purposes of the poor rate. This order of quarter sessions was quashed, the court holding that the case was too clear for argument. The cases on charitable trusts, quoted to your Lordships by the counsel for the appellants come within the above principle. In *R. v. Catt* (2) the argument was largely directed to the question whether the person proposed to be rated was, or was not, to be regarded as an occupier of the property within the statute of Elizabeth. Catt was held to be the occupier of the property for which he was rated, and, therefore, liable on the value of his beneficial occupation, although the house, &c., was assigned, under the terms of the trust, "for the habitation and use of the master and his family freely without payment of any rent, income, gift, sum of money, or other allowance whatsoever." In *R. v. Mundy* (3), it was again decided that, although the objects of a charitable foundation were in the actual occupation of the almshouse and lands for their own benefit in the manner prescribed by the rules of the institution and liable to be dismissed for any breach of such rules, yet that they were liable to be rated as occupiers on the basis of the beneficial enjoyment of the property. This case again turned mainly on the fact that an occupier could be found, and that the words of the Poor Relief Act, 1601, are general in directing that the rate for the relief of the poor is to be levied on every occupier of lands, houses, &c. In *R. v. Green* (4) the appellants against the rate were poor women, resident in the almshouses as almswomen, paying no rent for the same, and removable at the pleasure of the master, wardens, and court of assistants of the company of Merchant Taylors. It was again held that where a person is found to be the occupier of a house he must be rated as such in the value of his beneficial occupation, though the house be appropriated to charitable purposes, and no rent is paid for the same. D E F G H

It has long been recognised as a matter of principle in rating law that to make actual rentals the basis of rateable value would contravene the fundamental principle of equality, both between the rate contributions from individual ratepayers, and between the totals of rate contributions levied in different contributory rating areas. In effect, the result would be to make the amount on which the occupier of property is liable to pay rates dependent in many cases on the contractual relationship between a particular landlord and tenant, whereas it is dependent in all cases on a statutory direction applicable on the same principle to all hereditaments, and intended to insure equality of treatment as between the occupiers of rateable property and the rating authority. Two illustrations will suffice. If a low actual rental is based on the payment of a premium, it is obvious that such rental does not denote the value of either the beneficial or profitable occupation of the particular property, and that to admit it as a test would be to give a benefit to a particular I

A occupier, placing him at a special advantage as compared with other ratepayers in the same area. A second illustration can be found in the facts of the particular case under appeal. The Cobden's Head, is a tied house, and the actual rental is lower than the true occupation value by the extent to which the tie covenant places a special disability on the tenant. It is recognised that in such a case the rateable value is assessed on the basis of the value of a free house, and
B the figures in the Special Case show that this basis gives a figure in excess both of the actual rental and of the standard rent, after allowing for increases, which may be added under the Rent Restrictions Act, 1920.

Rateable value is an assumed value based on an assumed rental. The method of ascertaining this assumed value is statutory. The present case comes within the provisions of the Valuation (Metropolis) Act, 1869, but there is no difference in
C principle between the statutory method directed in this Act and the statutory method directed in the Parochial Assessments Act, 1836. Prior to 1836 the same method was generally adopted in practice, although it cannot be said that this was universally the case. Under the Valuation (Metropolis) Act, 1869, the assessment committee is directed to ascertain the annual value which a tenant might reasonably
D be expected, taking one year with another, to pay if the tenant undertakes to pay all the usual tenant's rates, taxes, &c., and the landlord undertakes to bear the cost of repairs, &c. This statutory direction must be followed in all cases, unless it can be shown that the legislature in a particular case has directed a different method. It is notoriously difficult, in some instances, to ascertain the figure at
E which the assumed annual rent should be fixed, but it is the duty of an assessment committee, in all cases, to ascertain for this purpose as accurately as may be, the value of the beneficial or profitable occupation of the particular property, and then to make the statutory deductions. In ascertaining this annual value, all that can reasonably influence the judgment of an intending occupier ought to be taken into
F consideration, including not only the natural conditions, but any statutory provisions which may tend, either to enhance or diminish the value of the beneficial occupation of the property or its profit-earning capacity. The special skill or industry of a particular occupier is not one of the natural conditions which attach to property and on this ground it is excluded from consideration on the assessment of rateable value. There is no certainty that the above considerations have formed the basis on which an actual rental has been fixed between the landlord and tenant or that
G considerations which would be excluded from an assessment of rateable value have not been entertained. As stated above, such rental is not a conclusive consideration whether it is contractual or statutory.

The argument on behalf of the respondent is based on the proposition that although a contractual or statutory rental applicable to an existing tenancy would not be conclusive, yet it becomes conclusive if made applicable, not only to an existing tenancy, but to any tenancy created during the time while the Act is in
H operation. I am unable to assent to this proposition. In my opinion, the objections, as already stated, to adopting an actual rental as the basis of rateable value apply with the same force, whether such rental is limited to an existing tenancy, or is made applicable to all tenancies created during the operation of the Act. The fundamental distinction remains that the assumed rental, based on statutory directions for the purpose of ascertaining occupation value, is in itself a different
I thing from an actual rental which denotes the liability between owner and tenant, and which may depend on a variety of conditions, other than those affecting the beneficial or profitable occupation of the property. In the charitable trust cases, referred to above, it does not appear to have been argued that a restriction on rent, applicable to successive tenants, in any way concluded the rateable value, or that, if the person sought to be charged was in the position of an occupier, any other than the ordinary method should be adopted in ascertaining the value of the beneficial occupation of the property. If the Rent Restrictions Act, 1920, contained

any provision which directly affected the statutory basis of ascertaining the rateable value of such a hereditament as the Cobden's Head, then, no doubt, the standard rent might be made the conclusive test of rateable value. The Rent Restrictions Act, 1920, contains no such provision. The object of the Act is not, except in the specified instances, to control the assumed rentals as ascertained under the Valuation (Metropolis) Act, 1869, but to place a special statutory limitation on actual rentals, as between landlord and tenant, providing that, if it is attempted to exact a rent in excess of the amount permitted under the Act, the amount of such excess shall, notwithstanding any agreement to the contrary, be irrecoverable from the tenant. I can find no provision in the Rent Restrictions Act which would allow a different basis of rateable value to be adopted as between tied houses which come within the operation of the Act and those of higher value, or which would make conclusive an actual rental which, apart from the Act, would not be conclusive for the purposes of a rate valuation. I think that the Rent Restrictions Act was passed to limit the amount of rental recoverable by a landlord from his tenant, and that it does not affect the statutory directions for ascertaining rateable value in the Valuation (Metropolis) Act, 1869, as applicable to the Cobden's Head, and that it certainly is not conclusive in the question of amount.

In the Court of Appeal, ATKIN, L.J., expresses his agreement in the judgment delivered by AVORY, J., in the Divisional Court, and says that if no higher rent than the standard rent and statutory increases is enforceable, as a matter of common sense that seems to be the limit of the rent a tenant can be reasonably expected to give. If the statutory rent actually enforceable is to be regarded as the same thing as the assumed rental for ascertaining rateable value, there would be no answer to the view expressed by the lord justice, but if they are not the same thing, and the same considerations and limitations do not apply, there appears to me to be no difficulty in following, as in other cases outside the operation of the Rent Restrictions Act, 1920, the directions of the Valuation (Metropolis) Act. AVORY, J., in delivering the judgment of the Divisional Court, says :

"Having regard to these decisions and to the fact that the restrictions imposed by the Rent Restrictions Act, 1920, attach to the house by whomsoever it may be occupied, I am unable to imagine any tenant who would pay a rent for the house greater than that authorised by the Act."

The decisions to which the learned judge refers are : *Staley v. Castleton Overseers* (12), *Altrincham Union Assessment Committee v. Cheshire Lines Committee* (13), *Sculcoates Union v. Kingston-upon-Hull Dock Co.* (14), *Port of London Authority v. Orsett Union Assessment Committee* (1). These cases all show, to use the language of BLACKBURN, J., "that any statutory restrictions on the profit-earning or rent-earning capacity of the hereditament must be taken into consideration." The question, however, remains whether a restriction on rent under the Rent Restrictions Act, 1920, can be regarded as a statutory restriction on the value to an occupier of the profit-earning or rent-earning capacity of the Cobden's Head. Ordinary rent is not a restriction on the profit-earning or rent-earning capacity of an hereditament in the hands of an occupier and has never been so regarded. I am unable to see in what way a statutory restriction on rent payable from a tenant can operate as a statutory restriction on the profit-earning or rent-earning capacity of the Cobden's Head, or how the value to an occupier is affected or controlled by the fact that a landlord cannot enforce, as against a tenant, a rent higher than the statutory standard rent in operation at the time. In the *Sculcoates Case* (14) the statutory limitation of the amount of tolls receivable was, no doubt, a restriction on the profit-earning capacity of the hereditament, but the rent payable by the tenant to his landlord in respect of the hereditament of which the occupier is rated, leaves untouched the sources on which an assumed intending occupier would rely in assessing the probable benefit or profit to be received from his occupation of the hereditament. I cannot find any indication in any of the cases quoted that

A actual rent, whether statutory or not, and whether applicable generally or only to a particular tenancy, is a conclusive factor on rating values. In my opinion, the Rent Restrictions Act, 1920, does not affect the ordinary principles of valuation applicable under the statutory directions of the Valuation (Metropolis) Act, 1869. The appeal should be allowed with costs here and below.

B **LORD CARSON.**—The only question we are asked to determine is whether the highest gross value which can be assigned to and placed upon the hereditament in question in the valuation list for the year 1920 is the standard rent "within the meaning of the Rent Restrictions Act, 1920" applicable to the hereditament plus the highest increase or increases of rent provided for and set out in s. 2 (1) (c) and (d) of that Act. The three learned judges who heard the case in the King's Bench Division by a unanimous judgment answered this question in the affirmative. In the Court of Appeal, SCRUTTON and ATKIN, L.JJ., gave judgments affirming this decision, whilst BANKES, L.J., although holding that the Rent Restrictions Act, 1920, must necessarily be taken into account in arriving at the valuation of the hereditaments, dissented for reasons to which I shall afterwards refer. I agree with the decision arrived at by the King's Bench Division, and by the majority in the Court of Appeal. Under the Parochial Assessment Act, 1836, and the Valuation (Metropolis) Act, 1869, the basis of the net annual value which is to be assessed is the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for the hereditaments. That is the only guide laid down, and although in its application it has been found necessary in some cases to make "estimates of profit" or of "interest on cost," such calculations are merely relevant to the ascertainment of the rent.

Turning to the Rent Restrictions Act, which is applicable to the hereditament in question, we find that no higher rent than the standard rent and statutory increases as thereby laid down can be enforced during the material period. Are we then, as the appellants' counsel contend, to disregard this statutory limitation of rent in ascertaining for valuation purposes the rent which the hypothetical tenant under the valuation would pay? Reading the Acts side by side and for a moment keeping my mind free from the entanglement of authorities which have been cited, I find it impossible to do so. I agree with ATKIN, L.J., that

G "if no higher rent than the standard rent and statutory increases is enforceable, as a matter of common sense that seems to be the limit of the rent a tenant can be reasonably expected to give."

But it has been argued before us, and it was upon this point that BANKES, L.J., dissented from the majority in the Court of Appeal, that although the Rent Restrictions Act, 1920, may affect the rateable value of these premises, it does not fix the rateable value within the limits of the standard rent and statutory increases, because the Act does not prohibit the tenant from agreeing to pay more, although such excess could not be enforced and, even if paid, could be recovered back. I cannot persuade myself that it is possible to ask the assessment authority to enter into such super-speculative and hypothetical regions, and I am of opinion that the only rent we have to consider is a rent *de jure* recoverable and not a voluntary promise which cannot be enforced. It is only where one begins to consider the authorities which have been decided in the efforts of the courts to apply the provisions of the Valuation Acts to various hereditaments differing very widely in their nature and the conditions of tenure from such a hereditament as that under discussion, that a difficulty arises. I do not propose to examine the authorities because they are fully dealt with in the judgments of AVORY, J., and the lords justices in the Court of Appeal. In my opinion, the result of the authorities and their application to various complicated cases which have arisen in attempting to

estimate the rent a hypothetical tenant would pay is accurately stated in the following passage from the judgment of ATKIN, L.J., where he says : A

“How then is the annual rent to be ascertained? It is obvious that the definition pre-supposes that the premises are deemed to be vacant and are deemed to be capable of being let. Any restriction upon the owner in respect of the power to let must by the very force of the definition be excluded. Thus the owner who does not desire to let, or who by nature of the grant to him has no power to let, or who by statute is forbidden to let, is still rateable. Moreover, the definition requires that he shall be deemed to be a possible tenant notwithstanding that he is already possessed of property by statute or otherwise, and that his powers of taking that property on an annual agreement are restricted or defined by statute or otherwise. This is the decision in the *Eriih Case* (6), following and followed by numerous authorities. But the principle of these cases is confined to freeing the owner from restrictions for the purpose of obtaining a hypothetical landlord and putting the owner in the class of hypothetical tenants. When this is done the principle is clear. The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands with all its privileges, opportunities, and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament: per LORD BUCKMASTER in *Port of London Authority v. Orsett Union Assessment Committee* (1). If a general statute prevents some or all persons from taking such a hereditament, the fact will be taken into account. If it restricts them in the enjoyment of such a hereditament that also will be taken into account. Any similar common law prohibition will have a similar effect.” B C D E

As SCRUTTON, L.J., observes :

“In none of these cases up to the present time has any statutory restriction in the actual rent been considered; all statutory restrictions at present given effect to are in the receipt from the beneficial occupation. Statutory restrictions on the possibility of paying rent have up to the present been disregarded.” F

I can find nothing in any of the principles to be deduced from the authorities which compels me to disregard the statutory limitations of rent and the consequent limitations on competition amongst hypothetical tenants. On the contrary, the decisions in *Sculcoates Union v. Kingston-upon-Hull Dock Co.* (14) and the *Great Western and Metropolitan Rail Cos. v. Kensington Assessment Committee* (5), appear in principle fully to support the conclusion at which I have arrived on the consideration of the two Acts of Parliament. There is one other matter to which I would like briefly to refer. It is argued that the Rent Restrictions Act, 1920, was not intended to interfere with the system of valuation set up by the Act of 1869. What the intention may have been it is impossible to say, but one can hardly come to the conclusion that where, under the statute, valuation is based upon rent, it was not present to the minds of those who promoted this Act that the valuation might and probably would be affected by statutory limitations as to the rent which a tenant could be asked to pay. That the question of valuation was under consideration is, I think, clear from the provisions contained in sub-s. (9) of s. 12 of the Rent Restrictions Act. I think the appeal should be dismissed. G H

Appeal allowed.

Solicitors: *E. J. Marsh; Maitland, Peckham, Washington, Fox & Hatten.*

[Reported by W. C. SANDFORD, Esq., Barrister-at-Law.]

A

COMMONWEALTH SHIPPING REPRESENTATIVE v. PENINSULAR AND ORIENTAL BRANCH SERVICE

[HOUSE OF LORDS (Viscount Cave, L.C., Viscount Finlay, Lord Dunedin, Lord Atkinson and Lord Sumner), November 27, December 14, 1922]

B

[Reported [1923] A.C. 191; 92 L.J.K.B. 142; 128 L.T. 546; 39 T.L.R. 133; 67 Sol. Jo. 182; 16 Asp. M.L.C. 33; 28 Com. Cas. 296]

Insurance—Marine insurance—Insurance against “consequences of warlike operations”—Ship engaged in warlike operation—Carriage in time of war of ambulance wagons and other government stores from one war base to another.

C

During the war of 1914–1918 a ship, the G., was requisitioned by the Australian government for transport purposes in connection with the war on the terms that the Australian government would be responsible for such risks of war as would be excluded from an ordinary policy of marine insurance by the presence therein of a f. c. and s. warranty which included “all consequences of hostilities and warlike operations.” On Jan. 1, 1916, the G., which was not at the moment required for the transport of war material, was carrying a general cargo for government account from Port Said to Gibraltar where she would receive orders. In accordance with naval orders she was steaming after dark at her best speed and showing no lights, and while so doing she was in collision with the B., a vessel requisitioned by the British government, which was carrying ambulance wagons and other government stores from one war base in the eastern Mediterranean to another. As a result the G. sank and was totally lost. It was agreed that neither vessel was guilty of negligence.

E

Held: in the absence of special circumstances putting a different colour on the transaction the carriage in time of war of ambulance wagons and other government stores from one war base to another was carriage for the purposes of war and part of a military operation, and, therefore, the B. was engaged on a warlike operation when she collided with the G., the G. was sunk as a result of that warlike operation within the terms of the requisition, and her owners were entitled to recover from the Australian government.

F

Evidence—Judicial notice—Date of operation during modern war.

G

Per VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, and LORD SUMNER: While judicial notice will be taken of the existence of a state of war between this country and another, the court cannot take notice of the date in a modern war when a particular operation, such as an engagement or a withdrawal, began or was in progress.

H

Notes. Considered: *Clan Line Steamers, Ltd. v. Board of Trade, The Clan Matheson*, [1929] All E.R. Rep. 17; *Hain Steamship Co. v. Board of Trade*, [1928] 2 K.B. 534; *Yorkshire Dale Steamship Co. v. Minister of War Transport*, [1942] All E.R. 6. Referred to: *A.-G. v. Adelaide Steamship Co.*, [1923] A.C. 292; *Cayzer, Irvine & Co., Ltd.*, [1927] 1 K.B. 269; *Wharton (Shipping), Ltd. v. Mortleman*, [1941] 1 All E.R. 175; *Clan Line Steamers v. Liverpool and London War Risks Insurance Association, Ltd.* [1942] 2 All E.R. 367; *Larrinaga Steamship Co., Ltd. v. R.*, [1943] 2 K.B. 736; *Conservas Cerqueira Limitada v. H.M. Procurator-General*, [1944] A.C. 6; *Liverpool and London War Risks Insurance Association v. Ocean Steamships Co.*, [1947] 2 All E.R. 586.

I

As to the f. c. and s. warranty in a policy of marine insurance see 22 HALSBURY'S LAWS (3rd Edn.) 78–80, and for cases see 29 DIGEST 226–230, 41 DIGEST 990–992. As to matters of which judicial notice is taken see 15 HALSBURY'S LAWS (3rd Edn.) 333 et seq., and for cases see 22 DIGEST (Repl.) 136 et seq.

Cases referred to :

- (1) *British and Foreign Steamship Co., Ltd. v. R.*, [1918] 2 K.B. 879; 87 L.J.K.B. 910; 118 L.T. 640; 34 T.L.R. 546; 62 Sol. Jo. 701; 14 Asp. M.L.C. 270, C.A.; 29 Digest 228, 1849.
- (2) *Dolder v. Lord Huntingfield* (1805), 11 Ves. 283; 32 E.R. 1097, L.C.; 22 Digest (Repl.) 142, 1284.
- (3) *R. v. De Berenger* (1814), 3 M. & S. 67; 105 E.R. 536; 22 Digest (Repl.) 1285.
- (4) *Taylor v. Barclay* (1828), 2 Sim. 213; 2 State Tr. N.S. App. 1000; 7 L.J.O.S. Ch. 65; 57 E.R. 769; 22 Digest (Repl.) 142, 1291.
- (5) *Read v. Bishop of Lincoln*, [1892] A.C. 644; 62 L.J.P.C. 1; 67 L.T. 128; 56 J.P. 725; 8 T.L.R. 763, P.C.; 22 Digest (Repl.) 378, 4080.
- (6) *Britain Steamship Co. v. R.*, *Green v. British India Steam Navigation Co.*, *British India Steam Navigation Co. v. Liverpool and London War Risks Insurance Association*, [1921] 1 A.C. 99; 89 L.J.K.B. 881; 123 L.T. 721; 36 T.L.R. 791; 64 Sol. Jo. 737; 15 Asp. M.L.C. 58; 25 Com. Cas. 301, H.L.; 29 Digest 230, 1860.
- (7) *A.-G. v. Ard Coasters, Ltd.*, *Liverpool and London War Risks Insurance Association, Ltd. v. Richard de Larrinaga Steamship Marine Underwriters*, [1921] 2 A.C. 141; 91 L.J.K.B. 31; 125 L.T. 548; 37 T.L.R. 692; 15 Asp. M.L.C. 353; 26 Com. Cas. 352, H.L.; 29 Digest 228, 1851.

Also referred to in argument :

- Harrisons, Ltd. v. Shipping Controller*, [1921] 1 K.B. 122; 90 L.J.K.B. 384; 124 L.T. 540; 36 T.L.R. 880; 15 Asp. M.L.C. 270; 29 Digest 230, 1861.
- Adelaide Steamship Co., Ltd. v. R.*, [1923] 1 K.B. 59; 92 L.J.K.B. 102; 128 L.T. 258; 38 T.L.R. 864; 16 Asp. M.L.C. 57; 28 Com. Cas. 49, C.A.; affirmed sub nom. *A.-G. v. Adelaide Steamship Co., Ltd.*, [1923] All E.R. Rep. 31; [1923] A.C. 292; 92 L.J.K.B. 537; 129 L.T. 161; 39 T.L.R. 333; 67 Sol. Jo. 455; 16 Asp. M.L.C. 178; 28 Com. Cas. 315, H.L.; 29 Digest 228, 1850.

Appeal from an order of the Court of Appeal (LORD STERNDAL, M.R., WARRINGTON and SCRUTTON, L.J.J.), reported [1922] 1 K.B. 706, on a Case Stated by an arbitrator.

On or about April 17, 1915, the *Geelong*, belonging to the respondents, was requisitioned by the Australian government, of whom the appellant was Shipping Representative, for transport purposes in connection with the war. The terms of the requisition provided (inter alia) as follows :

"The Commonwealth government accepts full war risks, and will indemnify owners against any claim arising from the requisition in this connection, but owners must take all ordinary sea risks which could be covered by an ordinary marine policy in ordinary times of peace."

It was agreed before the arbitrator, and the case was argued on the basis, that the effect of this clause was to make the Australian government responsible only for such risks of war as would be excluded from an ordinary marine policy by the presence therein of the usual f. c. and s. warranty, including in such warranty all consequences of hostilities or warlike operations. On Jan. 1, 1916, the *Geelong*, while under requisition, collided with the British steamship *Bonvilston* in the eastern Mediterranean, and sank and was totally lost. At the time of the collision the *Geelong* was bound from Port Said to Gibraltar for orders. She had come from Australia via the Suez Canal and had discharged some troops at Suez. She was laden at the time of the collision with a part cargo of general goods, laden on government account, in accordance with a term of the requisition whereby cargo might be carried for stability purposes, and the profitable utilisation

A of such space as might not be required to accommodate troops, horses, stores, etc., the freight received by the owners for the carriage of such cargo to be credited to the Commonwealth government. At the time in question the Mediterranean was the scene of considerable activity on the part of enemy submarines, and the *Geelong* was being navigated in accordance with confidential instructions received from the naval authorities at Port Said, with a view to

B minimising the risk of submarine attack. These instructions prescribed the courses to be followed, and in addition provided that the vessel was, at night, to be navigated at best speed continuously and without showing any lights. The *Bonvilston* at the time of the collision was proceeding from Mudros to Alexandria. She was under requisition by the British government and was carrying ambulance wagons and other government stores from one war base (Mudros) to another

C war base (Alexandria). In accordance with the orders of the naval authorities given for the purpose of minimising the risk of submarine attack she was steaming at her best speed and was showing no lights. In an action in the Admiralty Division between the respondents and the owners of the *Bonvilston* arising out of the collision, SIR SAMUEL EVANS, P., held that there was no negligence in the navigation of either vessel. This finding was not disputed before the arbitrator

D when the matter as between the present parties came before him, and, accordingly, he found that the collision was solely due to the fact that both vessels were navigating at night, under naval orders, at full speed and without lights. The arbitrator found that the loss of the *Geelong* was caused by a marine peril and not by a war peril, he accordingly awarded that the respondent, the Commonwealth Shipping Representative, was under no liability to the claimants in respect of

E the loss. The Court of Appeal held (affirming the decision of BAILHACHE, J.) that the court was entitled to take judicial notice of the circumstances existing at the date on which the collision occurred, that the *Bonvilston* was carrying out an operation of war at the time of the collision, and that the loss of the *Geelong* was due to a war risk and not to a marine risk. The Representative of the

F Australian government appealed.

R. A. Wright, K.C. and *Claughton Scott* for the appellant.

Sir John Simon, K.C., *MacKinnon, K.C.*, and *G. P. Langton* for the respondents.

The House took time for consideration.

Dec. 14. The following opinions were read.

G **VISCOUNT CAVE, L.C.**—This appeal raises once more a question which has already been several times debated in this House, viz., the question of the meaning to be given to the expression "all consequences of hostilities or warlike operations" when contained in a policy of marine insurance.

H The respondents were the owners of a steamship called the *Geelong* which, in the year 1915, was requisitioned by the government of the Commonwealth of Australia for transport purposes in connection with the war. The requisition was made upon the terms of the well-known form of charter known as T. 99, which included a provision that the Commonwealth government should accept full war risks, an expression which was understood and agreed by all parties to make the government responsible for such risks of war as would be excluded from an ordinary marine policy by the usual f. c. and s. warranty, including

I in that warranty all consequences of hostilities or warlike operations. On Jan. 1, 1916, the *Geelong*, which was not at the moment required for the transport of war material, was carrying a general cargo on government account, and was bound from Port Said to Gibraltar for orders; and at about half-past seven in the evening of that day, when she was a few miles off Alexandria and was sailing (in accordance with the Admiralty instructions) at best speed without showing any lights, she was run into by another steamship called the *Bonvilston*, which was also sailing at full speed without lights, and was sunk. The *Bonvilston* was under requisition

by the British government, and at the time of the collision was carrying ambulance wagons and other government stores from Mudros to Alexandria. There was no negligence on the part of either vessel. The respondents having made a claim against the appellant on the ground that the loss of the vessel was due to a war risk, and their claim being disputed, the matter was referred to the arbitration of Mr. Raeburn, K.C., who made his award in the form of a Special Case for the opinion of the court. By that Case he found the above facts, his findings as to the purpose for which the *Bonvilston* was being used at the time of the collision being in the following terms:

"The *Bonvilston* at the time of the collision was proceeding from Mudros to Alexandria. She was carrying ambulance wagons and other government stores from one war base (Mudros) to another war base (Alexandria). In accordance with the orders of the naval authorities given for the purpose of minimising the risk of submarine attack she was steaming at her best speed and was showing no lights."

Upon the above facts the arbitrator found that the loss of the *Geelong* was caused by a marine peril and not by a war peril, but submitted the question whether he was right in law in so doing, for the opinion of the court. The case was argued before BAILHACHE, J., who held that the *Bonvilston*, being engaged in carrying ambulance wagons and other government stores from one war base to another war base, was engaged in a warlike operation, and, accordingly, gave judgment for the respondents. Upon the matter being taken to the Court of Appeal, that court (consisting of LORD STERNDALÉ, M.R., WARRINGTON and SCRUTTON, L.J.J.) unanimously affirmed the decision of the learned judge, but upon somewhat varying grounds. WARRINGTON, L.J., while declining to express a definite opinion whether upon the facts found by the arbitrator he would have come to the same conclusion as BAILHACHE, J., had done, held that the court was entitled to take notice of the historical fact that Mudros was the advance base for the British operations in the Gallipoli Peninsula, and that the collision happened in the middle of the operation connected with the evacuation of the Peninsula; and from these facts he inferred that the *Bonvilston* was at the time of the collision carrying warlike equipment from Mudros in connection with the evacuation, and for that reason was engaged in a warlike operation. On the other hand, SCRUTTON, L.J., while holding that the court was at liberty to take from the *St. Oswald (British and Foreign Steamship Co., Ltd. v. R.)* (1) the fact that Gallipoli was being evacuated on Dec. 31, 1915, and Jan. 1, 1916, and to conclude that the voyage of the *Bonvilston* from Mudros to Egypt on Jan. 1 was part of that warlike operation, was prepared, apart from that circumstance, to hold that carrying ambulance wagons and government stores from one war base to another in time of war, was a warlike operation. The Master of the Rolls, while he would have preferred to have from the arbitrator a more complete finding as to what the *Bonvilston* was doing at the time of the collision, did not dissent from the opinions of his colleagues. Thereupon the present appeal was brought.

I am inclined to think that, in taking notice of the dates of the evacuation of Suvla Bay and Helles in the Gallipoli Peninsula, and in inferring from those dates (without any finding by the arbitrator) that the *Bonvilston* was taking part in that evacuation, the Court of Appeal carried too far the doctrine of judicial notice. There is no doubt that judicial notice may be taken of the existence of a state of war between this country and another: see per LORD ELDON in *Dolder v. Lord Huntingfield* (2), 11 Ves. at p. 292, and per LORD ELLENBOROUGH in *R. v. De Berenger* (3), 3 M. & S. at p. 69; and it was said in *Taylor v. Barclay* (4) (2 Sim. at p. 220) that "it is the duty of the judge in every court to take notice of public matters which affect the government of the country." Further, where it is important to ascertain ancient facts of a public nature, the law permits historical works to be referred to: per LORD HALSBURY, L.C., in *Read v. Bishop of Lincoln*

A (5) [1892] A.C. at p. 653. But I know of no authority for the proposition that the date of a particular event in a modern war, such as an engagement or a withdrawal, however important in itself, may be stated without proof, and an inference based upon it; and in any case I do not understand how such an inference can be drawn for the first time in a Court of Appeal, when the opportunity of rebutting the inference has passed by.

B I, therefore, put on one side this element in the decision of the Court of Appeal, and proceed to consider the effect of the findings in the award, and first it is necessary to determine what those findings mean. Your Lordships were invited by counsel for the appellant to proceed on the footing that the ambulance wagons and other government stores referred to in the award were being transported by the *Bonvilston* for some perfectly peaceful purpose, that they may never have been landed at Mudros at all, and that they may have been intended for use in connection with some civil hospital at Alexandria, or for some other non-combatant purpose. It appears to me that any such assumption would do less than justice to the language of the award. When the arbitrator found that the *Bonvilston* was under requisition by the British government, and was carrying "ambulance wagons and other government stores from one war base (Mudros) to another war base (Alexandria)," he must assuredly have intended the court to understand that the cargo consisted of war material of the above character which was being transported from one war base—that is to say, from a point behind a fighting front from which the forces engaged on that front might be fed with men, munitions, and supplies—to another war base for war purposes. At all events I so read the finding, and am satisfied that if anything else had been intended very different language would have been used. This, then, was the duty in which the *Bonvilston* was engaged at the time of the collision; and the question to be determined is whether this was a warlike operation within the meaning of the warranty.

F I do not propose to attempt to define the expression "warlike operations." It is composed of ordinary English words in common use, and to define them by other like words might only produce a call for further definition. But it is possible to go some way in considering what is or is not included in the expression. Plainly it does not include all operations in war, or even all operations for the purposes of war. For instance, the *Petersham* which was carrying iron ore to be used in the manufacture of munitions, and the *Matiana* which was carrying cotton which might well have been intended to be used for the clothing of troops, were held by all the members of your Lordships' House who heard the appeals in those cases not to be engaged in warlike operations: *Britain Steamship Co. v. R.* (6). On the other hand, the expression is not confined to actual combatant operations against the enemy, whether by way of attack or of defence, for in *A.-G. v. Ard Coasters, Ltd., Liverpool and London War Risks Insurance Association, Ltd. v. Richard de Larrinaga Steamship Marine Underwriters* (7) a warship on her way to pick up a convoy was held by this House to be engaged in a warlike operation. Indeed, it has been said that almost any movement of a warship in the course of her duties may be included in the phrase "warlike operations." Probably the phrase includes all those operations of a belligerent power or its agents which form part of or directly lead up to those processes of attack and defence which are of the essence of war. Thus, as was said by LORD ATKINSON in the *Petersham Case* (6), the transfer of the combative forces of a belligerent power from one area of war to another for combative purposes would be a warlike operation; and the same may, I think, be said of the transport in like manner of guns or munitions of war. Nor, in my opinion, can any valid distinction be drawn in this respect between munitions of war and the materials for equipping a fighting force, such as saddles for the cavalry, field kitchens for the infantry, or ambulance wagons for the wounded in battle. All these things are an essential part of the

equipment of an army in the field, and to transport them to an area of war is a part of the warlike operations conducted in that area not less essential than the provision of men, guns, rifles, or ammunition. A

If this be—as I think it is—the true meaning of the expression to be construed, then the finding of the arbitrator in this case (interpreted as I have interpreted it) contains ample material on which to support the decisions of BAILHACHE, J., and the Court of Appeal. The *Bonvilston* was a vessel in the service of the British government and engaged in the warlike operation of transporting war material from one base to another, and while so engaged and sailing at full speed without lights, to avoid submarine attack, she without any negligence struck and sank the *Geelong*. If so, it follows, according to the decisions already given in this House, that the loss of the *Geelong* was a direct consequence of a warlike operation, and, accordingly, that the respondents are entitled to succeed. For these reasons I move your Lordships that this appeal be dismissed with costs. B C

VISCOUNT FINLAY.—This case arises upon an award and Special Case, and the question is whether the loss of the steamship *Geelong* was due to war risks or to ordinary marine risks.

In April, 1915, the *Geelong* was requisitioned by the Commonwealth government for transport purposes in connection with the war. The terms of the requisition provided as follows: D

“The Commonwealth government accepts full war risks and will indemnify owners against any claim arising from the requisition in this connection, but owners must take all ordinary sea risks which could be covered by an ordinary marine policy in ordinary times of peace.” E

For the purposes of this case, however, it was agreed that the effect of this special definition was to make the Commonwealth government responsible only for such risks of war as would be excluded from an ordinary marine policy by the presence therein of the usual f. c. s. warranty, including in such warranty all consequences of hostilities or warlike operations. The form of this warranty is not stated in the Case, but the parties agreed at the Bar of your Lordships’ House that it is as follows: F

“Warranted free of capture, seizure and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war.” G

It follows that any risk excluded by this warranty will be a war risk for the purposes of this case. It is alleged by the claimants that the risk in the present case would be excluded from an ordinary policy by the words “from all consequences of hostilities or warlike operations.”

It is settled by decision that the mere fact that a collision between merchantmen caused by navigating at full speed at night without lights in obedience to regulations in force during wartime does not by itself make the loss one resulting from a war risk within the meaning of this clause. But if one or both of the vessels were engaged at the time in a warlike operation it becomes a war risk as being a consequence of a warlike operation. The case, therefore, resolves itself into the inquiry whether either or both of two merchant vessels, the *Geelong* and the *Bonvilston*, were on the facts of this case engaged in a warlike operation. The facts appearing upon the Special Case are the following. The *Geelong* was totally lost by a collision between her and the British steamship *Bonvilston* in the east Mediterranean in latitude 32° 46’ N., longitude 30° 5’ E., at 7.25 p.m. on Jan. 1, 1916. There was no negligence on the part of either vessel. The *Geelong* was bound from Port Said to Gibraltar for orders, and was laden with a cargo of general goods. The *Bonvilston* was under requisition by the British government, and was carrying ambulance wagons and other government stores from Mudros to H I

A Alexandria. Both Mudros and Alexandria were war bases. The Mediterranean at that time was the scene of considerable activity on the part of enemy submarines, and in obedience to the instructions of the naval authorities both vessels were, when the collision took place, being navigated at best speed and without showing any lights. It has not been alleged that the *Geelong* was engaged in a warlike operation. She was proceeding with a cargo of general goods to

B Gibraltar for orders. The question is whether the *Bonvilston* was so engaged.

That question was referred to Mr. Raeburn, K.C., as arbitrator. Mr. Raeburn in his award and Special Case, after stating the contentions of the parties, finds as follows :

C "In so far as it is a question of fact, I find, and in so far as it is a question of law (and in such case subject to the opinion of the court), I hold that the loss of the *Geelong* was caused by a marine peril, and not by a war peril."

The learned arbitrator does not state the grounds on which he arrived at this conclusion. Personally I should have been very glad to have had the help, which might have been afforded by a statement from so able and experienced an arbitrator, of the path by which he arrived at his conclusion. The award

D states his conclusion, subject to the opinion of the court upon the Case, and adds :

"The question for the opinion of the court is whether I am right in law in holding that the loss of the *Geelong* was in the circumstances hereinbefore stated caused by a marine peril and not by a war peril."

E The question, therefore, is whether upon the facts stated in the Case, the loss of the *Geelong* was as a matter of law a loss by war peril. BAILHACHE, J., held that the *Bonvilston* was engaged in a warlike operation. He says :

"Now, in my opinion, a vessel engaged, as the *Bonvilston* was, in carrying government and British stores and ambulance wagons from one war base to another war base is engaged in a warlike operation."

F He refers to the opinion expressed by LORD ATKINSON in the *St. Oswald* (1) that a vessel engaged in the business of carrying some of the forces of the Crown from Gallipoli upon its evacuation to some other destination, was engaged in a warlike operation. BAILHACHE, J., then proceeds :

G "Now, if it be a warlike operation to take troops from one place to another, I am unable to see myself that it is not equally a warlike operation to take other munitions of war, or ambulance wagons for the use of wounded soldiers, or to convey these things from one place to another."

On this ground he answered the questions in the Special Case in favour of the claimants.

H The decision of BAILHACHE, J., was confirmed in the Court of Appeal, but not precisely upon the same ground. The Master of the Rolls, referring to the proposition laid down by BAILHACHE, J., which I have already quoted, says :

I "I am not prepared myself to assent to such a broad proposition as that. I can quite conceive that a merchant vessel may be carrying ambulance wagons and other government stores from one war base to another war base and still in certain circumstances may not be engaged in a warlike operation, and I think, if left to myself, I should have said we have not sufficient findings of fact to determine whether the learned judge is right in his decision or not."

He goes on to say that personally he should have desired further information, but as his colleagues thought this unnecessary he would not dissent from their affirmance of BAILHACHE, J. WARRINGTON, L.J., thought the court was at liberty to take notice of the dates of the evacuation of Gallipoli and of the fact that Mudros was notoriously the advanced base for the operations in Gallipoli, and

so to infer that the carriage of wagons and stores by the *Bonvilston* was part of the process of evacuation, and, therefore, a warlike operation. SCRUTTON, L.J., put his decision on two grounds. In the first place he said :

"I am prepared to hold that carrying ambulance wagons and government stores from one war base to another in time of war was a warlike operation."

But he went on to say :

"I also think, though, of course, it is not necessary for my decision on the view I take, that we are at liberty to take from the *St. Oswald Case* (1) the fact that Gallipoli was being evacuated on Dec. 31 and Jan. 1, and to conclude that this voyage from Mudros to Egypt on Jan. 1 was part of the warlike operations of the evacuation of Gallipoli, which, of course, if correct, makes the case much stronger."

Possibly some error has crept into the transcript of this passage, and I am not prepared to accept as correct the proposition that we may add to this Special Case additional facts which happen to have been proved in another case. The question must be decided simply upon the facts stated in the Special Case itself. The precise dates and details of particular warlike operations cannot be regarded as matters of which the court can take judicial notice. If they are material they should be found by the arbitrator.

But, in my opinion, enough is stated in the Case itself to enable us to answer the question. Paragraph 1 states that the *Geelong* was requisitioned by the Commonwealth government for transport purposes in connection with the war, but there is nothing to show that at the time of the collision she was engaged in any warlike operation. She was simply proceeding to Gibraltar for orders and was carrying a part cargo of general goods laden on government account. It is otherwise in the case of the *Bonvilston*. The material facts with regard to her, as stated in para. 7 of the Case, are these :

"The *Bonvilston* at the time of the collision was proceeding from Mudros to Alexandria. She was under requisition by the British government, and was carrying ambulance wagons and other government stores from one war base (Mudros) to another war base (Alexandra)."

That the Mediterranean was the scene of considerable activity on the part of enemy submarines is stated in para. 6 of the Case, and this is illustrated by the fact that both vessels when the collision occurred were, in accordance with naval regulations, proceeding at night at their best speed and showing no lights.

In the absence of any circumstances tending to put a different colour upon the transaction, the carriage in time of war of ambulance wagons and other government stores from one war base to another war base is carriage for the purposes of the war. It is immaterial whether the wagons and stores are being taken to a base for the purpose of warlike operations to be conducted from that base, or are being fetched away from a base because the warlike operations conducted from it have ceased. In either case the carriage is part of a military operation. It is possible that, as the Master of the Rolls said, there may be circumstances which would prevent such carriage in time of war of government stores from one war base to another from being in the nature of a military operation. Such circumstances must be of a special character, and it cannot be supposed that if any such circumstances existed in the present case they would not have been stated by the arbitrator. In the absence of all explanation the only rational inference is that the carriage by the *Bonvilston* of the ambulance wagons, and the other government stores formed part of a warlike operation, and was, therefore, a war risk under the test on which the parties agreed. I think that the same result would have followed under the clause contained in the terms of requisition, as a collision caused by the fact that the two vessels were, under war regulations,

A proceeding in the dark at full speed in time of war without lights, hardly falls within the category of "ordinary sea risks." This, however, is immaterial.

LORD DUNEDIN.—I concur with the Lord Chancellor and would not add anything were it not that this question has been raised how far it is legitimate to take judicial notice of certain facts. I should not feel I was justified in resting any conclusion which I formed on such things as the particular dates when certain operations of war were begun or were in progress when those dates had not been proved, but had to be supplied from my own private knowledge. On the other hand, it is settled by authority that a judge may be aware that there is a state of war, and by that I do not understand a vague consciousness, such as may have been felt by an ancient Roman when he noticed that the temple of Janus was open, but an intelligent apprehension of the war as it is and the theatre of the operations thereof. Knowing then that there was a war in the Levant, and that the Dardanelles and Syria were the scenes of naval and military operations, and that it is found as a fact by the arbitrator that the vessel which caused the loss by collision was carrying stores of a character to be employed in active warfare from one war base, Mudros, to another war base, Alexandria, I consider I have sufficient to warrant me in agreeing with the Court of Appeal that the risk was a war risk in the sense of the indemnity in question.

LORD ATKINSON.—Any difficulty which arises in this case is due to the fact that some of the most important facts were not elicited at the arbitration. The collision took place on Jan. 1, 1916. The *Bonvilston* was then engaged in carrying some ambulance wagons and some other government stores from Mudros to Alexandria. The arbitration took place about five years later. Nothing would have been easier than to have ascertained and proved in the arbitration what was the condition of things at Mudros when the ship *Bonvilston* was loaded there—whether the evacuation of Gallipoli was or was not proceeding, what aid the island of Mudros lent to the process of evacuation, if any, for what purpose were these ambulances sent to Alexandria, was it an order that they should be destroyed, and so put out of the reach of the enemy, or were they sent home to England or to some peaceful depot, or was it that they should be used in aid of combative operations then being actively carried on, or about to be instituted by His Majesty's military forces against the military forces of the Turkish Empire, with which His Majesty was then at war? It is much to be regretted that these matters were not inquired into. It is well established that the courts of law in this country, can take judicial notice of the fact that a state of war exists between this country and some foreign enemy, but I am not at all sure that the courts of law in this country can take judicial notice of the fact that any particular operation, such as a battle or a siege, an advance or retreat, or the evacuation of a particular field of action actually took place, and much less when such an operation began or ended.

Whether the *Bonvilston*, when carrying these ambulance wagons to Alexandria, was or was not engaged in a "warlike operation" will depend very much, if not entirely, on the purpose for which they were carried there. In the opinion which I delivered in *Britain Steamship Co. v. R.* (6), which I would not have alluded to but that it has been so often referred to, I clearly indicated that this purpose is in such cases a vital matter to be considered. I said:

"The transfer of the combative forces of a power from one area of war to another, or from one part of an area of war to another for combative purposes, would, I think, be a warlike operation."

I adhere to that opinion, and I think the principle applies to the carriage of wagons, ammunition, guns, or other material things carried to and discharged at a particular place for the purpose of being used by the forces of the Crown operating in a field of action in which the landing place is situated, in attacking their

enemy, or defending themselves against his attacks. I think the words "attacking" A
and "defending" in this sentence must be taken to include the providing of
ancillary things such as beds to lie on, or food to eat, which are necessary to
fit the combatants for attack and defence. Counsel for the respondents most
ingeniously argued that the words "war base" as used in the following passage
of the Case Stated:

"She (the *Bonvilston*) was under requisition by the British government and B
was carrying ambulance wagons and other government stores from one war
base (Mudros) to another war base (Alexandria)"

indicated with sufficient clearness the purposes these things fulfil at the place
from which they were taken, and those they were designed and intended to
fulfil at the place to which they were carried. For the purposes of this argument
he distinguished between a "war base" and a "base of supply." A base of C
supply, he said, is a place where war stores are accumulated and preserved ready
to be drawn upon when occasion may require for the needs of the war; but it
may be far distant from the field of war. In that sense the stores in London
and elsewhere in this country containing clothes and boots, rifles and ammunition,
&c., were in the war of 1914-18 bases of supply, but he said, as I understood D
him, that a "war base" meant a place with which the combative forces actually
carrying on the war were, as it were, in touch, that it was a place so near to
the fighting lines that the goods collected there could be made available to
supply the daily needs of the combative forces, whatever position they might
hold or occupy in the whole field of war. It was a place to which nothing was
brought not deemed to be necessary to supply these needs. If that be so, then E
it may fairly be inferred that everything brought to such a base is dedicated to
the use I have mentioned, and is brought there for the purpose of being available
for that use. I have thought much over this argument, and have come to the
conclusion that it is sound and may be acted upon with safety. In my opinion,
therefore, the respondents have been enabled by relying on these words "war
base" to discharge the burden of proof that lay upon them. I think they estab- F
lished that the voyage of the *Bonvilston* from Mudros to Alexandria was a warlike
operation, that it was the proximate cause of collision, and that the appeal fails
and should be dismissed with costs.

LORD SUMNER.—When the *Geelong* and the *Bonvilston* came into collision, G
both ships were navigating at best speed at night without lights under imperative
Admiralty orders, and the *Geelong*, having the *Bonvilston* on her starboard
hand, was the give-way ship. SIR SAMUEL EVANS, P., however, found that neither
ship was guilty of negligence, and this finding is accepted. The only cause of
the collision, therefore, was that the *Geelong* did not give way and so avoid the
collision, because the *Bonvilston* had made herself invisible, she was carrying H
government property, so described as to show that, *prima facie*, it was material
of war, transported from one "war base" to another "war base," and was doing
so with lights out for fear of enemy submarines. This operation was the direct
cause of the collision. The question is whether it was "warlike" within the
agreed effect of the contract.

Had this case been the first of its class to be decided, instead of being the I
latest, I can understand that some difficulty might have been felt in saying that
the operation was warlike, for in itself it was peaceable enough. It was
unaggressive; it was unobtrusive, not to say furtive; and the *Bonvilston* would
have behaved in exactly the same way, if she had been carrying a purely com-
mercial cargo between exclusively mercantile ports. The difficulty is to
distinguish this case, if not from previous decisions, for none quite covers the
point, at least from dicta more or less closely involved in them. It is not quite
satisfactory to say that, if the operation of carrying troops would be warlike, at
any rate when they are in fighting trim, the operation must be also warlike in

A carrying one or more of those appurtenances without which it would be inhuman to send them into battle. This is, after all, only an argument from analogy, and analogy is often deceptive. "Warlike operations" is an expression deliberately wide, and, incidentally, rather vague, but it has been held that a mere operation during war is not warlike, if it is not also an operation of war. On the other hand, what is more like war than doing with the indispensable equipments of an army such things as have to be done, in order that the army may itself engage the enemy with proper provision for those who fall? I think that the real question is, whether the learned arbitrator found the facts sufficiently to bring the case within this consideration, when he said "she was under requisition by the British government and was carrying ambulance wagons and other government stores from one base (Mudros) to another war base (Alexandria).

C It is certainly legitimate to consider what is implied in this finding as well as what is expressed in it. "War base" is a term which the Special Case does not define. I doubt if it has a definition for the present purposes. A war base is evidently a place used for certain purposes of military supply in a time and in an area of war. The term is an administrative one, and, whatever it may connote in a text-book on the theory of war, in practice it is simply the place chosen by the competent military authority on which to base other operations of war. A place is, therefore, not a war base because nature made it so, or owing to the fitness of things, but because those directing the war chose it for that purpose. I think that a court of law may with propriety, and I hope with substantial conformity to the fact, presume, till the contrary is shown, that government material of war is not idly shifted from war base to war base, or transported at great cost otherwise than for war purposes. If so, it seems to me to be implicit in the facts found, that this transportation of these stores was a warlike operation. This appears to have been the view of SCRUTTON, L.J., and, subject to some comment on the language which he used, it was the view of BAILHACHE, J., also. The learned judge says:

F "if it be a warlike operation to take troops from one place to another, I am unable to see myself that it is not equally a warlike operation to take other munitions of war—ambulance wagons for the use of wounded soldiers—to take those things from one place to another."

G I do not think that the learned judge meant to say, at any rate with reference to the transport of chattels, that transport of munitions of war from any place to any other place is necessarily a warlike operation. Possibly there may be some difference in the case of the transport of troops, of which it may be said that any transportation of them in time of war is warlike, but in the case of chattels, I assume that his remark was intended to be directed to the case in hand as found in the Special Case.

H The objection is made that some connection must be shown between the voyage with its termini, on the one hand, and the chattels transported, on the other, and that, if this is not shown, the claimant has not proved his case. If, for example, the government property was neither taken on board at Mudros nor was intended to be discharged at Alexandria; if it had never belonged to the Mudros stock and was not to belong to the Alexandria stock, then the transport from war base to war base was purely fortuitous and had no connection with the property transported, at least none which would colour the transportation with the quality of being a warlike operation. In certain circumstances it may be that this objection would be valid. If the stores had been shipped in England for Hong Kong, and the calls at Mudros and at Alexandria had been made for ship's purposes or in connection with other cargo, so that they were mere incidents in a prolonged voyage, or if the goods formed but a small part of the lading of the ship, which otherwise consisted of ordinary merchandise, different considerations, I dare say, would arise. It seems to me, however, that we should be

imputing to the learned arbitrator a finding equally irrelevant and misleading, unless we read it as implying a material connection between the termini of the voyage and the object and character of the transportation. I can have no doubt myself that his finding means that, for good reasons connected with the war, the military authorities in the course of their duty depleted a stock at one war-base with the object of increasing that at another, where presumably it would be of more use for the military purpose for which it was primarily designed.

It is further suggested that the Court of Appeal considered the findings of the arbitrator insufficient in themselves to warrant the conclusions drawn by BAILHACHE, J., without the introduction of facts, which had not been found but which might be supplied on appeal by taking what is called judicial notice of them. These facts appear to have been (i) that the voyage of the *Bonvilston* synchronised with the evacuation of the Dardanelles, and (ii) that Mudros was so intimately connected with the operations in the Dardanelles that the evacuation of stores from Mudros might be regarded as part of the evacuation of some of the positions in the Gallipoli Peninsula. To require that a judge should affect a cloistered ignorance of facts which every other man in court is fully aware of, and should insist on having proof on oath of that, which, as a man of the world, he knows already better than any witness can tell him, may easily become pedantic and futile. Least of all would it be possible to require this detached and blindfold attitude towards facts, which the course of the late war has burnt into the memories of us all. It does not, however, seem to me, as at present advised, that the month and day at or about which a particular military movement was carried out, or that the existence between the Gallipoli Peninsula and Mudros Bay of the relation of active front to supply base, are matters as to which everybody can be deemed to be fully and accurately informed or of which judges can be required, in the legal sense of the words, to take judicial notice—still less is the fact—which is a matter of expert military training—that, in such a relation and about such a time, the simultaneous removal of such things as ambulance wagons from the base would have any particular connection with the operations going forward at the active front. At any rate, I have not found any authority which goes nearly so far, and there are many which, surprising as they are in any case, would be absurd, if the rule really went to this extent.

I do not, however, think that this is a true case of taking judicial notice, for that involves that, at the stage when evidence of material facts can be properly received, certain facts may be deemed to be established, although not proved by sworn testimony, or by the production, out of the proper custody, of documents, which speak for themselves. Judicial notice refers to facts which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer. In the present case the opportunity for introducing new evidence had passed. The question was one of law, namely, what was implicit in the facts stated by the learned arbitrator, who was the judge of fact, selected by the parties. As it seems to me, all that the Court of Appeal obtained by noticing historical facts, whether from general recollection or from the report of the *St. Oswald* (1), was equally to be got by considering that this transportation took place in time of war from one "war base" to another "war base," both situated in the eastern Mediterranean, and both more or less infested by enemy submarines, and referred to articles, which are not primarily subjects of ordinary commerce, but are naturally provided for use in warlike operations, at any rate, when they are at a war base. If so, and without more, I think it is right to hold, that in the absence of any contradiction or modification of these facts, this transportation itself was a warlike operation also. Those who carried it out were not indeed combatants, but they were ministering to combatant needs, and were themselves exposed to risk of attack and destruction from

A combatants on the other side. If not an actual operation of war, this was a warlike operation, and I think it falls outside the class which is properly described as being merely operations during war. I, therefore, think that the appeal fails.

Appeal dismissed.

Solicitors: *Parker, Garrett & Co.; Ince, Colt, Ince & Roscoe.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

Re BRITISH AMERICAN CONTINENTAL BANK, LTD. CREDIT GENERAL LIEGEOIS' CLAIM

[CHANCERY DIVISION (P. O. Lawrence, J.), February 21, 28, March 15, 1922]

[Reported [1922] 2 Ch. 589; 91 L.J.Ch. 765; 127 L.T. 284; 38 T.L.R. 464; 66 Sol. Jo. 388]

Company—Winding-up—Claim in foreign currency—Debt—Conversion into sterling—Date of conversion.

The correct date for the conversion of foreign currency into sterling in an action brought in England for the recovery of a debt due in a foreign country in the currency of that country is the date when the debt became due and not the date when the judgment of the court is pronounced.

This principle is applicable to a claim by a creditor in the winding-up of a company. Where, therefore, on Jan. 10, 1921, a Belgian bank received notice that a provisional liquidator had been appointed of an English banking company which had a current account with the Belgian bank, and thereupon closed the account and struck a balance which resulted in the English bank's account being found to be overdrawn to the extent of 150,396 francs (Belgian currency), and on Jan. 25, 1921, an order was made winding-up the English company, and on February 25, 1921, the Belgian bank lodged a proof in the winding-up for such a sum in sterling as would produce 150,396 Belgian francs on the date of payment,

Held: the fact that this was a claim in a winding-up and not an action for a debt made no difference to the application of the principle that a debt, which this overdraft was, ought to be converted into English currency as at the date when the debt was incurred and not on the date of the winding-up order or the date of judgment in an action, and, therefore, the proper date to ascertain the rate of exchange for the conversion into sterling of the English company's debt was Jan. 10, 1921.

Notes. Considered: *Madeleine Vionnet et Cie v. Wills*, [1939] 4 All E.R. 136; *Graumann v. Treitel*, [1940] 2 All E.R. 188. Followed: *Re Russian Commercial and Industrial Bank*, [1955] 1 All E.R. 75. Referred to: *Re British American Continental Bank, Lissner and Rosenkranz's Claim*, [1923] All E.R. Rep. 52; *Re Chesterman's Trusts, Mott v. Browning*, [1923] All E.R. Rep. 705; *The Baarn*, [1933] P. 251; *Rhokana Corpn., Ltd. v. I. R. Comrs.*, [1936] 2 All E.R. 678.

As to conversion of foreign currency liabilities see 27 HALSBURY'S LAWS (3rd Edn.) 6, 7, and for cases see 35 DIGEST 173–176.

Cases referred to:

- (1) *Joachimson v. Swiss Bank Corpn.*, [1921] 3 K.B. 110; 90 L.J.K.B. 973; 125 L.T. 338; 37 T.L.R. 534; 65 Sol. Jo. 434; 26 Com. Cas. 196, C.A.; Digest Supp.

- (2) *Re British American Continental Bank, Ltd., Goldzieher and Penso's Claim*, [1922] 2 Ch. 575; 91 L.J.Ch. 760; 38 T.L.R. 785; 66 Sol. Jo. 647, C.A.; 35 Digest 175, 53. A
- (3) *Société des Hôtels Le Touquet-Paris-Plage v. Cumming*, [1922] 1 K.B. 451; 91 L.J.K.B. 288; 126 L.T. 513; 38 T.L.R. 221; 66 Sol. Jo. 269, C.A.; 35 Digest 173, 36.
- (4) *Celia (Owners) v. Volturmo (Owners)*, [1921] 2 A.C. 544; 90 L.J.P. 385; 126 L.T. 1; 37 T.L.R. 969; 15 Asp. M.L.C. 374, H.L.; 35 Digest 174, 39. B
- (5) *Manners v. Pearson & Son*, [1898] 1 Ch. 581; 67 L.J.Ch. 304; 78 L.T. 432; 46 W.R. 498; 14 T.L.R. 312; 42 Sol. Jo. 413, C.A.; 35 Digest 176, 57.
- (6) *Scott v. Bevan* (1831), 2 B. & Ad. 78; 9 L.J.O.S.K.B. 152; 109 E.R. 1073; 35 Digest 174, 44. C
- (7) *Di Ferdinando v. Simon, Smits & Co., Ltd.*, [1920] 2 K.B. 704; 124 L.T. 117; affirmed [1920] 3 K.B. 409; 89 L.J.K.B. 1039; 124 L.T. 117; 36 T.L.R. 797; 25 Com. Cas. 37, C.A.; 35 Digest 52.
- (8) *Marburg v. Marburg* (1866), 26 Maryland Rep. 8.

Adjourned Summons in Companies Winding-up. D

The applicants, the Credit General Liegeois, were Belgian bankers carrying on business in Brussels. The British American Continental Bank, Ltd., was a customer of the applicants and kept a current account at the applicants' bank in Brussels. All the operations on this current account were conducted in Belgian currency. On Jan. 5, 1921, the British American bank suspended payment and on the following day a creditor presented a petition to the court for a compulsory winding-up order. On Jan. 7, 1921, an order was made appointing the official receiver as provisional liquidator, and Mr. Kettle as special manager. On Jan. 8, 1921, Mr. Kettle wrote to the applicants informing them of the appointment of the provisional liquidator and special manager, and asking them to send in an account of what was due to them from the bank down to the close of the bank's business on Jan. 5, 1921. This letter was received by the applicants on Jan. 10, 1921, and thereupon they closed their account with the bank and struck a balance. On Jan. 14, 1921, they sent to Mr. Kettle a statement of their account with the bank, showing that on Jan. 10, 1921, the account was overdrawn to the extent of 150,396 frs. The statement of account so sent was admittedly correct, and it was not disputed that the overdraft of 150,396 frs. became due to the applicants in Brussels on Jan. 10, 1921. On Jan. 25, 1921, the court made the usual compulsory order to wind-up the bank. On Feb. 25, 1921, the applicants lodged a proof in the winding-up in respect of the overdraft due to them as before mentioned. They claimed that the bank was at the date of the winding-up order indebted to them "in such a sum or sums in sterling as will produce on the date or dates of payment 150,396 Belgian francs for balance of account due on Jan. 10, 1921, to the Credit General Liegeois from the above-named company whereof full particulars have been delivered to the above-named company." The liquidator rejected this proof on two grounds: first, because the applicants had not stated the amount due to them in English currency, and, secondly, because they had not stated the amount due to them at the date of the winding-up order. The Credit General Liegeois issued the present summons asking for an order that the decision of Mr. Kettle rejecting their claim, might be revised, and that the claim might be allowed in full at 150,396.40 Belgian francs or such sum in sterling as would at the date of payment produce that amount of Belgian francs, or (alternatively) at such a sum of sterling as should be equal to the amount of Belgian francs aforesaid calculated at the rate of exchange (a) on Jan. 25, 1921, the date of the winding-up order, or, alternatively, (b) on Jan. 10, 1921, when the applicants closed the account of the bank, or (c) on Jan. 6, 1921, when the bank suspended payment and the petition to wind-up was presented to the court, and that in any case there should be added interest at the rate of 7 per cent. E
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A from Jan. 6 to Jan. 25. On Jan. 6 the Belgian franc was quoted at 57.825, and on that calculation the claim would amount to sterling £2,600 17s. 9d. On Jan. 10 the quotation was 58.475, making the claim £2,571 19s. 6d., and on Jan. 25, the quotation was 49.725 to the pound sterling in which case the claim would amount to £3,024 11s. 4d.

B *Wilfred M. Hunt* for the Credit General Liegeois.
Schiller, K.C. and *Hilbery* for the liquidator.

Cur. adv. vult.

Mar. 15. **P. O. LAWRENCE, J.**, read the following judgment. On this application the court is asked to determine the correct date on which a debt due from the British American Continental Bank, Ltd., (hereinafter referred to as the bank) to the applicants (a Belgian company) in Belgium in Belgian currency ought to be converted into English currency for the purpose of ascertaining the amount for which the applicants are to be admitted as creditors in the winding-up. It is now admitted that the applicants must state their claim in the shape of a definite sum expressed in English money, and also that they must state the amount due to them on the date of the winding-up order. In these circumstances the only question argued before me was whether the 150,396 frs. ought to be converted into English currency at the rate of exchange prevailing on Jan. 10, 1921 (the date when the account was closed), or at the rate of exchange prevailing on Jan. 25, 1921 (the date of the winding-up order). There is a marked difference in the rate of exchange in favour of the applicants if the correct date for conversion is Jan. 25, 1921. The operations on this current account were conducted in Belgian francs and wherever I refer to francs in this judgment I refer to Belgian and not French francs. From the facts it will have been gathered that the claim of the applicants is simply one by bankers against their customer in respect of an overdraft. The relationship between banker and customer has recently been fully explained by the Court of Appeal in *Joachimson v. Swiss Bank Corpn.* (1). Applying the principles there laid down, the claim of the applicants is for a debt which became due from the bank to the applicants in Brussels in Belgian currency on Jan. 10, 1921. The notice received by the applicants from the special manager on this date, in my opinion, amounted to a direction to the applicants to close the account and operated as a waiver of any notice to which the bank might otherwise have been entitled before the applicants could properly have closed the account.

In my opinion, the question which has arisen falls to be determined in the present proceedings as if this court were sitting on Jan. 25, 1921, and were then trying an action brought by the applicants against the bank for the recovery of their debt: see *Re British American Continental Bank Ltd., Goldzieher and Penso's Claim* (2). Therefore, if the correct date for conversion is the date when the debt became due in Belgium, this court ought to hold that the amount due from the bank to the applicants on Jan. 25, 1921, is such a sum of English money as is equivalent to 150,369 frs. taken at the rate of exchange prevailing on Jan. 10, 1921. If, on the other hand, the correct date for conversion is the date when for the first time it became necessary for the applicants or the court to express the debt in English currency, then this court ought to hold that the amount due from the bank to the applicants on Jan. 25, 1921, is such a sum of English money as is equivalent to 150,396 frs. taken at the rate of exchange prevailing on Jan. 25, 1921, this date, in a winding-up, taking the place of the date of the judgment in an action. No later date has been suggested by counsel for the applicants.

On the assumption that my decision in *Re British American Continental Bank, Ltd., Goldzieher and Penso's Claim* (2) is right, I am of opinion that the question which I have to determine is concluded in the liquidator's favour by authorities which are binding on me. I have arrived at this opinion during the hearing of the case, and held it with some confidence until my attention was drawn to the observations made by ATKIN, L.J., at the end of his judgment in *Société des Hôtels*

Le Touquet-Paris-Plage v. Cumming (3). I confess that those observations caused A
me to distrust my opinion and raised a suspicion in my mind that there may be some
fallacy underlying the conclusions which I have drawn from the authorities.
Nevertheless, further reflection and a further study of those authorities have con-
firmed me in my opinion, the reasons for arriving at which I will now proceed to
state.

It is now finally settled by the decision in the House of Lords in *Celia (Owners) v.* B
Volturmo (Owners) (4) that in an action brought in England either for breach
of contract or for tort, where the damage is fixed and is due to conditions determined
at a particular date, but has to be assessed in a foreign currency, the date for con-
version into English money is the date when the breach or the tort was committed,
and not the date when the judgment of the court is pronounced. The principle C
affirmed by this decision, in my opinion, applies to an action brought in England
for the recovery of a debt payable in a foreign country in foreign currency, as the
amount of the debt, for the purpose of being expressed in the judgment in English
money, must be converted into English currency according to the rate of
exchange prevailing between the two countries, and this mode of computation,
and this converting the one currency into the other is based upon damages D
for the breach of contract to deliver the commodity bargained for (i.e., the
foreign currency) at the appointed time and place, consequently, the date for
conversion is the date of breach and not the date of the judgment: see per
VAUGHAN WILLIAMS, L.J., in *Manners v. Pearson & Son* (5), ([1898] 1 Ch. at
p. 592). This view of the learned lord justice was based to a large extent upon the
decision in *Scott v. Bevan* (6), which has been so fully commented upon recently E
in the Court of Appeal in *Di Ferdinando v. Simon, Smits & Co., Ltd.* (7) that I need
not say more about it here than that the plaintiff there was seeking to recover in an
English court a judgment debt payable to him in the island of Jamaica in the
currency of that island, and that it was there held that the date for conversion was
the date of the judgment in Jamaica. In *Manners v. Pearson & Son* (5), VAUGHAN
WILLIAMS, L.J., took the view that the plaintiff there was claiming to recover a F
debt, or rather a succession of debts, payable to him in Mexico in Mexican currency,
and he expressed in the clearest possible language that in his judgment the correct
date for conversion was the date when each debt became due in Mexico. It is true
that the learned lord justice was in the minority; the other members of the court,
however, did not disagree with his judgment on this point, but only differed from G
him as to the applicability of the principle stated by him to the case before the
court, which they held to be an action for an account and not an action to recover
a debt or debts which had become due before action brought. The decision in *Scott*
v. Bevan (6) and the judgment of VAUGHAN WILLIAMS, L.J., in *Manners v. Pearson*
& Son (5) were held by the House of Lords in *Celia (Owners) v. Volturmo (Owners)*
and by the Court of Appeal in *Di Ferdinando v. Simon, Smits & Co., Ltd.* (7) to H
furnish an accurate guide to the principle which ought to be applied in actions for
damages for breach of contract, and in neither tribunal was it suggested that
VAUGHAN WILLIAMS, L.J., was wrong in applying that principle to an action to
recover a debt. In these circumstances I consider that I am bound to follow the
judgment of the learned lord justice in deciding the case before me now. Here the
applicants are not claiming to have an account taken by this court of what is
due to them, but are claiming in respect of a debt which, admittedly, became due I
to them before the winding-up order. Therefore, the actual decision in *Manners v.*
Pearson & Son (5) has no application to the facts of this case, and I need
not consider whether that decision ought to be followed, even by a court of first
instance, in view of the comments made upon it in the House of Lords in *Celia*
(Owners) v. Volturmo (Owners) (4). On the other hand, the judgment of VAUGHAN
WILLIAMS, L.J., seems to me to be directly in point upon the question I have to
decide, and that being so, as well as for the reasons expressed by LORD BUCKMASTER

A in *Celia (Owners) v. Volturmo (Owners)* (4) I do not think that I am at liberty to follow either the American decision in *Marburg v. Marburg* (8) or the views expressed in STORY'S CONFLICT OF LAWS (8th Edn.) ss. 308 to 315, and in WESTLAKE'S PRIVATE INTERNATIONAL LAW (5th Edn.) s. 226, p. 315.

B The case of *Société des Hôtels Le Touquet-Paris-Plage v. Cumming* (3) to which I have already alluded, requires further mention. In that case the plaintiffs (a foreign company) were suing for a debt payable to them in France in French currency, and AVORY, J., applying the principles laid down in the cases I have mentioned, held that the correct date for conversion was the date when the debt became due in France. In the Court of Appeal it became unnecessary to decide this point as it was there held that the payment by the defendants of the debt in French currency after action brought amounted to accord and satisfaction and afforded a good defence to the action. No report of the case in the Court of Appeal has as yet appeared in the LAW REPORTS; but judging from the report in the TIMES LAW REPORTS, the Court of Appeal expressed no opinion as to the correctness or otherwise of the view taken by AVORY, J., on the point now under consideration. ATKIN, L.J., however, is reported as having stated that no case that he knew of had yet decided what the position was when a foreign creditor, to whom a debt was due in his country in the currency of his country, came to sue his debtor in the courts of this country for the foreign debt, and that much might be said for the proposition that the debtor's obligation was to pay, say francs, and so continued until the debt was merged in the judgment, which gave him the English equivalent at that date of those francs, and that it was a problem which seemed to require very full consideration and which he personally should desire to reserve. From these observations I gather that the learned lord justice was not satisfied that the authorities I have mentioned have laid down the true principles for ascertaining the correct date for conversion in actions for the recovery of debts as distinguished from actions for damages for breach of contract.

E As already stated, my conclusion is that the decision in *Scott v. Bevan* (6) and the judgment of VAUGHAN WILLIAMS, L.J., in *Manners v. Pearson & Son* (5) do lay down the true principles according to which the court ought to ascertain the correct date for conversion in an action brought in England for the recovery of a debt due in a foreign country in the currency of that country. It is true that in the two cases I have just mentioned it is not shown that the plaintiffs were foreigners, and that in *Scott v. Bevan* (6) the country where the debt was payable was not a foreign country, and, therefore, they are not precisely on all fours with the cases put by G ATKIN, L.J., but I do not for a moment think that the learned lord justice intended by his observations to convey that his doubts were caused by these differences, as the principle in no way depends either upon the nationality of the creditor or upon the fact whether the place of payment is in the creditor's own or in some other country, but applies, if at all, to every case where an action is brought in H England for the recovery of a debt payable in some other currency than English money. Therefore, the only conclusion I can draw is either that the learned lord justice doubted whether the decision in *Scott v. Bevan* (6) and the judgment of VAUGHAN WILLIAMS, L.J., in *Manners v. Pearson & Son* (5) covered the case of an action for the recovery of a foreign debt, or that the learned lord justice disagrees with that decision and with that judgment. If the former be the true explanation of I his doubts, I have given my reasons for not sharing those doubts. If the latter be the true explanation, I do not consider that I am at liberty, even if I should wish to do so, to depart from the principle established by those cases.

It follows from the opinion I have expressed in the present case that I do not agree with the dictum of ROCHE, J., in *Di Ferdinando v. Simon, Smits & Co., Ltd.* (7) ([1920] 2 K.B. at p. 708) to the effect that the rate of exchange at the time of the order or judgment is the rate to be adopted where the defendant is indebted to the plaintiff in a sum of money in foreign currency. This dictum seems to me to be in

direct conflict with the judgment of VAUGHAN WILLIAMS, L.J., in *Manners v. Pearson & Son* (5), which was apparently not cited to him. It also follows that I agree with the reasons given by AVORY, J., for his decision in *Société des Hôtels Le Touquet-Paris-Plage v. Cumming* (3). In the result, I make an order that the applicants be admitted as creditors in the winding-up for such a sum in English money as is equivalent to 150,396 frs. at the rate of exchange prevailing on Jan. 10, 1921.

Solicitors: *Henry Hilbery & Son; Stephen Harwood & Tatham.*

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

BRITISH AND BENINGTONS, LTD. v. NORTH WESTERN CACHAR TEA CO., LTD.

SAME v. BAINTOGORIE (DOOARS) TEA CO., LTD.

SAME v. MAZDEHEE TEA CO., LTD.

[HOUSE OF LORDS (Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Wrenbury and Lord Carson), July 11, 13, November 3, 1922]

[Reported [1923] A.C. 48; 92 L.J.K.B. 62; 128 L.T. 422;
28 Com. Cas. 265; 13 Lloyd, L.R. 67]

Sale of Goods—Repudiation of contract—Repudiation by buyer—Repudiation before breach—Acceptance by seller—Need for seller to prove readiness and willingness to deliver goods.

When a buyer, before the breach of a contract for the sale of goods, repudiates it, and that repudiation is accepted and acted on by the seller, the seller is relieved from the performance of all conditions precedent, including the condition of being ready and willing at the date of the repudiation to deliver the goods. Accordingly, on a question in such circumstances whether the buyer is liable in damages to the seller for wrongful repudiation it is not necessary for the seller to prove that at the material date he was able and willing to deliver the goods in accordance with the contract.

Notes. Applied: *Rose and Frank Co. v. J.R. Crompton & Bros., Ltd.*, [1924] All E.R. Rep. 245. Referred to: *Larrinaga v. Société Franco-Américaine des Phosphates de Médulla* (1922), 27 Com. Cas. 160; *Royal Exchange Assurance v. Hope*, [1927] All E.R. Rep. 67; *Scammell v. Ouston*, [1941] 1 All E.R. 14; *Dennis Reed, Ltd. v. Goody*, [1950] 1 All E.R. 919; *Universal Cargo Carriers Corp. v. Citati*, [1957] 2 All E.R. 70.

As to remedies of seller and buyer for breach of contract by buyers see 29 HALSBURY'S LAWS (2nd Edn.) 188 et seq., and for cases see 39 DIGEST 644 et seq.

Cases referred to:

- (1) *Morris v. Baron & Co.*, [1918] A.C. 1; 87 L.J.K.B. 145; 118 L.T. 34, H.L.; 39 Digest 398, 341.
- (2) *Stead v. Dawber* (1839), 10 Ad. & El. 57; 2 Per. & Dav. 447; 9 L.J.Q.B. 101; 113 E.R. 22; 39 Digest 665, 2545.
- (3) *Ogle v. Earl Vane* (1868), L.R. 3 Q.B. 272; 9 B. & S. 182; 37 L.J.Q.B. 77; 16 W.R. 463, Ex. Ch.; 39 Digest 676, 2624.

- A** (4) *Hickman v. Haynes* (1875), L.R. 10 C.P. 598; 44 L.J.C.P. 358; 32 L.T. 873; 23 W.R. 872; 39 Digest 659, 2512.
- (5) *Hunt v. South Eastern Rail. Co.* (1875), 45 L.J.Q.B. 87, H.L.; 12 Digest (Repl.) 375, 2957.
- (6) *Thornhill v. Neats* (1860), 8 C.B.N.S. 831; 2 L.T. 539; 141 E.R. 1392; 12 Digest (Repl.) 376, 2954.
- B** (7) *Goss v. Lord Nugent* (1833), 5 B. & Ad. 58; 2 Nev. & M.K.B. 28; 2 L.J.K.B. 127; 110 E.R. 713; 12 Digest 398, 3082.
- (8) *Marshall v. Lynn* (1840), 6 M. & W. 109; 9 L.J.Ex. 126; 151 E.R. 342; 39 Digest 427, 573.
- (9) *De Medina v. Norman* (1842), 9 M. & W. 820; 11 L.J.Ex. 320; 152 E.R. 347; 30 Digest (Repl.) 418, 618.
- C** (10) *Jones v. Barkley* (1781), 2 Dong. K.B. 684; 99 E.R. 434; 12 Digest (Repl.) 489, 3669.
- (11) *Hotham v. East India Co.* (1787), 1 Term Rep. 638; 99 E.R. 1295; 12 Digest (Repl.) 489, 3672.
- (12) *Cort v. Ambergate, etc. Rail. Co.* (1851), 17 Q.B. 127; 20 L.J.Q.B. 460; 17 L.T.O.S. 179; 15 Jur. 877; 117 E.R. 1229; 39 Digest 537, 1472.
- (13) *Braithwaite v. Foreign Hardwood Co.*, [1905] 2 K.B. 543; 74 L.J.K.B. 688; 92 L.T. 637; 21 T.L.R. 413; 10 Asp. M.L.C. 52; 10 Com. Cas. 189, C.A.; 39 Digest 416, 495.
- (14) *Re Bayley-Worthington and Cohen's Contract*, [1909] 1 Ch. 648; 78 L.J.Ch. 351; 100 L.T. 650; 40 Digest (Repl.) 127, 982.
- E** (15) *Ellis v. Rogers* (1885), 29 Ch.D. 661; 53 L.T. 377, C.A.; 40 Digest (Repl.) 276, 2296.
- (16) *Perry v. Smith* (1842), Car. & M. 554; 9 M. & W. 681; 11 L.J.Ex. 269; 152 E.R. 288; 40 Digest (Repl.) 280, 2332.

Also referred to in argument :

- F** *Frost v. Knight* (1872), L.R. 7 Exch. 111; 41 L.J.Ex. 78; 26 L.T. 77; 20 W.R. 471, Ex. Ch.; 12 Digest (Repl.) 380, 2973.
- Hite v. Chaplin* (1658), Com. Dig. 5th. ed. 326; 12 Digest (Repl.) 370, 2921.
- Hochster v. De la Tour* (1853), 2 E. & B. 678; 22 L.J.Q.B. 455; 22 L.T.O.S. 171; 17 Jur. 972; 1 W.R. 469; 1 C.L.R. 846; 118 E.R. 922; 12 Digest (Repl.) 377, 2960.
- G** *Jefferson v. Paskell*, [1916] 1 K.B. 57; 85 L.K.B. 398; 113 L.T. 1189; 32 T.L.R. 69, C.A.; 12 Digest (Repl.) 426, 3283.
- Leverly & Co. v. Goldberg*, [1922] 1 K.B. 688; 91 L.J.K.B. 551; 127 L.T. 298; 38 T.L.R. 446; 28 Com. Cas. 244; 12 Digest (Repl.) 402, 3118.
- Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 424; 53 L.J.Q.B. 497; 51 L.T. 637; 32 W.R. 989, H.L.; 39 Digest 424, 558.
- H** *Moore v. Campbell* (1854), 10 Exch. 323; 23 L.J.Ex. 310; 2 C.L.R. 1084; 156 E.R. 467; 12 Digest (Repl.) 399, 3100.
- Noble v. Ward* (1867), L.R. 2 Exch. 135; 36 L.J.Ex. 91; 15 L.T. 672; 15 W.R. 520, Ex. Ch.; 12 Digest (Repl.) 401, 3108.
- Patmore v. Colburn* (1834), 1 Cr. M. & R. 65; 4 Tyr. 840; 3 L.J.Ex. 314; 149 E.R. 996; 12 Digest (Repl.) 373, 2945.
- I** *Plevins v. Downing* (1876), 1 C.P.D. 220; 45 L.J.Q.B. 695; 35 L.T. 263; 40 J.P. 791; 12 Digest (Repl.) 401, 3111.
- Sanderson v. Graves* (1875), L.R. 10 Exch. 234; 44 L.J.Ex. 210; 33 L.T. 269; 23 W.R. 797; 12 Digest (Repl.) 403, 3119.
- Taylor v. Hilary* (1835), 1 Cr. M. & R. 741; 7 C. & P. 30; 3 Dowl. 461; 1 Gale, 22; 5 Tyr. 373; 4 L.J.Ex. 72; 149 E.R. 1279; 12 Digest (Repl.) 496, 3721.

Thornhill v. Neats (1860), 8 C.B.N.S. 831; 2 L.T. 539; 141 E.R. 1392; 12 Digest (Repl.) 376, 2954. A

Tyers v. Rosedale and Ferryhill Iron Co. (1875), L.R. 10 Exch. 195; 44 L.J.Ex. 130; 33 L.T. 56; 23 W.R. 871, Ex. Ch.; 12 Digest (Repl.) 394, 3047.

Consolidated Appeals by the buyers from orders of the Court of Appeal (BANKES, SCRUTTON, and YOUNGER, L.J.J.) reversing decisions of McCARDIE, J., in favour of the buyers, upon the awards of an arbitrator stated as Special Cases. The question in each case was whether the buyers were liable to pay damages to the sellers for repudiation of contracts to buy tea from the sellers. B

The facts appear in the opinions of their Lordships.

Talbot, K.C., Leck, K.C., and S.L. Porter, for the appellants, the buyers. C
Neilson, K.C. and Jowitt, K.C., for the respondents, the sellers.

Their Lordships took time for consideration.

Nov. 3. The following opinions were read.

LORD ATKINSON.—This is an appeal from the order of the Court of Appeal dated Nov. 29, 1921, reversing orders of McCARDIE, J., dated June 23, 1921, in favour of the appellants, the buyers, upon three awards of an arbitrator stated in the form of a Special Case. The question of law stated in each Case for the opinion of the court was whether on the facts stated in the award the buyers were liable to pay damages to the seller. It was further stated that if the court should be of opinion that the buyers were liable to pay damages to the sellers, the arbitrator's award against the buyers, for £3,766 10s. and costs should stand, but if, on the contrary, the court should be of opinion that the buyers were not liable to pay damages to the sellers, the award should be set aside, and in lieu thereof the sellers' claim to recover damages should be dismissed. The sum awarded in the second case to be paid by the same buyers to the sellers, the Baintgoorie (Dooars) Tea Co., under identical conditions, was £2,118 15s. 7d. and costs. In the third the sum awarded to be paid by the same buyers to the sellers, Mazdehee Tea Co., Ltd. was £1,245 3s. 5d. D

Three contracts had been entered into between the appellants, British and Beningtons, Ltd., and the three respondents, bearing dates Sept. 17, 1919, July 11, 1919, and Sept. 26, 1919 respectively. By the first, the North-Western Tea Cachar Co. sold to the appellants the balance of the crop of the Bierampore division of the latter's estates of the season 1919–20, dust excluded. By the second, the second respondent, the Baintgoorie (Dooars) Tea Co., sold to the appellants the whole of their crop of tea for the season 1919–1920, excluding dust; and, by the third, the third respondent, the Mazdehee Tea Co., Ltd., similarly sold to the appellants the whole of their tea crop for the same season (with an exception not material in this case). This contract, which, so far is material, is similar in terms to the others, provided only that the teas purchased were to be delivered at a bonded warehouse in London, with the option to the sellers of taking delivery ex ship at an allowance of $\frac{3}{4}$ d. per lb. on due notice being given. It provided, in addition, among other things (i) that the price was to be 1s. 2d. per lb. at exchange at 1s. 8d., under usual sale conditions; (ii) that the official estimate of the amount was 4800 maunds, of which 1600 maunds had already been sold; (iii) that the tea was to be accepted and delivered without guarantee as to quality, but to be delivered in sound and mercantile condition; (iv) that any teas rejected by the Customs or certified by any bonded warehouse to be country or sea-damaged to be on the sellers' account; (v) that any quantity up to 5 per cent. over the estimate was to be taken as part of the contract, any excess over this to be offered to the buyer at one-third less than the contract price; (vi) that should the exchange rise over 1s. 8d. one halfpenny in the lb. to be added to the price for every penny of a rise, and should exchange fall below 1s. 8d. one halfpenny to be allowed for every fall; and (vii) an arbitration clause. E
F
G
H
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A As will presently be seen, much turns on the existence in these contracts of these seven provisions, in addition to the provision touching delivery.

Owing to the congestion existing in the Port of London in the early part of the year 1920, the ships carrying the bulk of the tea sold were by order of the Shipping Controller diverted away from London to several outports. Disputes between the parties arising out of these diversions were ultimately referred to the arbitration and award of Mr. John Kenelm Stenning (an expert in the tea trade). These disputes included, among others, those between the appellants and the first respondents relating to the three following shipments—that is, 977 cases in the steamship *Clan Buchanan*, 176 cases in the *Clan Macbean*, and 199 cases in the *Clan McDonald*. The first-named of these three ships arrived at Southend on Feb. 6, 1920, and was diverted to Greenock, arriving there on Mar. 1. The second, the *Clan Macbean*, was diverted to Plymouth, arriving there on Feb. 26, 1920. At these ports these two ships discharged into warehouses the tea which they respectively carried. The *Clan McDonald* did not arrive in London till much later, on June 27, 1920. When the 157 cases of tea which she carried were discharged into a bonded warehouse, but owing to the congestion were not weighed out till Aug. 4, 1920. The dispute between the appellants and the second respondents had reference to three shipments of seventy cases by the steamship *Mainayo*, 644 cases by the steamship *Maihar*, and 200 cases by the steamship *Malakand*. The congestion in the Port of London caused the first two of these to be diverted to Leith to discharge. They arrived at Leith on Feb. 26 and 23 respectively, and discharged the tea shipped in them into a warehouse. The *Malakand* arrived in London on Mar. 26, 1920. The tea which she carried was put into temporary storage, no bonded warehouse being available. The dispute between the appellants and the third respondents had reference to two shipments of the following tea—namely, 306 cases by the steamship *Clan Robertson* and 220 cases by the *Clan Macbean*. The latter of these was, as already mentioned, diverted to Plymouth, arrived there on Feb. 12, 1920, and discharged there into a warehouse these 220 cases with the other tea which she carried. The *Clan Robertson* arrived at Southend on Dec. 20, 1920, and was diverted to Glasgow, arrived there on Feb. 26, and discharged the tea which she carried into a warehouse. Large quantities of teas other than those belonging to the sellers had by the Controller been diverted to the ports of Greenock, Leith, and Glasgow, with the result that those ports were greatly congested, and that the weighing of the teas of the sellers, which had been landed there, was much delayed. The tea ex the *Mainayo* was ready for delivery on July 12, 1920, and weigh-notes in respect of it were delivered next day, July 13. The tea ex the *Clan Robertson* was ready for delivery early in July, 1920, and weigh-notes in respect of it were delivered to the appellants about July 10, 1920. With the exception of these teas, none of the sellers' teas was weighed or ready for delivery before July 28, 1920. During this delay an interview took place on May 12, 1920, between Mr. Wilson Benington, representing the buyers, and Mr. Wilson, of the firm of Lloyd, Matheson, and Carrell, tea brokers, representing the sellers. Some proposals were made as to the appellants taking delivery at the several outports of the teas of the sellers which had been discharged there, and ultimately on that day a parol agreement was alleged to have been concluded between these representatives of the respective parties to the effect that the buyers, the appellants, should take delivery at Greenock, Leith, and Glasgow, instead of London, of the several parcels of the teas purchased by them, which had been taken to those ports, on receiving a reduction of $\frac{3}{4}$ d. per lb. on the tea so delivered. The sellers insisted that no such agreement had ever been concluded. The buyers contended the contrary. The arbitrator found that a parol agreement to the above effect had been concluded as the buyers alleged.

It will be observed that this parol agreement, not void, but admittedly unenforceable, at law under s. 4 of the Sale of Goods Act, 1893, only dealt with one of the

several matters dealt with in the original agreement of purchase and sale concluded between the appellants and respondents—namely, the place of delivery. The seven other stipulations of the original agreement, already mentioned, were left untouched. The arbitrator has not found within what time this parol agreement was to be performed, nor has he found whether the parties entered into it with a view to substitute it for the original agreement (which would amount to a rescission by parol of the latter), or whether they entered into it with a view of merely varying by parol the original written agreement in respect of one of its terms, the place of delivery, which is the very thing which cannot legally be done: *Morris v. Baron & Co.* (1). I did not understand that it was contended in argument on this appeal that the arbitrator had not evidence before him upon which he might reasonably have found, as he did find, as to the making of this parol agreement of May 12, 1920. The letters which passed between the parties from July 15 to July 28, 1920, both inclusive, touching on this with other matters, were before him. In the first of these, dated July 15, 1920, the appellants wrote to Messrs. Lloyd, Matheson, and Carrell a letter in which the following paragraph occurs:

"We believe you are aware of the position which the directors take up, namely, that as several months have elapsed since the teas arrived in this country, and they are not yet delivered in London, as provided by the contracts, the latter are null and void."

The writers proceed to suggest that the sellers should make an allowance of 2d. or 3d. per lb. if the appellants should take delivery of the teas at the outports. On July 17, 1920, Messrs. Lloyd, Matheson, and Carrell wrote to the appellants, informing them that the sellers were prepared, as to the Bierampore estate teas, to adhere to the arrangement already made—that is, the agreement of May 12, 1920—or, if they, the buyers, preferred it, to bring the teas to London when and as opportunity offered and give them delivery there, and that in the case of the teas of the Baintgoorie estate and the Mazdehee estate, they adhered to the arrangement made on May 12, 1920. On July 19, 1920, the appellants replied in a letter containing the following passage:

"Surely it is the business of the sellers to give delivery within a reasonable time. If, owing to force majeure they are unable to do so, the risk is surely theirs and not the buyers."

On July 28, 1920, Mr. J. Howard Moore, one of the directors of the appellant company, wrote to Messrs. Lloyd, Matheson, and Carrell a letter in which the following passages occur:

"It is true that the sellers were not bound to deliver by any particular date, but nevertheless the law implies (as we are advised) an obligation to deliver within a reasonable time. It would be wholly unreasonable to hold us as buyers bound to accept delivery after an interval so long that the market conditions have altogether altered. This would be to impose upon us a new contract which we did not make. We, therefore, hold ourselves no longer bound by these contracts and return the weigh-notes enclosed in your letter."

The contention of the buyers, as set forth in these letters, amounts to this—that contracts are to be construed as if the words "delivered within a reasonable time" were written into each of them. If this reasonable time had not elapsed before July 28, 1920, then it does not appear to me to be possible to hold that there was frustration of either contract, since the limit of time fixed by the contract for the delivery of the goods had not been reached. If the goods were delivered within that time, the contract, despite the exercise of force majeure, would have been fully performed. There was nothing to prevent the bringing of the teas from Greenock, Leith, Glasgow, or Plymouth quickly. Unfortunately, the arbitrator has not fixed the length of the reasonable time within which the buyers repudiated. In para. 17 of his award he found:

A "Having regard to all the circumstances, I find that a reasonable time for delivery of the teas under the said contract of Sept. 17, 1919 (whether in London or in Greenock as regards the tea discharged there if the verbal contract is enforceable) had not expired on July 28, 1920. The buyers contended that in determining what was a reasonable time for delivery I should take into consideration the statements made by the sellers' representative at the interview on May 12, 1920. I have done so."

B It is not very clear what is the precise meaning of this paragraph. BANKES, L.J., considered that it meant that, if the agreement with regard to taking delivery at Greenock—that is, the agreement of May 12, 1920—is enforceable, that delivery was offered to the buyers within a reasonable time; but that, even assuming that contract not to be enforceable, and that the teas at the outpost had to be brought to London under the terms of the original contract, a reasonable time to do so had not expired before the buyers repudiated the contract by their letters of July 15 and July 28. I concur with BANKES, L.J., on this point. McCARDIE, J., found himself rather embarrassed by s. 56 of the Sale of Goods Act, 1893, which provides that what is a reasonable time in any given case is a question of fact; but though he did not hold that there was no evidence to support the arbitrator's findings on this point of reasonable time, he doubted if the evidence was sufficient. I concur with BANKES, L.J., in thinking that, the arbitrator being an expert in the tea trade, with special knowledge of such matters, it is impossible to hold that he had no evidence before him reasonably sufficient to sustain his finding.

C Counsel for the appellants forcibly contended (i) that the contract of September, 1919, was rescinded by the parol agreement of May 12, 1920; and (ii) that, even if it only sought to vary the earlier contract, being verbal, it was unenforceable, and the sellers had not discharged the burden which lay upon them of proving that at the date of the buyers' repudiation they were ready and willing to deliver the goods sold. As to the first point, there is this difficulty, if there were no other—that the arbitrator has not found that the parties to those two contracts ever intended to rescind the first of them by the second. In *Stead v. Dawber* (2) the plaintiff sued the defendants for breach of a contract in failing to deliver to the plaintiff on May 20 to May 22 400 quarters of ground bones at 16s. 6d. per quarter, payment by acceptance three months after delivery. In the declaration in assumpsit it was averred, after these facts had been set out, that on May 17 the plaintiff, at the special instance of the defendant, gave time to the latter to deliver the bones till May 24, and that the defendant had failed to deliver them on that day or at all. The fourth plea filed to this declaration was to the effect that the contract or agreement giving time was part and parcel of a contract for the sale of goods; that there was no memorandum in writing of it, nor did any of those things mentioned in the Statute of Frauds, such as tender, &c., take place. ALDERSON, B., who tried the case, being of opinion that the effect of the enlargement of the time was not to alter the contract, but only to dispense with its performance on the day first named, directed a verdict for the plaintiff, reserving leave to move to enter a verdict for the defendant on the first and fourth pleas. The first was of non assumpsit. A rule was accordingly obtained. On cause being shown, LORD DENMAN, C.J., delivering the judgment of a court, composed of LITTLEDALE, WILLIAMS, COLERIDGE, JJ., and himself, said (10 Ad. & El. at p. 64):

"The principles on which this case must be decided are clear and admitted. The contract is a contract within the Statute of Frauds and cannot be proved, as to any essential parcel of it, by merely oral testimony: for to allow such a contract to be proved partly by writing and partly by oral testimony would let in all the mischiefs which it was the object of the statute to exclude. Many cases were cited in the argument of both sides. . . . But it seems to us that we are mainly called on to decide a question of fact; what, namely, was the

intention of the parties in the arrangement come to for substituting the 24th for the 22nd as the day of delivery; did they intend to substitute a new contract for the old one, the same in all other respects except those of the day of delivery and date of the accepted bill, with the old one?"

He concludes with this passage :

"Putting, therefore, that construction on what passed between these parties which best effectuates their intention, and giving also full effect, as we ought, to the salutary provisions of the Statute of Frauds, we think that this giving of time was parcel of the contract, and, consequently, that the verdict on the fourth plea should be entered for the defendants."

This decision was approved of in *Morris v. Baron & Co.* (1). Sections 4 and 17 of the Statute of Frauds, like s. 4 of the Sale of Goods Act, require that the whole—not part of the contract—shall be evidenced by writing. Where a written contract is varied by parol there is no writing covering both the original and the variation, hence the contract as varied is unenforceable. If the giving of two days' additional time for the delivery of the goods was not, in *Stead v. Dawber* (2), treated as a mere concession for the convenience of the plaintiff to facilitate the performance of the written contract of the kind given to *Ogle v. Vane* (3) and in *Hickman v. Haynes* (4), but a variation of the original contract, it is difficult to see how the parol agreement of May 12 must not be similarly regarded, changing, as it does, the place of delivery of the goods or some of them. A written contract may be rescinded by parol either expressly or by the parties' entering into a parol contract entirely inconsistent with the written one, or, if not entirely inconsistent with the written one, inconsistent with it to an extent that goes to the very root of it: *Morris v. Baron & Co.* (1), *Hunt v. South Eastern Rail. Co.* (5), and *Thornhill v. Neats* (6). I have already pointed out the seven different important matters dealt with in the written contract, not referred to, much less provided for, in the parol agreement of May 12, 1920. There is a single provision for changing the place of delivery of some of the teas which cannot possibly be treated as so inconsistent with the earlier written contract as to go to the root of the latter. The object and purpose of this parol contract was merely to vary the written contract with respect to one of its provisions. But that is precisely the thing which cannot be done so as to be enforceable at law: *Goss v. Lord Nugent* (7), and *Marshall v. Lynn* (8). The sellers, in order to sustain this award, must take their stand on the written contract; and if the buyers had not repudiated it, and had been suing for some breach of it, I did not understand it to be contended that at the time of the alleged breach they were ready and willing to deliver the goods. LORD ABINGER, C.B., in *De Medina v. Norman* (9) laid down that the words "readiness and willingness," used in such connection, imply not only the disposition, but the capacity, to obey the Act. But the point has been urged by the respondents, and was much relied upon by the Court of Appeal, that when a buyer, before breaches of the contract of sale of goods, repudiates it, as it was held by the arbitrator that the appellants on June 28, 1920, did in this case, and the repudiation is accepted and acted upon by the seller, as it evidently was in this case, the seller is relieved from the performance of all conditions precedent, including the condition of being ready and willing at the date of repudiation to deliver the goods.

In *Jones v. Barkley* (10) LORD MANSFIELD says (2 Doug. K.B. at p. 694):

"Take it on the reason of the thing. The party must show he was ready; but, if the other party stops him on the ground of an intention not to perform his part, it is not necessary for the first to go further, and do a nugatory act. Here, the draft was shown to the defendant for his approbation of the form, but he would not read it, and, upon a different ground, namely, that he means not to pay the money, discharges the plaintiffs."

A In *Hotham v. East India Co.* (11), where there was a covenant that the allowance for short tonnage should not be made unless the shipowner procured a certificate from the freighter's agent at the commencement of the voyage, the court held that a demand and refusal of this certificate was sufficient. *Cort v. Ambergate, etc., Rail. Co.* (12) is something to the same effect. There the plaintiff contracted with the defendant company to manufacture and from time to time supply to them certain goods, called railway chairs, to be paid for after delivery. The defendant company were by the plaintiffs supplied with, accepted, and paid for a certain portion of these goods. The defendant company then gave the plaintiff notice not to manufacture any more chairs, as they, the company, had no need for them, and would neither accept nor pay for them. The plaintiff was desirous and able to manufacture the chairs and complete the supply. It was held that the plaintiff was entitled, without manufacturing or tendering the rest of the chairs, to maintain an action against the purchasers, the defendant company, for breach of contract without manufacturing or tendering the goods, and that the proof of this notice enabled the plaintiff to recover on a count alleging readiness and willingness to perform the contract, and that the defendant company's refusal to accept the same absolved them from supplying the goods. LORD CAMPBELL, in delivering judgment, said (17 Q.B. at p. 143):

"The defendants contend that, as they did not make and tender the residue of the chairs, they cannot be said to have been ready and willing to perform the contract."

E He then points out that the defendants had in effect declared that they would not accept or pay for any more of the chairs than they had received. He then said (*ibid.* at p. 144):

"that the jury were fully justified upon the evidence in finding that the plaintiffs were ready and willing to perform the contract, although they never made and tendered the residue of the chairs. In common-sense the meaning of such an averment of readiness and willingness must be that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it if it had not been renounced by the defendants. What more can reasonably be required by the parties for whom the goods are to be manufactured?"

G In *Braithwaite v. Foreign Hardwood Co.* (13) the contract provided for the sale of rosewood in the year 1903, to be delivered at Hull in instalments during the year. While the first consignment was on the sea, the buyer repudiated the contract, and refused to accept the rosewood, on the ground that the seller had committed a breach of a collateral contract not to supply rosewood to any other person in the trade during the year 1903. When the bill of lading was tendered to the buyer for the first consignment he refused to accept it, or to pay for the rosewood covered by it. The sellers sold this rosewood, and claimed from the buyer, as damages for his refusal to accept, the difference between the contract price and the price at which it was sold. The subsequent consignment was treated in the same manner. The buyer subsequently discovered that some portion of the first consignment, though none of the second, was of an inferior quality, which would be compensated for by an allowance of six per cent. The buyer was sued by the seller for damages for not accepting the rosewood. The defendants pleaded (i) that the purchase was subject to this collateral agreement; and (ii) that they were entitled to repudiate the contract on the ground that the shipments of rosewood tendered under the contract were not of a good, sound, and merchantable quality. The learned judge who tried the case found that the collateral agreement never existed, that the repudiation was wrongful, and that it was accepted by the plaintiff as final; but he also found that the first consignment was not according to contract, and that it would have entitled

the defendants to repudiate the whole of the consignment had they not previously repudiated it. It was this obligation to prove that the first consignment was not of inferior quality which the plaintiff was relieved from establishing. COLLINS, M.R., said ([1905] 2 K.B. at p. 552):

"The defendants are not in a position now, by reason of their after-acquired knowledge, to set up a defence which they previously elected not to make. We must in such a case look to see whether, at the time of each alleged breach, each side was ready and willing to perform the conditions of the contract which it lay upon them to perform, and there was clearly a breach by the defendants, for they had by their own act absolved the plaintiff from the performance of the conditions of the contract."

The party must show that he is ready, but if the other stops him on the ground of an intention not to perform his part it is not necessary for the first to go further and do a nugatory act. In *Re Bayley-Worthington and Cohen's Contract* (14), PARKER, J., says ([1909] 1 Ch. at p. 664):

"In my opinion the repudiation of the contract by the purchaser relieved the vendors during such time as the purchaser insisted on repudiation from proceeding with their part of the bargain."

He cites *Jones v. Barkley* (10), *Ellis v. Rogers* (15), and *Perry v. Smith* (16).

I am, therefore, of opinion that, the purchasers having on July 28, 1920, wrongfully repudiated their contract, the sellers were not, in order to recover damages for breach of this contract, bound to prove that they were ready and willing on that day to deliver the teas at London. No distinction can be drawn between the three cases. The answer to the question submitted by the arbitrator is that the amounts awarded should stand.

LORD SUMNER.—Four points have been argued in this case: (i) that the three written contracts were discharged by frustration of the commercial purpose of the adventure; (ii) that they were discharged by mutual consent when the parol contract of May 12, 1920, was made; (iii) that the sellers repudiated their obligations under the written contracts, and that the buyers accepted that repudiation and so terminated them; and (iv) that if, in truth, the buyers repudiated their obligations under the written contracts, and the sellers purported to accept such repudiation, the latter were not then ready and willing to perform their own obligations, and, therefore, could not recover nominal or any damages for the buyers' breach.

(i) The arbitrator has found against frustration, so far as it is a matter of fact. It certainly is not a matter of abstract law; and as all this tea reached British ports without mishap and is not a particularly perishable commodity, any frustration of the commercial objects of the adventure must have been connected with markets and prices or other matters of fact, which were for the arbitrator. I, therefore, think that this point fails.

(ii) *Morris v. Baron & Co.* (1) determines the second point, a case which we have only to appreciate and apply. The question is whether the common intention of the parties on May 12, 1920, was to "abrogate," "rescind," "supersede," or "extinguish" the old contracts by a "substitution" of a "completely new" and "self-contained" or "self-subsisting" agreement, "containing as an entirety the old terms, together with and as modified by the new terms incorporated." [His LORDSHIP referred to the facts and continued:] In the circumstances it is plain that the three original contracts were not made an end of on May 12, 1920, but were meant at most to be subjected to a variation or alteration as to the manner and measure of performance of the original terms. The change does not go to the very root of the original contracts, nor is it inconsistent with them; it merely varied the written contract by parol, the situation of the parties being otherwise unchanged. I, therefore, think that the agreement de facto of May 12,

A 1920, had no effect on the original contracts, not having been reduced into writing and signed by the buyers, and not having superseded the original contracts. It was, however, argued before your Lordships that, even so, the old contracts were discharged because a varied contract is not the old contract; and as you cannot have a new and varied contract and an old and unvaried contract regulating the same thing at the same time, the old contract, like other old things, must be disregarded. As a matter of formal logic, this may possibly be so; but such was not the view taken by this House in *Morris v. Baron & Co.* (1), since, if their Lordships had thought that any variation whatever would make a new contract and discharge the old one, they would have said so expressly, and would not have dealt with the extent and completeness of the changes as they did. The variation may be a new contract so as to make writing, duly signed, indispensable to its admissibility, for this is a matter of form and of the words of the statute, but the discharge of the old contract must depend on intention tested in the manner settled in *Morris v. Baron & Co.* (1).

(iii) After May 12, 1920, the sellers asserted in correspondence, which I need not quote, that the matter had been regulated once and for all by the agreement actually made on that date; but they did not, I am sure, thereby intend to intimate that they would no longer be bound by the original agreements according to their terms. As a matter of fact, they obviously wanted to carry those agreements out, and to get rid of their tea and collect their money; but they believed and said that the true way, because it was the agreed way, of carrying out those agreements was for the buyers to take delivery of the tea, which was in Scotland, where it lay, with an allowance of $\frac{3}{4}$ d. per lb. for doing so. This, I take it, was a reasonable arrangement in the circumstances, in face of a situation which was nobody's fault, for both parties in fact freely agreed to it. Further, it was reasonable for the sellers to rely on it, though it had not been duly written out and signed; for in commerce it is not very common to insist that one's word is not as good as one's bond, though legally, of course, it is in accordance with the Sale of Goods Act. "Anticipatory breach," as it is called, is a matter of intention, and I am satisfied that the real intention of the sellers was to perform their legal obligations, whatever they might be, though they contended, as in business well they might, that those objections, when examined, would take one form and not another. It might as well be contended, if a man says of any arguable question on a contract, that he will take it into court that he thereby gives the opposite party the right to treat this as a repudiation in the event of the decision in court being adverse to the contention.

(iv) On the last question it is perfectly clear that the buyers did refuse to be bound by the contracts, and that, by demanding arbitration on the point and making no further attempt to deliver the tea in dispute, the sellers accepted that as a final repudiation. This being so, after the opinions above expressed, I am bound to think, and do think, that the buyers must justify the position which they so took up or must fail. Their answer, as I understand it, is that the sellers cannot claim damages for this anticipatory repudiation, unless they were in such a position, when they accepted it, as to be able to prove that they were then for their part able and willing to perform their obligations under the contracts in accordance with their terms, and that in such proof they must fail, because, as regards the tea lying at Scottish ports, they manifestly could not satisfy an agreed condition precedent—namely, to ship all the tea direct to London and there deliver it ex bonded warehouse. The sellers successfully contested this below on the authority of *Braithwaite v. Foreign Hardwood Company* (13), a decision which bound the Court of Appeal. As reported, that decision is not quite easy to understand. It was presented to your Lordships by the respondents, fortified by the opinion of SCRUTTON, L.J., as a decision that, when there has been a repudiation by one party on a given ground and an acceptance of that

repudiation by the other party, the former can no longer rely on any other ground for refusing to perform his obligations, and particularly cannot require the latter to prove his readiness and willingness to perform any of his obligations under the contract thus repudiated. I have no recollection of that case to carry me beyond the language of the report, as I do not doubt that SCRUTTON, L.J., had; but, in my opinion, the case as reported either does not lay down this proposition, or, if it does so, is wrong. The majority in the Court of Appeal in that case expressly refused to decide the question whether the deficiency in the quality of the first consignment would have justified the rejection of the whole of that consignment had it stood alone, while MATHEW, L.J., differing from the finding of KENNEDY, J., as I think under some misapprehension as to the percentage of the cargo which was inferior to the contract quality, expressly says that it would not. The case was dealt with as one in which the buyers had explicitly waived all conditions precedent, while retaining a right to rely on them as terms, the breach of which would sound in damages which could be given in evidence in reduction of the claim; and the judgment of KENNEDY, J., who had thus reduced the plaintiff's damages, was consequently affirmed. In effect it was said that, even after the seller had, as it was called, kept the contract alive and proposed to tender the cargo, he had been told a second time, in terms of the first refusal, "you need not tender any cargo to us at all; a fortiori you need not tender a cargo which is not in conformity with the contract. You have a cargo of some sort, which we refuse to take; and you may prove your damages for that, if we fail to prove you wrong." Furthermore, it does not anywhere appear that, even if the first cargo might rightly have been rejected, the seller could not have found another exactly conforming with the contract, which he might have duly tendered and so have put himself right. So far, the case does not affect the present argument, except that it is ground for saying that this point only went to damages unless and until it was shown that the *Spheroid's* cargo, and that alone, was available for delivery by the plaintiff. I do not think that the case, as reported, lays it down that a buyer who has repudiated a contract for a given reason which fails him has, therefore, no other opportunity of defence either as to the whole or as to part, but must fail utterly. If he had repudiated, giving no reason at all, I suppose all reasons and all defences in the action, partial or complete, would be open to him. His motives certainly are immaterial, and I do not see why his reasons should be crucial. What he says is, of course, very material upon the question whether he means to repudiate at all, and, if so, how far and how much, and on the question in what respects he waives the performance of conditions still performable in futuro or dispenses the opposite party from any obligation to perform his own obligations any further; but I do not see how the fact that the buyers have wrongly said: "We treat this contract as being at an end, owing to your unreasonable delay in the performance of it," obliges them, when that reason fails, to pay in full if, at the very time of this repudiation, the buyers had become wholly and finally disabled from performing essential items of the contract altogether. *Braithwaite's Case* (13) says nothing which affects the regular consequences when it appears that at the time of breach the plaintiff is already completely disabled from doing his part at all. I am not, however, satisfied in this case that the position of the sellers was one of this kind. It is not found that they could not have forwarded the tea to London, or that the tea, when so forwarded, would not have been still such as the contract provided for. All that can be said is that the tea had not been brought to London direct from India. The contract does not expressly require this. The Case Stated finds that there is no custom for direct shipment which would impose this method of carriage on the sellers; and all that the parties agreed at the arbitration was that delivery was to be made in London ex bonded warehouse, unless the buyer exercised the option of taking delivery ex ship. The question is, therefore,

- A purely one of construction of the words of the contract. Even if the option, truly construed, is to take delivery ex ship in London and not ex ship in port of discharge, of which I am not convinced, I do not see why we are bound to read this as "ex a ship arriving direct from India in London" so as to make direct shipment to London a condition precedent to any obligation to take delivery at all. At most I think that it would be a term the breach of which would sound in damages, but no damages for this were found. In any case, as a condition I think that it had long been waived; for treating the contracts as a whole, it had been obvious from the first that direct shipment, with two exceptions, had failed, and it is only with regard to the difference between an allowance of 3d. per lb. and one of $\frac{3}{4}$ d. per lb. that any difficulty arose at all. I am of opinion that in all three cases the appeals fail.

- C **LORD BUCKMASTER, LORD WRENBURY, and LORD CARSON** concurred in the judgment of **LORD SUMNER**.

Appeals dismissed.

Solicitors: *Parker, Garrett, & Co.; Sanderson, Lee, Eddis & Tennant.*

- D [Reported by W. C. SANDFORD, Esq., Barrister-at-Law.]

E

POWELL v. POWELL

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Buckmaster), July 18, 19, 1922]

- F [Reported [1922] P. 278; 92 L.J.P. 6; 128 L.T. 26; 38 T.L.R. 844]

Divorce—Desertion—Parties living under same roof—Occupation of separate part of house—Wife occasionally cooking meals for husband—Partial support of wife by husband—Minimum verbal contact—Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85), s. 27.

- G Desertion may be constituted by withdrawal for the statutory period of one of the spouses from matrimonial cohabitation, though remaining under the same roof. Removal to a separate dwelling-house is not a necessary ingredient of the offence.

- H The husband and the wife lived in the same house. In March, 1919, the husband moved his bed into a part of the house which had separate access to the street, but also opened on to the part of the house where the wife lived. The wife cooked meals for him occasionally, and he made her an allowance which partially supported her. Except for saying "Good morning" when they met he had nothing to do with her and had threatened to bring another woman into his part of the house. He left the house finally in November, 1921.

Held: these above facts were sufficient to constitute desertion.

- I **Notes.** Desertion for a period of at least three years is now a ground of divorce alone: *Matrimonial Causes Act, 1950, s. 7 (3).*

Considered: *Jackson v. Jackson*, [1924] P. 19; *Smith v. Smith*, [1939] 4 All E.R. 533; *Angel v. Angel*, [1946] 2 All E.R. 635. Referred to: *Scotcher v. Scotcher*, [1947] P.I.; *Walker v. Walker*, [1952] 2 All E.R. 138.

As to what constitutes desertion see 12 HALSBURY'S LAWS (3rd Edn.) 241 et seq.; and for cases see 27 DIGEST (Repl.) 307-310. For the *Matrimonial Causes Act, 1950*, see 29 HALSBURY'S STATUTES (2nd Edn.) 388.

Cases referred to in argument :

Duchess of Westminster v. Duke of Westminster (1919), *The Times*, June 18, unreported.

Wily v. Wily, [1918] P. 1; 87 L.J.P. 31; 117 L.T. 703; 34 T.L.R. 33; 62 Sol. Jo. 55; 27 Digest (Repl.) 287, 2324.

Sickert v. Sickert, [1899] P. 278; 68 L.J.P. 114; 81 L.T. 495; 48 W.R. 268; 15 T.L.R. 506; 27 Digest (Repl.) 350, 2897.

Synge v. Synge, [1901] P. 317; 70 L.J.P. 97; 85 L.T. 83; 17 T.L.R. 718, C.A.; 27 Digest (Repl.) 446, 3781.

R. v. Leresche, [1891] 2 Q.B. 418; 60 L.J.M.C. 153; 65 L.T. 602; 56 J.P. 37; 40 W.R. 2; 7 T.L.R. 685; 17 Cox, C.C. 384, C.A.; 27 Digest (Repl.) 346, 2872.

Undefended Petition by a wife for the dissolution of her marriage on the grounds of her husband's desertion and adultery. No question arose as to the evidence of adultery, but the case stood over to the following day for argument whether a case of desertion for the necessary period [two years under s. 27 of the Matrimonial Causes Act, 1857] had been made out.

The facts appearing from the evidence of the petitioner were that in March, 1919, the respondent moved his bed into a separate part of the house, having a separate access to the street, though also opening on to the part of the house in which the petitioner lived. She used to take some meals to him in his part of the house, but sometimes he cooked his own. Beyond making her an allowance (which only partially supported her, and which she supplemented by working as a teacher), and saying "Good morning" when they met, he would have nothing to do with her from the time he moved his bed till he finally left the house in November, 1921. He had threatened to bring a woman into his part of the house, and when he finally left it, went to live with the woman, with whom adultery was charged. In January, 1922, she received a letter from him, in which he wrote: "I wanted to be done with you two years ago."

G. C. Tyndale for the petitioner.

LORD BUCKMASTER (after finding adultery proved) said: The only difficulty in this case is on the question of desertion—an offence very difficult to define. Neglect and contempt, however hard to bear, do not of themselves constitute desertion. In this case, however, the wife's evidence is striking, and I think entitles me to hold that there has been desertion. In March, 1919, the respondent forsook her bed, avoided her society, shut himself in one room, refused her access to it, and told her that he was bringing in a woman. Except that one roof sheltered the two there was desertion in every meaning of the word. I am unable to see that the Matrimonial Causes Act, 1857, ss. 16, 27 requires a separate dwelling-house. In November, 1921, the husband moved to the house he now occupies, and was seen there with the woman, with whom he has committed adultery.

There will, therefore, be a decree nisi with costs and custody of the child. I would remark, however, that the petitioner would have avoided a difficult legal question if she had taken proceedings for restitution of conjugal rights.

Solicitor: *Sterns*.

[Reported by J. A. C. SKINNER, ESQ., Barrister-at-Law.]

A

HANSSON v. HAMEL AND HORLEY, LTD.

[HOUSE OF LORDS (Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Wrenbury and Lord Carson), March 16, 1922]

B

[Reported [1922] 2 A.C. 36; 91 L.J.K.B. 433; 127 L.T. 74; 38 T.L.R. 466; 66 Sol. Jo. 421; 15 Asp. M.L.C. 546; 27 Com. Cas. 321]

Shipping—Bill of lading—Through bill—Protection of buyer from shipment to destination—Contract of subsequent carrier without complementary promise to bind prior carrier.

C

Sale of Goods—C.i.f. contract—Contract of affreightment—Procurement "on shipment"—Bill of lading issued thirteen days after shipment at port in another country.

The appellant in Sweden sold to the respondents 600 tons of cod guano to be shipped from Norway to Japan c.i.f. Kobe or Yokohama, payment net cash against documents in London. The guano was shipped in April, 1920, from Braatvag, Norway, was carried by a local steamer to Hamburg under a bill of lading of Apr. 22, 1920, and was there transhipped to a Japanese steamer, the *A. M.*, which carried it to Japan. On the arrival of the guano at Hamburg, L., the agent there of the *A. M.*, issued through bills of lading each being dated May 5, 1920, and in the following form: "Through bills of lading from Braatvag to Yokohama. Shipped from Braatvag according to bill of lading on Apr. 22, 1920. Shipped in apparent good order and condition by Messrs. Hamel & Horley, Ltd., on board the steamship *Kiev*, lying in or off the port of Braatvag, and bound to Hamburg for transshipment into the . . . *Atlas Maru* . . . 1,500 bags cod guano . . . to be delivered . . . at . . . Yokohama unto order." The respondents refused to accept these bills of lading on the ground that they did not fulfill the conditions of a c.i.f. contract.

F

Held: a seller under a c.i.f. contract had to cover the buyer by procuring and tendering documents which would be available for the buyer's protection from shipment to destination; the initial words of the bills of lading in the present case were not words of contract under which the owners of the *A. M.* would be answerable for the safe carriage of the guano from the Norwegian port to Hamburg, but were a mere recital of a fact; the bills of lading were not through bills, but contained only the contract of the subsequent carrier without any complementary promise to bind the prior carrier in the through transit; in a sale under a c.i.f. contract the contract of affreightment must be procured "on shipment," and, while that was an expression of some latitude, a bill of lading issued thirteen days after the original shipment at a port in another country a substantial distance away was not duly procured "on shipment," and the words did not mean on re-shipment or on transshipment; therefore, the bills of lading issued at Hamburg were a bad tender and the respondents were entitled to reject them.

G

H

Notes. Considered: *Foreman and Ellams v. Blackburn*, [1928] 2 K.B. 60. Referred to: *N. V. Aarnold Otto Meyer v. Aune*, [1939] 3 All E.R. 168; *May and Hassell, Ltd. v. Exportles of Moscow* (1940), 45 Com. Cas. 128; *Rayner & Co. v. Hambros Bank, Ltd.*, [1942] 2 All E.R. 694.

I

As to through bills of lading see 30 HALSBURY'S LAWS (3rd Edn.) 380, 381, and for cases see 41 DIGEST 375-377. As to c.i.f. contracts see 29 HALSBURY'S LAWS (2nd Edn.) 210 et seq., and for cases see 39 DIGEST 558, 576-581.

Cases referred to:

(1) *The Kronprinsessan Margareta, The Parana, etc.*, [1921] 1 A.C. 486; 90 L.J.P. 145; 124 L.T. 609; 3 P. Cas. 803, P.C.; 37 Digest 583, 176.

- (2) *Re General Trading Co. and Van Stolk's Commissiehandel* (1911), 16 Com. Cas. 95; 39 Digest 422, 552. A
- (3) *Landauer & Co. v. Craven and Speeding Bros.*, [1912] 2 K.B. 94; 81 L.J.K.B. 650; 106 L.T. 298; 56 Sol. Jo. 274; 17 Com. Cas. 193; 39 Digest 577, 1811.
- (4) *Biddell Bros. v. E. Clemens Horst Co.*, [1911] 1 K.B. 934; 80 L.J.K.B. 584; 104 L.T. 577; 27 T.L.R. 331; 55 Sol. Jo. 383; 12 Asp. M.L.C. 1; 16 Com. Cas. 197, C.A.; reversed sub nom. *E. Clemens Horst Co. v. Biddell Bros.*, [1912] A.C. 18; 81 L.J.K.B. 42; 105 L.T. 563; 28 T.L.R. 42; 56 Sol. Jo. 50; 12 Asp. M.L.C. 80; 17 Com. Cas. 55, H.L.; 39 Digest 575, 1801. B
- (5) *Cox, McEuen & Co. v. Malcolm & Co.*, [1912] 2 K.B. 107, n.; 17 Com. Cas. 205, n.; 39 Digest 577, 1810. C

Appeal from an order of the Court of Appeal reversing a judgment of BAILHACHE, J., whereby he ordered judgment to be entered for the plaintiff in the action, the present appellant, against the respondents, defendants in the action, for £4,683 2s. 11d.

The appellant was a Swedish subject carrying on business as a merchant at Gothenburg. The respondents were an English company carrying on business as merchants in London. By his points of claim the appellant alleged that by two contracts contained in contract notes signed by him and dated Feb. 9 and 14, 1920, and a letter from the respondents dated Mar. 5, 1920, the appellant sold to the respondents a shipment of cod guano, March–April, from Norway c.i.f. Kobe or Yokohama, payment net cash against documents in London; that the appellant had shipped between April 20 and 22 from Norwegian ports by the steamship *Kiev* for transshipment via Hamburg by the steamship *Atlas Maru* to Kobe or Yokohama five parcels of cod guano totalling 5,650 bags or 565 tons; that the appellant procured to be issued at Hamburg on May 5, 1920, by the Osaka Shosen Kaisha Steamship Co., the owners of the steamship *Atlas Maru*, five through bills of lading relating to the five parcels covering the entire voyage from the Norwegian ports to Kobe or Yokohama showing on the face thereof, as the fact was, that the goods were shipped from Norway within the contract period on board the steamship *Kiev* for transshipment into the steamship *Atlas Maru*, that the shipments under through bills of lading were made in accordance with the universal custom obtaining in Norway well known to the respondents when goods were sold c.i.f. Japan or the East and in accordance with the course of dealing between the parties in previous transactions of the same kind; that the shipping documents were duly tendered and refused by the respondents. The appellant claimed the agreed price or alternatively damages. By their amended points of defence the respondents said that the appellant was bound to ship the guano c.i.f. to Japan without transshipment and to tender documents for such direct shipment, that the bills of lading tendered were not such through bills of lading as were regular and valid tender under the contracts, and that the policy of insurance tendered with the shipping documents was irregular and insufficient in that it covered transit in the steamship *Kiev* and the steamship *Atlas Maru*, and in no other vessel. They also said that there was unreasonable delay in the transshipment by the *Atlas Maru* as that vessel did not leave Hamburg until June 5 and that such delay entitled the respondents to refuse to accept the documents. They denied the alleged custom and its validity and the alleged course of business. BAILHACHE, J., held that the shipments had been duly made in accordance with the established practice at a Norwegian port for transshipment at Hamburg and in accordance with the contracts, that at the time of shipment the appellant had a contract which covered the goods from the port of origin to the ultimate port of destination, and that the through bill of lading by which the Japanese company took upon themselves liability for the whole voyage was a proper document and

A was properly tendered and complied with the contractual obligations of the appellant. The learned judge, accordingly, entered judgment for the appellant. The Court of Appeal reversed this decision and the appellant appealed.

Leck, K.C. and *N. C. L. Macaskie* for the appellant.

R. A. Wright, K.C. and *O'Hagan* for the respondents.

B The House took time for consideration.

Mar. 16. **LORD SUMNER** read the following opinion of the House. The only question argued on this appeal was whether the respondents were right in refusing to take up and pay for certain shipping documents tendered to them, on the appellant's behalf, by his bankers in London. The bill of lading was the actual document in dispute. Why the respondents really refused the document does not matter, nor does the case turn on the particular objection put forward by them at the time.

C It was common ground that the whole transaction is governed by English law. The cargo—cod guano in bags—was sold c.f. and i., Kobe or Yokohama, to be shipped from Norway, 300 tons, March–April, and the balance, May–June. There was no stipulation as to the months within which the bill of lading itself must be dated, or as to the date of the bill of lading being conclusive evidence of the date of the shipment. The bags in question were shipped at Braatvag in Norway. A direct steamer to Japan was not available from Braatvag, nor do I imagine that the buyers supposed that it would be, and the seller shipped the consignment at Braatvag on board the *Kiev*, a steamer belonging to a Norwegian company, to be carried to Hamburg, where it was to be transhipped into the Osaka Shosen Kaisha's s.s. *Atlas Maru* for Yokohama. The appellant had made a contract, partly expressed in a "freight contract" and partly in correspondence, with a Mr. Lind, of Hamburg, the representative of the Osaka Shosen Kaisha, for the conveyance of the cod guano from Hamburg to Japan on the terms, among others, that bills of lading to Japan would be signed in Hamburg on presentation of the local bill of lading—that is, the bill of lading for carriage by the *Kiev*—as soon as the goods were in Mr. Lind's possession, being there either taken over in lighters on the appellant's behalf or direct into the steamer for Japan. If they arrived in Hamburg too late for the steamer scheduled, the appellant reserved to himself the right to ship them by the next steamer of the line.

D The first, or local, bill of lading was signed on behalf of the master of the *Kiev* on April 22, 1920, and acknowledged receipt of the cod guano from the appellant, to be delivered to "order Yokohama," the *Kiev* being bound for Hamburg, with the right to tranship and send on the goods by another steamer, freight being prepaid to Hamburg, the *Kiev's* destination. At Hamburg there was issued to the appellant an ocean bill of lading, signed by Mr. Lind on behalf of the captain of the *Atlas Maru* and dated May 5, 1920. The respondents were named in it as the shippers in accordance with a stipulation they had made, and the cod guano was made deliverable to order at Yokohama. The case is another instance, like *The Parana* (1), of transactions in which, in spite of the insertion of the consignee's name in the bill of lading, the intention to reserve the *jus disponendi* to the seller till the documents are taken up is manifested by the way in which the transaction is carried through with regard to the presentation of the documents. The respondents being named as the shippers, no question arises of any estoppel as against the carriers in favour of persons taking the bill of lading by endorsement and on the faith of the statements recited in it. The document was headed: "Through Bill of Lading," and it contained in the margin these statements: "From Braatvag to Yokohama" and "shipped from Braatvag according to bill of lading on April 22, 1920." It began thus:

"Shipped in apparent good order and condition by Messrs. Hamel & Horley, Ltd., on board the steamship *Kiev*, lying in or off the port of Braatvag, and

bound to Hamburg for transhipment into the Osaka Shosen Kaisha's steamship *Atlas Maru* . . . 1,500 bags cod guano . . . to be delivered . . . at the port of Yokohama . . . unto order."

This bill of lading, accordingly, was itself dated after the contract time of shipment, viz., March-April, but it is stated in the margin, and truly so, that, according to a bill of lading (that is the local one), shipment at Braatvag was within the contract time. It stated further that the goods, when shipped in the *Kiev*, were in apparent good order and condition, but it was silent as to their condition at Hamburg. There was no express statement that any goods had been shipped in the *Atlas Maru* at all, or, if so, in what order and condition they were when shipped, and it was reasonably plain that the *Kiev* did not belong to the Japanese owners of the *Atlas Maru*. The undertaking to deliver in Japan would, in the absence of special authority to those signing the bill of lading, apply only to such cargo as might, in fact, have been shipped at Hamburg on board the *Atlas Maru*, and no one would assume without actual evidence of it that a person like Mr. Lind, signing on behalf of the captain of the *Atlas Maru* had any authority to bind her owners for the carriage by the *Kiev* or the owners of the *Kiev* for anything at all. The question is whether this ocean bill of lading was a good tender under the contract of sale and whether the respondents were bound to take it up and pay for the consignment.

A c.f. and i. seller, as has often been pointed out, has to cover the buyer by procuring and tendering documents which will be available for his protection from shipment to destination and I think that this ocean bill of lading afforded the buyer no protection in regard to the interval of thirteen days which elapsed between the dates of the two bills of lading and presumably between the departure from Braatvag and the arrival at Hamburg. The initial words, on which the matter depends, may be put as a mere recital of a fact, or as words of contract, and in the latter case the contract may be that the owners of the *Atlas Maru* will (i) be answerable for the safe carriage of the goods from Braatvag to Hamburg, though they have not actually carried them, subject always to the perils excepted in their own bill of lading, though these do not correspond with the exceptions in the *Kiev* bill of lading, or (ii) will make good any loss or damage to the goods during the transit from Braatvag to Hamburg, if the owners of the *Kiev* fail to do so, or (iii) will indemnify the respondents against loss or damage affecting the goods during that voyage. Unless the words are words of contract to the effect first above-mentioned, they are useless to the respondents, and even so the question arises on the face of the document what authority, if any, the captain of the *Atlas Maru* or his agent, Mr. Lind, who signs for him, has to bind his owners by words of promise in respect of a voyage, which is already over before he has anything to do with the goods on behalf of the Osaka company. *Primâ facie* he has none, and there is nothing shown to rebut the presumption. No doubt a question may arise on any bill of lading whether the captain has, in fact, signed for more goods than were put on board, and, if so, whether he has any special authority to do so, but the doubt raised here, if not dissimilar in kind, is different in its actual form and much greater in degree. Of course, no contract by way of indemnity or by way of guarantee or of answering for the default of another will satisfy those requirements of a c.f. and i. sale which involve a contract of affreightment, since different defences are available on them and different incidents attach to them to those applicable to a bill of lading. Still less can a mere recital of facts avail.

With all deference to the very weighty opinion of BAILHACHE, J., to the contrary, in my judgment, these words are mere words of recital, but, even if they were what the appellant contends that they are, I think it is clear that they do not make the ocean bill of lading a good tender in this case. The bill of lading by the *Kiev* was originally a contract with the appellant himself, and never was,

A nor in any normal course of business ever would be, tendered to the respondents. As there were not, I suppose, to be two contracts for carriage as far as Hamburg, this is strong to show that the appellant never intended the ocean bill of lading to be a contract of carriage from Braatvag to Hamburg. When documents are to be taken up the buyer is entitled to documents which substantially confer protective rights throughout. He is not buying a litigation, as A. T. LAWRENCE, B J., says in the *General Trading Co. Case* (2) (16 Com. Cas. at p. 101). These documents have to be handled by banks, they have to be taken up or rejected promptly and without any opportunity for prolonged inquiry, they have to be such as can be re-tendered to sub-purchasers, and it is essential that they should so conform to the accustomed shipping documents as to be reasonably and readily fit to pass current in commerce. I am quite sure that, in the circumstances of C this case, this ocean bill of lading does not satisfy these conditions. It bears notice of its insufficiency and ambiguity on its face: for, though called a through bill of lading, it is not really so. It is the contract of the subsequent carrier only, without any complementary promises to bind the prior carriers in the through transit. The appellants' contract with Mr. Lind was not transferable by endorsement and delivery, nor was it tendered; the *Kiev* bill of lading he kept D to himself, and endorsed to Mr. Lind under his own contract with him. I do not suggest that tender of either document would have carried matters any further, but, as things stood, the buyer was plainly left with a considerable lacuna in the documentary cover to which the contract entitled him.

The point is also put in a slightly different way, which equally relates especially to bills of lading. SCRUTTON, J., points out in *Landauer & Co. v. Craven and E Speeding Bros.* (3), that in a sale of goods c.f. and i., the contract of affreightment must be procured "on shipment." Of course, this is practicable and common even when a through bill of lading is necessary, containing provision for transshipment at an intermediate port from a local to an ocean steamer not in the same ownership. I do not understand this proposition as meaning that the bill of lading would be bad, unless it was signed contemporaneously with the actual F placing of the goods on board. "On shipment" is an expression of some latitude. Bills of lading are constantly signed after the loading is complete and, in some cases, after the ship has sailed. I do not think that they thereby necessarily cease to be procured "on shipment," nor do I suppose that the learned judge so intended his words. It may also be that the expression would be satisfied, even though some local carriage on inland waters or by canal or in an estuary by barge G or otherwise, preceded the shipment on the ocean steamer, provided that the steamer's bill of lading covered that prior carriage by effectual words of contract. "On shipment" is referable both to time and place. In principle, however, and subject to what I have said, I accept this opinion of so great an authority, and I am quite sure that a bill of lading only issued thirteen days after the original shipment, at another port in another country many hundreds of miles away, is H not duly procured "on shipment." Indeed, the ocean bill of lading was not procured as part of this c.f. and i. shipment at all, and "on shipment" does not at any rate mean on re-shipment or on transshipment. It is not enough that at the time of the initial shipment the c.f. and i. seller procured a contract by correspondence with Mr. Lind for the forwarding of the goods by an ocean steamer, I for that was not procuring a bill of lading. If the *Kiev* had been lost with the cod guano on the coast of Norway, no contract of affreightment to Japan would have been procured or forthcoming at all. The matter was well tested thus in the Court of Appeal. In the absence of express stipulation, shipping documents under a contract of sale on c.f. and i. terms must be tendered by the buyer as soon as possible after shipment (*Biddel Bros. v. E. Clemens Horst* (4)). If, then, the port of transshipment was late on in the through voyage, a buyer might be entitled to tender the documents long before any through bill of lading to

Japan had been signed or procured at all, and when there was no bill of lading in existence except that to the intermediate port. This ocean bill of lading was, therefore, on this ground also, in my opinion, a bad tender. Though the document is called a through bill of lading it is not really so, for no one contracted by it for the carriage through from Braatvag to Yokohama. Accordingly, I express no opinion adverse to the sufficiency of through bills of lading, properly so called, as a tender under a contract like this. I would add that the evidence, given to prove a course of business between the contracting parties or a custom of merchants generally affecting the normal requirements of a c.f. and i. contract, failed to establish any distinction in this case, and I have no observation to make on the effect of such evidence had it been sufficient. The gist of it, however, was that, although in some cases the Japanese line either appointed an agent at the Norwegian port, or gave authority to the captain of the local steamer to sign a bill of lading on their behalf at and from that port, which would, of course, be a real through bill of lading, in cases where they had no control over the cargo till it reached Hamburg, of which this was an instance, they would sign only at and from Hamburg, and would not issue a through bill of lading, since they were not booking the cargo for the whole journey at a through rate. An experienced witness called by the appellant further stated that he did not recall any other instance of a through bill of lading dated (that is, signed and dated) at the port of transshipment, and it was admitted by counsel that no such instance could be found in any reported case. Nor was any instance forthcoming of a ship's signing for the carriage of goods, already carried and delivered by another ship, as a prior part of the entire transit. It was admitted by another of the appellant's witnesses that through bill of lading ought to be issued at the original port of shipment. Plainly, what the appellant ought to have done was either to get Mr. Lind to sign a bill of lading from Braatvag to Yokohama with the right to tranship at Hamburg, if he had authority so to sign, or to have sold c.f. and i. Hamburg for Yokohama, and have forwarded the goods to Hamburg on his own account.

I have only to add that, judging by the report in [1912] 2 K.B. 107, n, the decision in *Cox McEuen & Co. v. Malcolm & Co.* (5) does not touch the present case. Being a decision on a Case Stated and on questions put by an arbitrator, the issue was limited by his findings and by the terms of his questions. What those terms were is only to be gathered from the judgment, but they plainly did not include the question now in issue, viz., whether a bill of lading signed at and operating from an intermediate port of transshipment is a sufficient document for tender to the buyer under a c.f. and i. sale. The contract was for goods to be shipped from Manila to London by steamers "direct or indirect," and the buyers rejected bills of lading from Hong Kong, partly on the ground that they did not comply with a stipulation as to the date of shipment, and partly because they did not conform to the words "shipment direct or indirect." The arbitrator found as facts that transshipment at Hong Kong was usual, and that through bills of lading from Manila, though usual, were not essential. Evidently he was proceeding on some recognised custom of the trade affecting the meaning of the contract. Accordingly, the decision was that the contract did not require a through bill of lading; that the goods were, in fact, shipped to London "indirect," and were shipped at Manila within the contract time. The production of the Hong Kong bill of lading alone did not show that the conditions of the contract were not fulfilled, and the form of the arbitrator's question prevented the buyers from raising the contention that they were entitled to reject the tender because a Hong Kong bill of lading was not one which they were bound to take up. On the facts found it was assumed that the Manila bill of lading was not one of the shipping documents which had to be tendered and taken up, since, on a contract to which a through bill of lading was not essential and which was in terms satisfied by indirect shipment, the tender of the Hong Kong bill of lading sufficed. The arguments of counsel on both sides in *Landauer & Co. v. Craven*

A *and Speeding Bros.* (3) show that *Cox, McEuen & Co.'s Case* (5) was understood not to turn on any question of the shipping documents which are required by c.f. and i. terms in general, and I do not think this case can affect the present appeal. I would suggest to your Lordships that the appeal should be dismissed with costs.

Appeal dismissed.

B Solicitors: *Reynolds & Son; Donald Macmillan & Mott.*

[*Reported by W. C. SANDFORD, Esq., Barrister-at-Law.*]

HESKETH v. BIRMINGHAM CORPORATION

[COURT OF APPEAL (Bankes and Scrutton, L.JJ., and Eve, J.), October 24, 1922]

D [Reported [1924] 1 K.B. 260; 93 L.J.K.B. 461; 130 L.T. 476;
88 J.P. 77; 22 L.G.R. 281]

Local Authority—Sewer—Non-feasance—Liability of authority—Overflowing of sewer—Damage to adjacent property—Failure to bring drainage system up to date—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 15, s. 16.

E In pursuance of their powers and duties under s. 15 and s. 16 of the Public Health Act, 1875, and a local Act a local authority, in 1880, provided storm water outlets from a sewer into an adjacent brook. This method of drainage was adequate when it was constructed, but by 1920 the land in the neighbourhood of the sewer and brook had become almost entirely built over, with the result that a greatly increased quantity of water and sewage was discharged into the sewer, and, in August, 1920, a severe storm caused the brook to overflow, the property of the plaintiff being damaged by the flood water. By s. 308 of the Public Health Act, 1875: "Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not in himself in default, full compensation shall be made to such person by the local authority exercising such powers . . ."

G **Held:** the failure of the local authority to bring the drainage system up to date was non-feasance, and not misfeasance, and, therefore, the local authority were not liable, either in negligence or in nuisance, for the damage suffered by the plaintiff whose remedy, if any, was under s. 308.

H **Notes.** Sections 15 and 16 of the Public Health Act, 1875, were repealed by the Public Health Act, 1936 (see 19 HALSBURY'S STATUTES (2nd Edn.) 475). For the duties and powers of local authorities relating to the provision of sewers see s. 14 and s. 15 of the Act of 1936.

Referred to: *Blundy, Clark & Co., Ltd. v. London and North Eastern Rail Co.*, [1931] All E.R. Rep. 160; *Pride of Derby and Derbyshire Angling Association, Ltd. v. British Celanese, Ltd.*, [1953] 1 All E.R. 179; *Smeaton v. Ilford Corpn.*, [1954] 1 All E.R. 923.

I As to the exercise by a local authority of its statutory functions and liability for negligence and non-feasance see 30 HALSBURY'S LAWS (3rd Edn.) 685 et seq. For cases see 38 DIGEST 15 et seq.

Cases referred to:

(1) *Durrant v. Branksome U.D.C.*, [1897] 2 Ch. 291; 66 L.J.Ch. 653; 76 L.T. 739; 61 J.P. 472; 46 W.R. 134; 13 T.L.R. 482; 41 Sol. Jo. 621, C.A.; 38 Digest 56, 327.

(2) *Dent v. Bournemouth Corpn.* (1897), 66 L.J.Q.B. 395; 41 Digest 30, 225.

- (3) *Hawthorn Corpn. v. Kannuluik*, [1906] A.C. 105; 75 L.J.P.C. 7; 93 L.T. 644; 54 W.R. 285; 22 T.L.R. 28, P.C.; 41 Digest 25, 194. A
- (4) *Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch.D. 102; 49 L.J.Ch. 89; 40 L.T. 736; 44 J.P. 36; 28 W.R. 111, C.A.; 38 Digest 42, 249. B
- (5) *Robinson v. Workington Corpn.*, [1897] 1 Q.B. 619; 66 L.J.Q.B. 388; 75 L.T. 674; 61 J.P. 164; 45 W.R. 453; 13 T.L.R. 148, C.A.; 38 Digest 55, 318. B
- (6) *Stretton's Derby Brewery Co., Ltd. v. Derby Corpn.*, [1894] 1 Ch. 431; 63 L.J.Ch. 135; 69 L.T. 791; 42 W.R. 533; 10 T.L.R. 94; 8 R. 608; 38 Digest 26, 140. C
- (7) *Earl of Harrington v. Derby Corpn.*, [1905] 1 Ch. 205; 74 L.J.Ch. 219; 92 L.T. 153; 69 J.P. 62; 21 T.L.R. 98; 3 L.G.R. 321; 38 Digest 127, 934. C

Also referred to in argument :

Geddis v. Bann Reservoir Proprietors (1878), 3 App. Cas. 430, H.L.; 38 Digest 25, 137.

Pasmore v. Oswaldtwistle U.D.C., [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 14 T.L.R. 368, H.L.; 38 Digest 154, 38. D

Appeal by the defendants from an order of AVORY, J., in an action tried by him without a jury.

The plaintiff owned premises in Villa Street, Birmingham, which adjoined a stream known as Hockley Brook. The defendants were the sanitary authority for the city of Birmingham. In 1853, for the better drainage of the district in which Villa Street is situate, the defendants constructed a sewer known as the Hockley main sewer, which ran alongside of the brook. In 1880, to relieve the pressure on the sewer in times of heavy rain, they constructed in the sewer a number of storm-water outlets through which the surplus water in the sewer was discharged into the brook. At that date the capacity of the brook was sufficient to carry off all the water so discharged into it from the sewer. Between 1880 and 1920 the whole of the land near the brook had become practically covered with houses and the increase in the population caused a very much larger quantity of water and sewage to enter the sewer. As a result, in the event of a heavy rainfall, more excess water got into the brook than it was capable of carrying off. On Aug. 12, 1920, there was a severe storm, and the brook overflowed, flooded the neighbouring land and washed away the foundations of the plaintiff's houses causing them to be unsafe. By s. 15 of the Birmingham Corporation (Consolidation) Act, 1883, the defendants were empowered E

"to widen deepen and improve . . . Hockley Brook . . . within the borough . . . and to prevent and remove all obstructions or impediments therein or thereto." F

It was not disputed that the water which was allowed to flow through the sewer outlets into the brook had been to some extent contaminated with sewage, but there was no evidence to show whether or not before it entered the brook it had been freed from such impurities as would deteriorate the quality of the water of the brook. The plaintiff sued to recover damages for the injury (i) on the ground that the defendants had no statutory authority to allow water to be discharged from the sewer into the brook, and were guilty of a nuisance in doing so; and (ii) that in not widening the brook, as they were authorised to do by s. 15 of the local Act of 1883, after they knew that the brook was no longer capable of receiving the water discharged into it from the sewer, they were guilty of negligence. AVORY, J., held, that they were liable upon both grounds, and gave judgment for the plaintiff. The defendants appealed. G

Upjohn, K.C., Montgomery, K.C., and W. N. Birkett for the defendants.
J. G. Hurst, K.C. and Donald Hurst for the plaintiff. H

I

A **BANKES, L.J.**—This action is brought by a person who owns some houses which abut upon Hockley Brook, which runs through a portion of the city of Birmingham and drains naturally a very considerable area in the immediate neighbourhood which has been now almost entirely built over. As a result it became necessary many years ago to construct some drainage system, and for that purpose sewers were made north and south of the brook. Both those sewers, apparently, had constructed in them what is very usual, and, I think, according to the evidence, was absolutely necessary, namely, storm-water outfalls which, in case of very heavy rain, allowed the flood-water to pass from these two sewers into the brook. The course of the brook before it joins the river, and below the plaintiff's premises, appears to have been very much obstructed by the operations of owners of land who have constructed buildings over the brook and have made culverts and piers, and as a result, in time of heavy flood, the brook has risen to such an extent that it has flooded portions of the adjoining properties. In the present case, in August, 1920, there resulted such severe flooding against the plaintiff's premises that the foundations were seriously affected and the property suffered very serious injury. It was in respect of that injury and the consequent damage that this action was brought. The plaintiff's case, as set out in the pleadings, was alternative—first, that the damage was caused by reason of the corporation negligently erecting a culvert just below the plaintiff's premises which obstructed the water and so caused the flooding. That cause of action failed altogether, and the plaintiff was left with the cause of action which was not very fully or accurately stated in the statement of claim, but which counsel for the plaintiff developed into an alternative cause of action, namely, that the acts of the defendants which were complained of amounted to a nuisance causing him injury, or, alternatively, were negligent, and, therefore, actionable. No reference at the trial appears to have been made to the material provisions of the Public Health Act, 1875, but after the argument in this court of defendants' counsel, it appears that it is impossible to adjust the rights of these parties without reference to the provisions of that Act and enquiring what the rights and obligations of the corporation are under that statute.

F I will first deal quite shortly with those. The sections referred to are ss. 15, 16, and 17 of the Public Health Act, 1875. Counsel for the plaintiff has very frankly told us that the provisions of those sections were not in his mind at the trial, and there may be good reason for it, because the particular case, framed as it might have been framed if the provisions of that statute had been borne in mind, was not upon the pleadings, but, at any rate, from the plaintiff's point of view the statute was not material, and was not referred to. Counsel for the defendants says that the sections were in his mind, but it was not necessary to refer to them because of the way in which the plaintiff's case was conducted. We are told further that evidence was prepared and was available to deal with the question had it become material. The materiality of the question is this. Under s. 15:

H "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

Section 16 contains the power for making sewers. Section 17 is partly prohibitive and partly an implied authorisation. It provides:

I "Nothing in this Act shall authorise any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal, pond, or lake until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse, or in such canal, pond, or lake."

The effect of the construction of that statute has been referred to in *Durrant v. Branksome U.D.C.* (1) and I should like to refer again to what **NORTH, J.**, and

CHITTY, L.J., said, as indicating their view of what we must accept as a proper view of s. 17. After reading the section, NORTH, J., says [1897] 2 Ch. at p. 291):

"I think that section recognises in the clearest way that, subject to complying with the provisions of that section, the local authority have a right to empty their drains into a natural stream or canal, pond, and so on, observing, of course, the provisions of that section. It is clear from that, to my mind, that they may turn clean water into a stream, or what I may call cleaned water into a stream. They may even turn water that is sewage or filth into a stream if they free it from such noxious matters as would deteriorate the stream itself."

CHITTY, L.J. says (*ibid.* at p. 305):

"The first part of that is prohibitory, and it is by way of proviso on something that has gone before. The second part is explanatory. I do not say that by itself it confers a power. I think the better reading is that the power is conferred by s. 16, and in this portion of the section, which says that the sewage is not to be poured in until it is freed from foul or noxious matter, the legislature assumes it had already said something that would justify the pouring of pure water or water not fouled or noxious into the stream or canal."

Therefore one finds in the combination of these sentences statutory authority for discharging what NORTH, J., called clean or cleaned water into the stream, and, if the stream itself is of such a character that the discharging of foul water into it would not affect or deteriorate the purity and quality of the water, then one finds statutory authority for discharging foul water.

I think some day a serious question may arise where, in a case like the present, the allegations is that foul water has been discharged into a stream so as materially to affect the water in the stream and do a person injury. I will say nothing on the point at the moment except that in such a case a very material question will be upon whom the onus lies of showing that the case either falls within, or does not fall within, the section. But here there is this peculiarity which I wish to emphasise, because it is the foundation of my judgment. It is quite true that the one witness for the plaintiff who might have dealt with this matter does more or less refer to the liquid which poured from the sewer into the brook on the day in question as "storm-water containing sewage," and, therefore, there was some evidence given which required, or might have required, dealing with under the provisions of the section. But later on, when the matter was further discussed, counsel for the plaintiff made it quite plain that his case was not a complaint of pouring of vile water into the brook, or the pouring of water which did not comply with the requirements of s. 17 into the brook, but that his case was irrespective of the character of the water altogether since he was complaining of the quantity, and not the quality. In those circumstances it was not necessary for the defendants to call any evidence of the quality of the sewer water or of the brook, but they were entitled to rely on their statutory authority to discharge the water into the stream. That point was never brought to the learned judge's attention, and I feel satisfied myself that he would not have expressed himself at the end of his judgment as he did by saying that the corporation had no statutory authority to discharge water from the sewer into the brook if he had heard the discussion that has taken place before us and had his attention called to these sections of the statute. It follows, therefore, upon the view of the plaintiff's case which was presented by his counsel, that the corporation are entitled to say in those circumstances: "We have the statutory authority given us by the combination of the sections of the Public Health Act," to which I have referred. If that is so, the plaintiff is then driven to say: "I rely upon my alternative cause of action, and my alternative cause of action is that, assuming you have statutory authority to discharge water from the sewer into the brook, the discharge on this occasion was caused, permitted or occasioned by your

A negligence." That case seems of necessity to require some evidence, because the facts before the court below and before us were that the sewer was originally constructed in 1853 and the storm-water outfalls were constructed as long ago as 1880, and non constat upon this evidence they were not perfectly sufficient to carry off all the water without injury to anybody, having regard to the state of building going on in that neighbourhood at that time, and to the condition of the lower
B portion of the brook at that time. If they were sufficient at the time they were made, it seems to me that, if that was the only evidence there was, the plaintiff would be in a grave difficulty, having regard to the cases which are often referred to in reference to the non-liability of a corporation in cases of mere non-feasance. But apart altogether from that, I cannot see here a trace of any evidence of negligence on the part of the defendants in allowing this water to pass in the way it did on the day in
C question, because the plaintiff's expert's evidence does not condemn the system at all—he never says a word against it, and, on the other hand, the defendants' witness, without challenging cross-examination, said that it was the only system. That may be right or wrong, but upon that evidence it seems to me impossible to say that there was evidence before the learned judge upon which he was entitled to act, that, in the exercise of their statutory right and duty, the defendants were guilty of any
D negligence.

That is the result of my view of the case as it was fought and presented to us. I only desire to say, in conclusion, a few words about two of the authorities upon which the plaintiff relies. The first, *Dent v. Bournemouth Corpn.* (2), does not seem to present any difficulty from first to last when one looks into its facts, and it does not seem to amount to any authority of which the defendants need be at all
E afraid. It was tried before a judge and jury, and part of the plaintiff's claim was that the defendants had been negligent in the original construction of the sewer whence the water, or sewage, which did the damage, came. Presumably there was evidence given upon that point, because the case upon that point was allowed to go to the jury, who came to a finding on it favourable to the plaintiff. The only question was whether there was evidence to support the jury's finding, and
F VAUGHAN WILLIAMS, J., says (66 L.J.Q.B. at p. 398):

"The action is one in which the plaintiff, the owner and occupier of a dwelling-house and garden sues the defendants, an urban sanitary authority, because they wrongfully caused a large quantity of sewage to find its way down a drain and flow over his grounds. The statement of claim charges that this outfall of
G sewage was caused by the negligence of the defendants. It seems to me there was evidence at the trial upon which the jury could properly find the defendants guilty of negligence."

That case can be no authority except in a case where the evidence was precisely the same. What the evidence there was we do not know. We do know that in the present case there was no evidence and, in those circumstances, therefore, the
H authority does not seem to be one which need cause one any trouble. With regard to *Hawthorn Corpn. v. Kannuluik* (3), I confess that it does seem to me that, as reported, it is very difficult to reconcile with the decision in the Court of Appeal to which attention has been called. Personally, I can only account for LORD MACNAGHTEN'S judgment given in the way in which it was given upon the assumption that the question of non-feasance was really not material for the decision of that
I case at all. The case was a case in the Privy Council, on appeal from the Supreme Court of Victoria, and reference is made to the existence of the Victoria Local Government Act, 1890, and corresponding prior enactments, but the provisions of those statutes are not set out in the report. It is quite true that the counsel for the appellants did rely upon the suggestion that the case was one of non-feasance and that they referred to *Glossop v. Heston and Isleworth Local Board* (4), and other cases, and if the point had been material one can hardly understand a judge of the experience and care of LORD MACNAGHTEN omitting any reference to that point and

treating the question as one where the only question was whether there was evidence of negligence before the court below which would justify them in accepting it. LORD MACNAGHTEN deals with no other point. He says ([1906] A.C. at p. 108):

"Their Lordships agree with HOLROYD, J. The case seems to be a very simple one. The only question is, Have the municipal authorities acted negligently so as to do unnecessary damage to Mr. Kannuluik?"

Having regard to that language, it seems to me impossible to treat the case as one in which either the question of statutory right to do the thing, or the question whether or not the facts disclosed a case of non-feasance, as opposed to a case of misfeasance, was really under discussion or material*.

For these reasons I think that this appeal must be allowed, and the judgment which was entered for the plaintiff must be set aside, and entered for the defendants, with costs. Of course, if the defendants were acting, as they allege they were, in the exercise of their statutory authority, it has been pointed out that the plaintiff is not without a remedy, because, for damage done under those circumstances the statute provides a means of recovering compensation.

SCRUTTON, L.J.—I cannot say that I think this case has had a very satisfactory course. I do not gather that the learned judge below was referred to the provisions of the Public Health Act, although, no doubt, he was familiar with them, but, in the result, he has not given us the benefit of his views as to their application to the case. He also has not given us his view, perhaps because they were not cited to him, on some of the authorities which have been cited to us, which are not very easy to reconcile, and if it were necessary to try and lay down the boundary between non-feasance and misfeasance in the case of public authorities, or to give a considered view on the exact effect of s. 17 of the Public Health Act I should myself have desired to consider my judgment. But in the view I take of the case it does not turn on those matters, and, therefore, I feel able to express the reasons which have induced me to think that the learned judge came to a wrong conclusion.

[His Lordship then referred to the facts, and continued:] The plaintiff's case is that the brook overflowed because the sewer overflowed into it. When one looks at the committee's report they find that what happens in time of floods depends upon which rises first. Sometimes the brook rises first, it then goes into the sewer, and forces the sewer out into the roadway; and sometimes the sewer rises first, and goes into the brook, and causes the brook to rise; but there is no evidence whatever as to what happened on the occasion when the plaintiff's houses were damaged—whether the brook rose first and flooded the houses, and also went back into the sewer, or whether the sewer rose, and came into the brook and so raised the brook. I should have thought that it was a fundamental difficulty in the plaintiff's way that he did not prove that the sewer had anything whatever to do with the falling down of his houses. He only proved that the brook did it, without proving that the brook rose because the sewer came into it. That is merely one of the minor difficulties in the case.

If it is the fact that perfectly proper system of drainage, as originally made, has become improper by reason of the growth of the houses, and the covering of the land with buildings, we must consider the rule of non-feasance and misfeasance. The general rule is that a public authority is not liable for non-feasance, but is liable for misfeasance. The rule is sometimes stated in this way. If there is a road, and you repair it negligently, you may be liable, but if you let it get into disrepair, you are not liable, because the non-repair is non-feasance, and negligent repair is misfeasance. What is the case where a sewer, proper when constructed, becomes improper by reason of the growth of houses around and the covering of

* It would appear from the judgments in the Supreme Court of Victoria (reported 29 V.L.R. 308), and more particularly from the judgment of HOOD, J., that the flooding of the plaintiff's premises in that case was due to a considerable extent to positive acts done by the Hawthorn Corporation and not to mere non-feasance on its part.

A land with buildings? It seems to me that on that point I am bound, sitting in this court, by the decision which is one of several decisions of this court, in *Robinson v. Workington Corpn.* (5), because the facts there are almost exactly similar to those in this case. There, that which was a proper sewer originally became improper because of a number of new houses which had been built, the sewage from which drained into the sewer. There the sewer was large enough when it was constructed, but it was not large enough for the ultimate requirements of the district. The Court of Appeal held that that gave the individual whose property was damaged by the overflow from the sewer, which had become insufficient, no cause or action against the public body which had failed to keep the sewer up to the requirements of the district. The only remedy he had, if any, was under s. 299 of the Act by complaint to the Local Government Board. A very similar case is *Stretton's Derby Brewery Co., Ltd. v. Derby Corpn.* (6), a decision of ROMER, J. There the facts were very like those of the present case. It being shown that a new scheme for drainage would be a complicated and expensive one, requiring very considerable consideration before it was adopted, ROMER, J., held that there was no negligence in failing for three or four years to adapt the insufficient system to the new works, and he dismissed the plaintiff's claim.

D In the present case, the plaintiff pleaded as his cause of action that the corporation had blocked the brook lower down, and so caused the flooding. That failed because he did not prove those facts. Then at the end of his case, according to the judge's note, he substituted for his allegation that they had blocked the brook at Villa Street, that they had made a culvert smaller than originally it was. That turned out to be wrong, because on examination it was found that the culvert was three times as big as the original culvert. Thus, the plaintiff was left with allegations (i) of negligence, and (ii) of nuisance. I cannot see any evidence of negligence when the sewer and man-holes were constructed, and it seems to me, on the authority which I have cited, and by which I am bound, of the Court of Appeal, that the failure to bring the system up to date is non-feasance, and not misfeasance, giving no cause of action. That seems to dispose of the first part of the cause of action ultimately promulgated. The second cause of action, is nuisance. So far as nuisance is a cause of action, it appears to me to be permanent interference with rights, whether public or private, and not occasionally. I have had considerable trouble here in seeing what the nuisance is, whether it is the man-holes, or whether it is the water coming out of them at intervals, or what exactly the nuisance is said to be. But at any rate, it seems in very much the same position as the negligence. There was no evidence that these man-holes were a nuisance when originally constructed, and the corporation not being liable for non-feasance, is not liable if they become a danger by failure of the corporation to do anything, any more than the corporation is liable if it leaves a road un-repaired, and let it get into disrepair. Therefore, it seems that both of the causes of action put forward by the plaintiff fail.

H There was another possible cause of action. It appeared to me that it would not be difficult to think that water which came out of the sewer in time of storm was probably filthy water within s. 17 of the Public Health Act, 1875, but as to that, first, only the most casual evidence was given as to the condition of the water which caused the damage, and, secondly, the plaintiff's counsel expressly withdrew any claim based upon filthy water under s. 17. Therefore I do not find it necessary to consider the exact meaning of s. 17, or to consider whether I entirely agree with the view taken by BUCKLEY, J., in *Earl of Harrington v. Derby Corpn.* (7) ([1905] 1 Ch. at p. 222). Another authority which I have some difficulty in understanding is the decision of LORD MACNAGHTEN in the Privy Council in the *Hawthorn Corpn. Case* (3). One always approaches that learned lawyer's judgment with the greatest respect, but the facts stated in the Privy Council decision appear to be almost identical with the English decisions which are exactly the other way, and yet LORD MACNAGHTEN,

who was very well acquainted with the English decisions, did not refer to them, and did not appear to think that they interefered in any way with his judgment. I cannot help thinking that there must have been something which is not in the report in the colonial statutes which prevented the English decisions from applying. Anyhow, I feel bound to follow the English Court of Appeal decisions to which I have referred, of which *Robinson v. Workington Corpn.* (5) is only one, which all have the same way.

EVE, J. I agree. It is not disputed that the plaintiff's property was seriously damaged by the accumulation of water in the Hockley Brook consequent upon an abnormal rainfall on Aug. 12, 1920, nor is it denied, although possibly it was not strictly proved, that the volume of water collected in the brook at, or in the neighbourhood of, the plaintiff's premises was increased by water passed from the Hockley sewer, vested in the corporation, into the brook higher up by means of storm-water outlets in that sewer.

The plaintiff's first alleged cause of action is this. He says that the corporation, in passing additional water into the already surcharged brook and allowing it to accumulate in the neighbourhood of these premises, was creating an actionable nuisance rendering them liable in damages. The passing of the water through the storm outlets from the drain into the brook was done in the exercise of the statutory powers of the corporation, and, if, in fact, it could be established that in the exercise of such statutory powers they had, by nuisance or otherwise, inflicted damage on the plaintiff, the plaintiff is not left in the hopeless condition of having no remedy. His remedy is provided for by s. 308 of the Public Health Act, but in saying that, it must not be assumed for a moment that I am in the least encouraging the plaintiff to proceed under that section, because from the evidence it is clear that the obstruction, and the collection, of water in the vicinity of his premises was due not to the improper exercise by the corporation of its statutory powers, but to the existence of conduits and narrow pipes lower down the brook which prevented the water discharged into it by means of the sewer from finding an outlet into the river. As I say, if, in fact, the damage was due to the improper exercise by the corporation of their statutory powers a remedy is given to the plaintiff, but not a remedy by action. That seems the answer to his claim to recover in this action on the ground of nuisance. He next puts his claim on the ground that the statutory powers were exercised in a negligent manner. Time after time the plaintiff's counsel has been invited to put his hand upon the act of the corporation which he alleges was negligence, and he has failed to show us any act, or any conduct on the part of the corporation, which could be said to amount to negligence. That part of his action seems to me to entirely fail, and I agree, therefore that on both grounds the plaintiff has failed to make out his case, and that the appeal against the judgment must be allowed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for Town Clerk, Birmingham; *Barlow, Barlow & Lyde*, for *James Ore*, Birmingham.

[*Reported by W. C. SANDFORD, ESQ., Barrister-at-Law.*]

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HEAP v. MOTORISTS' ADVISORY AGENCY, LTD.

[KING'S BENCH DIVISION (Lush, J.), December 14, 15, 1922]

[Reported [1923] 1 K.B. 577; 92 L.J.K.B. 553; 129 L.T. 146;
39 T.L.R. 150; 67 Sol. Jo. 300]

B

*Criminal Law—Larceny—Larceny by a trick—Need to prove animus furandi—Intention to pass property—Car obtained from owner for sale to non-existent person.**Sale of Goods—Mercantile agent—Sale without authority—Purchaser acting in good faith and without notice of lack of authority—Onus of proof—"Ordinary course of business"—Sale by person not owner—No authority or consent—Owner precluded by conduct from denying seller's authority—Degree of negligence to be proved—Factors Act, 1889 (52 & 53 Vict., c. 45), s. 2 (1)—Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 21.*

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In October, 1921, the plaintiff, a motor engineer, made the acquaintance of one N., who represented that he had a friend, H., described by him as a man of means, who, he said, might buy the plaintiff's motor car for £210. On this, the plaintiff entrusted the car to N., solely for the purpose of driving it to H.'s home and trying to get H. to buy it for £210. Subsequently, N. informed the plaintiff that he had sold the motor car to H., and that H. would pay the price soon, on his return from abroad, and meanwhile wished him (N.) to use the car. All this was untrue. There was no such person as H. N. used the car for a few weeks and then sold it through an intermediary to the defendants for £110 which he retained. The plaintiff, having ascertained that the car was in the defendants' possession, brought an action against them, claiming its return.

Held: (i) there being no such person as H., the plaintiff had no intention to pass the property in the car to anybody; N. obtained possession of the car *animus furandi*; and, therefore, he was guilty of larceny by a trick and could confer on the defendants no title in the car: *Whitehorn Bros. v. Davison* (1), [1911] 1 K.B. 463, applied; *Folkes v. King* (2), [1923] 1 K.B. 282, distinguished; (ii) to give rise to a defence under the last words of s. 21 (1) of the Sale of Goods Act, 1893 (which provides that where goods are sold by a person who is not the owner thereof and does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller has "unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell"), the negligence shown by the owner must be more than mere carelessness in the conduct of his affairs and must amount to a disregard of his obligations towards the person who is setting up the defence, and in the circumstances the plaintiff had not been negligent in that sense; when N. obtained possession of the car from the plaintiff he was not a "mercantile agent" within s. 2 (1) of the Factors Act, 1889, nor did he, as such an agent, sell the car to the defendants, nor, if he did sell the car as a mercantile agent, was that sale "in the ordinary course of business," and, therefore, s. 2 (1) did not apply; even if the sub-section did apply, the onus was on the defendants to prove, under the proviso to the sub-section, that they had acted in good faith and at the time of the transaction had no notice that N. had no authority to sell the car, and that onus they had not discharged; and, therefore, the plaintiff was entitled to the return of the car.

Notes. Considered: *Lake v. Simmons*, [1926] 1 K.B. 366; *Dennant v. Skinner*, [1948] 2 All E.R. 29. Referred to: *Buller & Co., Ltd. v. T. J. Brooks, Ltd.*, [1930] All E.R. Rep. 534.

As to unauthorised dispositions by agents see 1 HALSBURY'S LAWS (3rd Edn.) 211-215, and as to larceny by a trick see *ibid.*, vol. 10, pp. 770, 771. For

cases see 1 DIGEST 330 et seq., 373 et seq., and 15 DIGEST (Repl.) 1037-1043. A
For Factors Act, 1889, see 1 HALSBURY'S STATUTES (2nd Edn.) 29, and for Sale
of Goods Act, 1893, see *ibid.*, vol. 22, p. 985.

Cases referred to :

- (1) *Whitehorn Bros. v. Davison*, [1911] 1 K.B. 463; 80 L.J.K.B. 425; 104 L.T. 234, C.A.; 15 Digest (Repl.) 1038, 10, 197. B
- (2) *Folkes v. King*, [1922] 2 K.B. 348; 91 L.J.K.B. 792; 38 T.L.R. 731; 66 Sol. Jo. 613; reversed [1923] 1 K.B. 282; 92 L.J.K.B. 125; 128 L.T. 405; 39 T.L.R. 77; 67 Sol. Jo. 227; 28 Com. Cas. 110; 86 J.P. Jo. 552, C.A.; Digest Supp. C
- (3) *Oppenheimer v. Frazer and Wyatt*, [1907] 2 K.B. 50; 76 L.J.K.B. 806; 97 L.T. 3; 23 T.L.R. 410; 51 Sol. Jo. 373; 12 Com. Cas. 280, C.A.; 15 Digest (Repl.) 1037, 10, 196.

Action tried by LUSH, J., without a jury.

The plaintiff claimed the return of a Citroen motor car, or its value. The defendants pleaded that the car came into the possession of the person selling it to the defendants, with the knowledge and consent of the plaintiff, and they relied on s. 2 (1), of the Factors Act, 1889, and s. 21 (1) of the Sale of Goods Act, 1893. D

The plaintiff was a motor engineer and in 1921 he had for sale a Citroen motor car, which he valued at £210. During October, 1921, he became acquainted with a man who described himself as "Captain the Hon. Roger North." On learning that the plaintiff was desirous of selling the car, North represented to him that he had a friend, a Mr. Hargreaves, of Uxbridge, who might buy the car for £210, and on Oct. 28 he was allowed by the plaintiff to have possession of the car solely for the purpose of driving it to Uxbridge and endeavouring to sell it to Hargreaves for £210. On the same day North returned to the plaintiff and said that Mr. Hargreaves had bought the car for £210, and that he would pay for it when he returned from a short holiday upon which he was just starting. He also said that Hargreaves was willing that during his absence North should have possession of the car for his own use. On being asked the reason of the delay in payment North told the plaintiff that Hargreaves was so rich that he did not like to trouble him for such a small sum as £210. North proceeded to use the car, and later, on the pretext that Hargreaves was about to pay for the car, he obtained the registration book from the plaintiff. The plaintiff never received payment for the car, nor was the registration book returned. While the car was in North's possession he obtained a situation as sales agent for a firm of motor engineers, and while so employed he became acquainted with a man named Cory who, at his suggestion, approached the defendants with a view to their purchasing the car. Cory told the defendants that "Captain the Hon. Roger North" was prepared to sell it at the very low price of £110. On Dec. 1, 1921, the defendants bought the car through Cory for £110. Payment was made by a cheque payable to Cory and dated Dec. 1, and Cory gave a receipt of the same date. There was no such person as Hargreaves and the whole story told by North to the plaintiff was a fiction. North was in fact a convicted thief, who had three or four convictions against him and was at the time of the hearing of the present action serving a term of penal servitude for stealing a car. These facts, however, were not known by either the plaintiff or the defendants until after the latter had purchased the car. E
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The plaintiff having found out that the defendants had the car, demanded its return or its value. At the hearing evidence for the plaintiff was given that when the car was entrusted to North it was worth £265, and for the defendants that £110 was a fair price for the defendants to have paid for the motor car having regard to its condition.

A By the Factors Act, 1889, s. 2 (1) :

"Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

B By the Sale of Goods Act 1893, s. 21 (1) :

"Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

C *Wilfrid Lewis* for the plaintiff.

Gerald Dodson for the defendants.

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LUSH, J.—This is an interesting case and it raises some important questions. The plaintiff ascertained that the motor car was in the hands of the defendants and he ultimately brought this action to recover it, his case being that the possession of the car was obtained from him by North in circumstances which amounted to larceny by a trick, so that the property in the car did not pass to North or to the defendants. If the car was obtained from the plaintiff by North in circumstances which amounted to larceny by a trick, the plaintiff's claim would be well founded and the defendants would be bound to deliver up the car, unless they could bring themselves within some statutory provision which enabled them to retain possession of it.

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The first question which I have to decide is whether or not the car was obtained by North in circumstances which amounted to larceny by a trick. The difference between larceny by a trick and obtaining goods by false pretences may be shortly stated. Simple larceny is the felonious taking of goods belonging to another person against the will and without the consent of that person. In the case of larceny by a trick the person who has lost the goods has given an apparent consent to the possession being taken by the thief, and, therefore, it is not in one sense a case of obtaining goods without the consent and against the will of the owner, but, as the consent of the person who parts with the goods has been obtained fraudulently by a trick, it is only an apparent and not a real consent, and the person who has obtained the goods cannot set up that the owner has consented to his obtaining possession. The case of larceny by a trick therefore falls into line with the case of ordinary larceny. In the one case, as in the other, the thief has *animo furandi* deprived the owner of his goods without his consent; and, consequently, if the thief hands the goods on to another person, he confers no title to them upon that person. The case of obtaining goods by false pretences is the converse of that just mentioned. There the person who parts with the goods intends to pass the property in them and the person who obtains them by false pretences can convey a good title to them to some third person.

Into which of these two classes of case does the present case fall? It is said by counsel for the defendants that this is a case of obtaining a car by false pretences, and not of larceny by a trick. To make that out he has to establish that the plaintiff intended to part with the property in the car to North. If he can establish that, he is right, but if he cannot, he is wrong. Apart from authority I should have held that this was a case of larceny by a trick and that the plaintiff only intended to part with the possession of the car to North. The person for whom North pretended to obtain it did not exist. On behalf of the defendants,

however, reliance is placed upon the recent case of *Folkes v. King* (2) in the Court of Appeal. At first sight, no doubt, the facts of that case would appear to be similar to those of the present case. The plaintiff there arranged with a man named Hudson, who was a dealer in motor cars, that Hudson should sell the plaintiff's car at a price which was not to be less than a certain figure without the plaintiff's permission. The car was, accordingly, delivered to Hudson, but he took it, not with the intention of carrying out the arrangement, but of defrauding the plaintiff, and in pursuance of that object he sold the car for his own benefit for less than the stipulated sum to a purchaser who sold it to the defendant. The plaintiff brought an action for the recovery of the car. The defendant's plea was that the car had been sold to his predecessor in title by a mercantile agent who was in possession of it with the consent of the owner, and that, therefore, under s. 2 of the Factors Act, 1889, the plaintiff could not recover. [His LORDSHIP read s. 2 (1) and continued:] It was essential therefore in *Folkes v. King* (2) to ascertain whether or not the car had been handed over to a mercantile agent with the consent of the owner. GREER, J., held that, inasmuch as the plaintiff only parted with the possession of the car on the terms that it was not to be sold below a certain sum, and Hudson, while apparently taking possession of it on these terms, intended when he took it to sell it for less and cheat the owner, the case was one of larceny by a trick. His view was that the plaintiff did not intend to part with the property in the car, and did not really consent to Hudson having it, his apparent consent having been obtained by a trick. The Court of Appeal reversed that judgment and held that the case was not one of larceny by a trick. As I understand it, their judgment proceeded on the ground that, inasmuch as the plaintiff there intended to confer a power on Hudson to pass the property, it could not be said that he did not intend to pass the property. The court held that, if the owner of a chattel delivers it to A. for the purpose of enabling A. to pass the property to a purchaser, the owner, having conferred that power upon A., did intend to pass the property in the chattel just as much as if he intended himself to pass the property to the person who bought the car from A. I need not cite passages from the judgments in that case. BANKES, L.J., compared the case to that of *Oppenheimer v. Frazer and Wyatt* (3) where the goods were sold on approval. *Folkes v. King* (2) is, therefore, an authority for the proposition that if the owner of a chattel delivers it to a person with the intention that that person shall find a purchaser and pass the property to that purchaser, he passes the property in the chattel, and it is wrong to treat the case as a case of larceny by a trick. Are the facts in this case similar to those in that case? In my opinion, they are not. There is, I think, an essential distinction between the two cases. In the present case, in my view of the facts, the plaintiff never did intend either that North should himself have the property in the car, or that he should pass the property in the car to any real person as would have been the case if he had instructed North to find a purchaser for the car. What he did intend was that North should have possession of the car in order to take it and show it to a person who in fact had no existence, namely, the alleged Hargreaves. There was no Hargreaves. The whole story relating to him was an invention, and the whole scheme a fraud. It is not true to say that the plaintiff intended that North should pass the property to anybody. If he had known that there was no Hargreaves the car would not have gone out of his possession. He did not instruct North to find somebody to buy the car and take delivery of it from North. The whole transaction was, in my opinion, just as much a nullity as it would have been if North had induced the plaintiff to give him the car by pretending to be somebody who in fact he was not.

In *Whitehorn Bros. v. Davison* (1) BUCKLEY, L.J., dealt with an analogous case and considered whether it ought to be treated as a case of larceny by a

A trick in which the property does not pass, or of obtaining by false pretences in which it does. He said ([1911] 1 K.B. at p. 479) :

B "I think there is larceny by a trick where the owner of goods being induced thereto by a trick, voluntarily parts with the possession of the goods, but does not intend to pass the property in them, and the recipient has the animus furandi; and the same is true where the owner of the goods does not intend to pass the property in them to the particular person with whom he is dealing, and has been deceived by that person as regards the identity of the person with whom he is dealing."

C That principle is just as applicable to a case like this where the man Hargreaves, who was the only person with whom the plaintiff thought he was dealing, did not exist at all, as to the case put by BUCKLEY, L.J. The whole story about Hargreaves was false and there was no such person, and, therefore, there was no intention on the part of the plaintiff to pass the property to anybody. That being so, I do not think that *Folkes v. King* (2) assists me, or in any way governs this case. There being no authority fettering my decision, I think that the true view to take in this case is that North obtained possession of this car by a trick, animus furandi, that the property never passed to him, and that he never had the right conferred upon him to pass the property to anybody else.

D It follows that the plaintiff should succeed unless the defendants can bring themselves within some statutory provision giving them a defence to the action. I will deal with the defences in order. It was said first that s. 21 (1) of the Sale of Goods Act, 1893, afforded a defence. That sub-section provides that where goods are sold by a person who is not the owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title than the seller had

E "unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

F The defence founded on that sub-section is raised in these circumstances. North having got the car, used it in order to go to the premises of a well-known firm of motor engineers who employed him for a time as an agent to sell cars of theirs if he could. North appears then to have become acquainted with a man named Cory who was also employed by the firm. North seems to have thought it likely that the defendants who are themselves dealers in motor cars, might buy this car, but, G apparently for reasons of prudence, instead of going to the defendants himself he got Cory to approach them. Cory, as to whom nothing is known either for him or against him, and has gone where nobody can find him, went to the defendants, told them that North had this car, which he was able to show them, for sale at the very low price of £110, and asked them to buy it. I need not for the moment H consider whether the defendants dealt with Cory or with North, I need only now say that they ultimately bought the car. On the assumption that for this purpose North was the seller of the car to the defendants, it is said that the plaintiff by his conduct is estopped from denying North's authority to sell to them. I cannot follow the argument that was addressed to me on behalf of the defendants on this part of the case. It is true that the plaintiff was very trustful in parting with the possession of the car, and in letting North go on using the car without accounting I for the price. He was not so careful as he should have been in his own interest, but that does not mean that he was negligent in the sense that he broke some duty that he owed to the defendants. Negligence, in order to give rise to a defence under this section in question must be more than mere carelessness on the part of a person in the conduct of his own affairs, and must amount to a disregard of his obligations towards the person who is setting up the defence. There is, in my opinion, no evidence to show that the plaintiff was negligent in that sense and to justify the defence that he is precluded from denying the seller's authority to sell.

Another defence set up is under the Factors Act, 1889, s. 2. It is said here that North was a mercantile agent, that with the consent of the plaintiff he was in possession of the car, that he sold the car when acting in the ordinary course of business of a mercantile agent, and that, therefore, the sale was as valid as if he had been expressly authorised by the owner to make the sale. Do the facts here establish that defence? In my opinion, they do not for several reasons. The section says that if a person voluntarily allows a mercantile agent to have possession of a chattel for the purpose of selling it, then the sale effected by the mercantile agent in the ordinary course of business shall be valid subject to the proviso which I will deal with in a moment. In order to see whether that section applies one must consider first whether the owner parted with the possession of the chattel to a mercantile agent. If at the time the owner parted with the possession the recipient was not a mercantile agent, if the owner did not part with the possession to a man who was filling that capacity, then in my opinion the section does not apply. Take the case that I put during the argument. A man who at the time is not carrying on any business, or acting in any business capacity, asks the owner of a car to lend it to him to drive to a place where he has an urgent mission to fulfil and says that he will bring it back in half-an-hour. He gets the car by cheating the owner out of the possession of it. The fact that he afterwards becomes a dealer and sells it as a mercantile agent does not bring the case within the section, because the owner in that case did not put it into the power of a mercantile agent to sell and make an apparently good title to the chattel. Here North got possession of this car from the plaintiff at the time when North was not a dealer in cars. He got it by posing as the friend of a man named Hargreaves to drive it to Hargreaves and show it to him. I do not think that North was a mercantile agent within the meaning of this section. He, no doubt, became an agent for the sale of cars before he got Cory to sell this car to the defendants, but he was not a mercantile agent at the time when he was entrusted with the car by the plaintiff. I do not think that there has ever been any sale by a mercantile agent within the meaning of this section. Another reason why I think this section does not apply is that North, if he was a mercantile agent, did not sell this car to the defendants. The defendants did not rely upon the position of North as the mercantile agent. On the contrary, then the defendants were told by Cory that North had this car they seem to have been a little suspicious about North, who had not produced any registration book, and they said both in letters and by word of mouth that they made a special point of not buying the car from North. They said by their representative that they knew Cory and were only willing to buy from Cory, and they made out their cheque to Cory. I do not think that North as a mercantile agent ever sold the car to the defendants. Moreover, if North did as a mercantile agent sell the car to the defendants, I do not think that he was acting in "the ordinary course of business of a mercantile agent." The sale was a very peculiar transaction, and it seems to me that that provision of the section was not complied with. For these reasons, I do not think that s. 2 (1), applies to this case.

If, however, that part of the sub-section does apply, there remains a further very serious question. The sub-section has the following proviso:

"provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

That proviso has two distinct parts. The first requires that the person taking under the disposition acts in good faith. The second, and I think it is different, requires that that person has not notice that the person making the disposition has not authority to make it. In dealing with the proviso the first question that arises is, on whom is the onus of proof? Must the defendant who sets up the section prove that he acted in good faith and without notice, or must the plaintiff who is seeking to assert his title to the goods prove that the defendant was not acting in good faith

A or that he had notice? I was asked to hold on the authority of *Whitehorn Bros. v. Davison* (1) that here the onus was on the plaintiff. I do not think that that case supports that view. In that case the question raised turned upon s. 23 of the Sale of Goods Act, 1893, which provides that:

B "When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of the seller's defect of title."

C The language of that section is no doubt somewhat similar to that of the section in question, but I think that it deals with quite a different subject-matter. I have no doubt that in *Whitehorn's Case* (1) the court did hold that the onus was on the plaintiff to prove that the defendant bought in bad faith. That, however, was quite a different case from this, because there the title that the seller would have under that section was a good title. It was a voidable title, but that voidable title had not been avoided at the time when the purchaser bought. The section gave him a good title that he would retain unless it could be shown that he had not bought in good faith or without notice. The Court of Appeal said that if the owner wanted to impeach the title he must prove that the buyer bought in bad faith or had notice. Under s. 2 of the Factors Act, 1889, however, the buyer gets no title apart from the section. He is allowed to get what I may call a statutory title provided he complies with the terms of the section. In order to acquire a title which he would not otherwise have, the buyer has to prove all these things that I have mentioned—that the owner consented to the mercantile agent having possession, that the agent acted in the ordinary course of business, and also, I think, that the buyer acted in good faith and had no notice. If the onus is on the defendants, they have certainly failed to satisfy me that they had no notice that the person selling the car, that is North, had no authority to sell. Indeed, I think that, for this purpose, wherever the onus rests, the defendants must be taken to have had notice. To begin with, the car appears to have been bought considerably under the value, though I do not say that the undervalue was so great as to show actual dishonesty. The defendants have endeavoured to prove that it would have cost them £50 or £60 to put it right, and that must, no doubt, be taken into account, but, to my mind, it would not have cost them more than £10 to £12, an outlay which would have left the car a remarkably cheap one for the defendants. Another peculiar circumstance was that North did not himself come to the defendants about the car, but got Cory to sell it to them. The defendants admit that they were a little suspicious, and made a point of not buying the car from North but from Cory, whom they knew. Neither North nor Cory produced the registration book, and the defendants never asked for it, though the whole object of registration is to facilitate transfers of cars and enable people to know who owns the car. Another circumstance which I cannot overlook is that after the defendants had given a crossed cheque to Cory he came back and asked for an open cheque because, according to him, North had no banking account near at hand and he wanted the money at once, and the defendants then allowed their cashier to cancel the crossed cheque and give an open cheque. All these circumstances were, in my opinion, enough to put the defendants on their guard and to fix them with notice. I do not say that they wickedly shut their eyes to an obvious fraud, but I do say that they did not do what any reasonable man would have done in this case, namely, declined to buy this car without knowing more about it. They thought it was a good bargain and made up their minds too easily to buy the car. I think they must be taken to have had notice of some want of authority in those who purported to sell it to them. The manager told me in evidence that he felt rather uncomfortable and suspicious about the sale. In my view the defendants

ought not in the circumstances to have bought the car. The result is that all the defences fail, and I therefore give judgment for the plaintiff for the return of the car or its value with costs. A

Judgment for plaintiff.

Solicitors: *Chatterton & Co.; Vizard, Oldham, Crowder & Cash.*

[Reported by T. W. MORGAN, Esq., Barrister-at-Law.] B

Re KEENE

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), May 12, 1922] C

[Reported [1922] 2 Ch. 475; 91 L.J.Ch. 484; 127 L.T. 831; 38 T.L.R. 663; 66 Sol. Jo. 503; [1922] B. & C.R. 103] D

Bankruptcy—Property available for distribution—Disclosure by bankrupt—Trade secret—Formulæ.

Two brothers entered into a partnership for the carrying-on of a business. Certain unwritten secret formulæ, known only to the two brothers, were essential to the manufacture of articles supplied by the business. These formulæ had never been put into writing, and each of the brothers agreed not to disclose them. The partnership was subsequently dissolved, one brother retaining the English and American business while the other retained the French business. One of the brothers became bankrupt, and he was required to answer questions in writing by the trustee in bankruptcy, involving the disclosure of the secrets as to these formulæ. E

Held: the formulæ formed part of the goodwill of the bankrupt's business and he was bound to answer the questions. F

Notes. As to property available for distribution in a bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 409 et seq.; and for cases see 5 DIGEST (Repl.) 696 et seq. G

Case referred to in argument :

Re Armstrong, Ex parte Gilchrist (1886), 17 Q.B.D. 521; 55 L.J.Q.B. 578; 55 L.T. 538; 34 W.R. 709; 2 T.L.R. 745; 51 J.P. 292; sub nom. *Re Armstrong, Ex parte Armstrong*, 3 Morr. 193, C.A.; 5 Digest (Repl.) 798, 6749. H

Appeal from an order of ASTBURY, J.

The bankrupt appealed from an order of ASTBURY, J., affirming an order of the registrar requiring him to disclose to the trustee in bankruptcy certain secret formulæ connected with his business. His contention was that the formulæ, which were unwritten, were not "property" which, under the Bankruptcy Acts, could be seized for the benefit of creditors. The facts are stated in the headnote. I

Beyfus for the bankrupt.

Hansell for the trustee in bankruptcy.

LORD STERNDALÉ, M.R.—The bankrupt was ordered to answer certain questions, thereby disclosing the secrets as to these formulæ. The secrets were not written down, and it is said that, not having been written down, they remained the property of the bankrupt and did not constitute "property," as that word is

- A used in the Bankruptcy Acts. In my opinion, that is not right. These formulæ were formulæ for the manufacture of certain articles which had been manufactured in accordance with them for years. They were manufactured for sale, and formed an appreciable part of the business which was being carried on. The court has had illustrations as to when trade secrets of this sort are property transferable to the trustee in a bankruptcy and when they are not, but I will not deal with them.
- B In my view, formulæ, used as these were used, form part of the goodwill of a business, and I think, therefore, that the bankrupt must be asked to answer these questions.

- It is said, however, that the court ought not to order him to answer questions which will disclose matters which he was bound not to disclose. It is said that when these formulæ were invented by himself and his brother, there was an agreement, which still exists, only to disclose the formulæ to the children of one or other of the brothers on their attaining twenty-one, although the evidence is rather loose as to it. It was not exactly a restrictive covenant, but it was a covenant, and it was made at a time when the brothers were carrying on business together in partnership. In 1918, they decided to dissolve partnership, and they divided the business by territories. One brother took the English and American business; the other took the French business. It was agreed that, in each territory, the business, with the goodwill, assets, and book debts, &c., should become the sole property of the brother to whom that territory was allotted. I think that, in all probability, it was intended by the brothers that they should not remain bound by the agreement as to secrecy, because, if that secrecy were still to be observed, neither brother could sell his business to any purchaser, and, therefore, in this instance the business in England and America would not have become the sole property of the bankrupt as it is admitted that it did. I think, therefore, that the second contention fails and that the appeal must be dismissed.
- C
- D
- E

- WARRINGTON, L.J.**—I can, myself, see no objection to the bankrupt being asked to disclose these formulæ. It is said that what he is being asked to disclose is personal skill, and that that is not "property" within the meaning of the bankruptcy laws. In my view, what he is being asked to disclose is certain facts in connection with the manufacture of these articles. Whether the facts are known to him and not written down, or whether they are written down, makes, in my view, very little difference.
- F

- With regard to the second objection raised, the bankrupt's brother is not before the court, and, of course, our decision will not preclude his enforcing any remedy he may have; but, in my opinion, the dissolution of the partnership put an end to the partnership agreement, including the alleged agreement not to disclose these formulæ. Each brother, after dissolution of the partnership, became absolute owner of the business in his own territory, with the goodwill, book debts, and trade secrets. The implied agreement alleged appears to contradict the written agreement between the parties, and, in my view, cannot be upheld. I agree that the appeal should be dismissed.
- G
- H

- YOUNGER, L.J.**—On the first point I am entirely of the same opinion. On the second point, the brothers do not appear to have made any arrangement as to keeping the secret of these formulæ, and have imposed no mutual obligations in that respect. Each partner seems to have relied on the other being sufficiently self-interested not to disclose the secret to outsiders, forgetting that he might be compelled to disclose it against his will.
- I

Appeal dismissed.

Solicitors: *Lawton & Taylor; E. H. Coopman.*

[*Reported by J. L. DENISON, Esq., Barrister-at-Law.*]

ADMIRALTY COMMISSIONERS v. NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND, LTD.

[CHANCERY DIVISION (Sargant, J.), March 16, 21, 1922]

[Reported 127 L.T. 452; 38 T.L.R. 492; 66 Sol. Jo. 422]

Mistake—Mistake of fact—Money paid into customer's account at bank under mistake of fact—Recovery without making customer a party.

Where a person makes a payment into a customer's account at a bank under a mistake of fact the person making the payment can recover it from the bank without the customer or his legal personal representative being a party to the proceedings, a bank being in no different position from that of other agents.

Cary v. Webster (1) (1721), 1 Stra. 480, and *Kerrison v. Glyn, Mills, Currie & Co.* (2) (1911), 81 L.J.K.B. 465 applied.

Notes. As to the liability of an agent for moneys received by him see 1 HALSBURY'S LAWS (3rd Edn.) 233, 234; and for cases see 1 DIGEST 667 et seq. As to recovery of money paid under a mistake, see 26 HALSBURY'S LAWS (3rd Edn.) 921 et seq., and for cases see 35 DIGEST 147 et seq.

Cases referred to :

- (1) *Cary v. Webster* (1721), 1 Stra. 480; 93 E.R. 647; 1 Digest 597, 2295.
- (2) *Kerrison v. Glyn, Mills, Currie & Co.* (1911), 81 L.J.K.B. 465; 105 L.T. 721; 28 T.L.R. 106; 17 Com. Cas. 41, H.L.; 1 Digest 670, 2826.

Also referred to in argument :

Re Bodega Co., Ltd., [1904] 1 Ch. 276; 73 L.J.Ch. 198; 89 L.T. 694; 52 W.R. 249; 11 Mans. 95; 35 Digest 147, 457.

Joachimson v. Swiss Bank Corpn., [1921] 3 K.B. 110; 90 L.J.K.B. 973; 125 L.T. 338; 37 T.L.R. 534; 65 Sol. Jo. 434; 26 Com. Cas. 196, C.A.; Digest Supp.

Tassell v. Cooper (1850), 9 C.B. 509; 14 L.T.O.S. 466; 137 E.R. 990; 2 Digest 188, 378.

Eyles v. Ellis (1827), 4 Bing. 112; 12 Moore, C.P. 306; 5 L.J.O.S. C.P. 110; 130 E.R. 710; 3 Digest 303, 974.

Fontaine-Besson v. Parr's Banking Co. and Alliance Bank, Ltd. (1895), 12 T.L.R. 121, C.A.; 3 Digest 222, 580.

William Brandt's Sons & Co. v. Dunlop Rubber Co., [1905] A.C. 454; 74 L.J.K.B. 898; 93 L.T. 495; 21 T.L.R. 710; 11 Com. Cas. 1, H.L.; 8 Digest (Repl.) 573, 230.

Action.

In 1917, M. S. Taylor, who was then serving as an officer in the Royal Naval Air Service, executed an allotment note directing the plaintiffs to pay £20 a month of his pay to the defendant bank at High Holborn, to be credited to his current account. In March, 1918, he was transferred to the Royal Air Force, and he was killed in July, 1918. After his transfer he received his full pay as an officer of the Royal Air Force until his death. By mistake, both the transfer and the death were overlooked by the plaintiffs' department dealing with allotment notes, and payments of £20 a month continued to be made to the bank and the bank still retained over £400 in respect of such payments. M. S. Taylor's father took out letters of administration in Saskatchewan, but such letters had not been sealed in England. The bank first heard of M. S. Taylor's death on an occasion in March, 1920, when they received a letter from the plaintiffs claiming repayment of the amounts which they had paid under a mistake of fact. The bank immediately communicated with M. S. Taylor's father, and he claimed the amount standing to the credit of his

A dead son's account. The plaintiffs accordingly started this action against the bank, but they did not make either M. S. Taylor's father or any other legal personal representative a party to the action. The only question raised by the bank in this action was whether the plaintiffs were entitled to have the money standing to the credit of their dead customer's account paid out to them without his legal personal representative being before the court.

B *The Attorney-General (Sir Ernest Pollock, K.C.), Dighton Pollock and Danckwerts* for the plaintiffs.

J. W. F. Beaumont for the bank.

SARGANT, J. stated the facts, and continued: It is suggested that, before an order can be made against the bank it is necessary that the legal personal representative of the customer shall be before the court, and that, unless he is made a party, the bank will not be protected, and will be liable to be sued over again. It is argued that moneys placed to the credit of a customer's account are sacred and cannot be dealt with under the order of the court, even when it is shown that the money has been paid into the account by someone in mistake of fact, except in the presence of the customer or his legal personal representative. The plaintiffs have cited *Cary v. Webster* (1), and, in view of that case, it is admitted on behalf of the bank that, if a person made payment to an agent and the principal was informed of it, yet if the person making the payment could show that it was made in mistake of fact, he can recover it from the agent without making the principal a party. But it is said that the position is different in the case of a bank. *Kerrison v. Glyn, Mills, Currie & Co.* (2) contains observations which clearly lay it down that banks are in no different position from other agents, and there is no apparent reason why they should be. In my opinion, any contract by which a bank agrees to honour cheques of the customer on his current account does not extend to amounts standing to the credit of that account in so far as they are swollen by inadvertent payments made in mistake of fact. As a result of an order for repayment of the amount claimed, the customer's current account will be deflated by that amount. Any subsequent action by the customer's legal representative to recover that amount from the bank would have no reasonable chance of success. There will be an order for repaying to the plaintiffs of the sum of £417 10s. 3d.

Solicitors: *Treasury Solicitor; Wilde, Moore, Wigston & Sapte.*

[*Reported by L. MORGAN MAY, ESQ., Barrister-at-Law.*]

THE LOREDANO

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Henry Duke, P.), March 27, 1922]

[Reported [1922] P. 209; 91 L.J.P. 158; 127 L.T. 158; 38 T.L.R. 516;
15 Asp. M.L.C. 565]

Shipping—Limitation of liability—His Majesty's ship—Action for damages in collision—Writ issued by the Crown more than two years after cause of action—Applicability of Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57), s. 8.

The Maritime Conventions Act, 1911, is not binding on the Crown, and an action brought by the Crown in respect of damage to one of H.M. ships need not be instituted within two years from the date of the damage as provided by s. 8 of the Act.

Notes. By the Crown Proceedings Act, 1947, s. 30, s. 8 of the Maritime Conventions Act, 1911, applies in the case of H.M. ships as it applies in the case of other vessels except in the case of proceedings in respect of any alleged fault of a ship of war, or a ship for the time being appropriated to the service of the armed forces of the Crown or to the service of the Post Office.

As to the Maritime Conventions Act, 1911, see 30 HALSBURY'S LAWS (2nd Edn.) 826 et seq., and for cases see 41 DIGEST 789 et seq. For the Maritime Conventions Act, 1911, s. 8, see 23 HALSBURY'S STATUTES (2nd Edn.) 834, and for the Crown Proceedings Act, 1947, s. 30, see *ibid.* vol. 6, p. 67.

Cases referred to :

- (1) *A.-G. for New South Wales v. Curator of Intestate Estates*, [1907] A.C. 519; 77 L.J.P.C. 14; 97 L.T. 614; 23 T.L.R. 752, P.C.; 23 Digest (Repl.) 351, 4186.
- (2) *H.M.S. Archer*, [1919] 1 P. 1; 88 L.J.P. 3; 35 T.L.R. 80; 41 Digest 796, 6553.

Summons adjourned into court.

The facts are stated in the judgment of SIR HENRY DUKE, P.

The Attorney-General (Sir Ernest Pollock) and Balloch for the Crown.
Alfred Bucknill for the defendant, the owners of the Loredano.

SIR HENRY DUKE, P.—I think it well to proceed to deliver judgment in this case, which is a matter of public importance, and I deliver it in court. The summons will be taken to be adjourned into court.

This is an action in the name of the Commissioners for executing the office of the Lord High Admiral of the United Kingdom against the owners of the steamship or vessel *Loredano* to recover damages in respect of a collision between H.M.S. *Salome* and the *Loredano*, which occurred in July, 1917. An application has been made by the defendants that the plaintiffs should show cause why they should not either apply for leave to maintain their action, or, alternatively, submit to have their action dismissed on the ground that the pleadings in the action were not commenced within two years from the date of the collision. The Attorney-General has appeared to establish on behalf of the Crown the contention that the limitation contained in s. 8 of the Maritime Conventions Act, 1911, does not bind the Crown. That contention is founded on two grounds. It is founded, first, on the general proposition that the statute is a statute of limitation, and that it is well settled law that no statute of limitation binds the Crown, unless the Crown be found to be expressly included within its terms. The Attorney-General cited a case in the Privy Council—*A.-G. for New South Wales v. Curator of Intestate Estates* (1)—which was not on the construction of the statute of limitation but raised the question whether the Crown was bound by provisions of an Act of the Parliament of New South Wales whereby certain assets of deceased persons were protected from

A payment of certain debts of those persons, and SIR ARTHUR WILSON, who delivered the judgment of the Privy Council, made this statement of the law ([1907] A.C. at p. 523) :

“The question therefore arises whether the present Act binds the Crown. The Crown is not named in it, nor can their Lordships see any clear indication to bind the Crown. *Primâ facie*, therefore, the Crown is not affected by it.”

B That is a statement in a carefully limited form of the prerogative of the Crown with regard to the exemption from the operation of statutes, not in particular of statutes of limitation. The rule with regard to statutes of limitation has been more emphatically stated in other decisions, and it is summed up in a very express statement in the passage which the Attorney-General cited from ROBERTSON'S
C CIVIL PROCEEDINGS BY AND AGAINST THE CROWN in the 1908 edition.

Taking the statute as it stands, it is not suggested that the Crown is expressly included in its provisions, and, after listening to the argument in which counsel has carefully protected the interests of the defendants, I am not able to find that, by implication the statute extends to the Crown. Counsel made reference to the comprehensive character of the Maritime Conventions Act, and to the proviso to s. 8, and said that the term “vessel” must be taken to mean “any other vessel.”
D That is no more comprehensive than is the legislation in an infinite variety of Acts of Parliament where such legislation in any way affects the prerogative of the Crown. He said that, in order to give effect to the contention raised on behalf of the Crown, the words “a vessel” in s. 8 must be read as “A vessel other than a vessel of His Majesty the King.” By well established principles of law it seems
E to me that every statute must be construed, where the King is not named, as though it contained a limitation of some such words as those which counsel for the defendants applies to this case. The prerogative of the Crown is saved by operation of law, and the statute is construed with reference to the principle. Counsel for the defendants pointed out too that personal claims are not limited—personal claims form no part of the prerogative of the Crown. An action against an individual is
F no infringement of either an immunity of the Crown or a right of the Crown. Reference was made to the decision in *H.M.S. Archer* (2), where, with regard to a personal action, this statute was treated as having application. That decision does not seem to me to affect the question which is here under consideration. It seems that the question which is here raised was not raised there, and did not arise. Counsel for the defendants said further that it would be inequitable to limit the
G operation in the manner for which the Attorney-General contends—that, for instance, the defendants in the action would not be at liberty to plead any immunity by reason of the Act, and they would not be able to raise any claim by way of counter-claim as they might have done if these proceedings had been taken within the two years limited by the Act. That is true, but the same argument, of want of equity, might be raised in a hundred cases where the interests of the State are held
H to be superior to the interests of individual claimants. So far as the general principle is concerned, I am bound to say I feel no doubt that the general principle entitles the Crown to the dismissal of this summons.

The argument was put on the further ground that by the express terms of the Maritime Conventions Act it must be taken that the Crown is not within these provisions. Section 10 of the Act provides that the Maritime Conventions Act shall be construed as one with the Merchant Shipping Acts, 1894 to 1907. Section 741 of the Merchant Shipping Act, 1894, provides this: “This Act shall not, except where specially provided, apply to ships belonging to Her Majesty.” Incorporating that section in the Act of 1911, there would be the very words for which counsel for the defendants urged the necessity. It seems to me that on both grounds the application of the defendants fails and must be dismissed. I should say this, that some contentions were raised in this action that it would be perfectly proper to raise in the pleadings in the case. If there be a specific ground of equity which
I

ought to be brought to the notice of the Crown, it can be alleged in the pleadings, and if there be any other specific ground on which the pleadings on behalf of the Crown ought to fail, that equally ought to be alleged. On this preliminary ground, I take the view that the summons is misconceived, and must be dismissed. A

Solicitors: *Treasury Solicitor; Ince, Colt, Ince & Roscoe.*

[Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.] B

THE ILE DE CEYLAN

[PROBATE, DIVORCE AND ADMIRALTY (Hill, J.), July 10, 1922]

[Reported [1922] P. 256; 91 L.J.P. 222; 128 L.T. 154; 38 T.L.R. 835; 16 Asp. M.L.C. 23] C

Shipping—Master's wages and disbursements—Maritime lien—Seizure of ship by sheriff under writ of fi. fa.—Priority of master's claim.

In June, 1921, a vessel was seized under a sheriff's writ of fi. fa. In August, 1921, the vessel was arrested by the marshal at the instance of the master in an action for wages and disbursements and was subsequently sold. The master's claim, which had arisen before the sheriff took possession under his execution, amounted to more than the proceeds of the sale. The master moved for judgment on his claim, and the sheriff claimed that his fees and costs ought to have priority over the master's claim. D

Held: the master having a maritime lien in respect of his claim, the sheriff could only seize the vessel subject to that lien, and, therefore, the master's claim had priority over the sheriff's claim. E

Notes. As to maritime liens, see 30 HALSBURY'S LAWS (2nd Edn.) 947 et seq., and for cases see 41 DIGEST 927 et seq. As to costs and expenses of execution, see 16 HALSBURY'S LAWS (3rd Edn.) 30 et seq.; and for cases see 21 DIGEST 606 et seq. F

Case referred to in argument:

The James W. Elwell, [1921] P. 351; 90 L.J.P. 355; 125 L.T. 796; 37 T.L.R. 835; 15 Asp. M.L.C. 418; 41 Digest 940, 8314. G

Motion for judgment in default of appearance by the master of the French auxiliary schooner *Ile de Ceylan* suing for his wages.

About two months before the issue of the writ in the master's action, the *Ile de Ceylan* had been seized by the sheriff of Glamorganshire under a writ of fi. fa. issued at the instance of execution creditors who had obtained a judgment against the owners of the vessel in the King's Bench Division. The vessel was subsequently sold by the marshal, and the fund in court amounted to £290 9s. 11d. The master claimed £962 0s. 9d. The sheriff asked that his fees and expenses should be preferred to the master's claim. H

E. Aylmer Digby for the master.

Rayner Goddard for the sheriff of Glamorganshire. I

HILL, J.—In this case the action is by the master of the *Ile de Ceylan*, suing for wages and disbursements. He issued his writ on Aug. 4, 1921, and the ship was arrested in his action by the marshal on the 16th of that month. In June, 1921, the sheriff had seized the vessel and was in possession of her at the time of the arrest by the marshal. The seizure by the sheriff was in execution of a judgment obtained by Messrs. Moxey, Savon & Co. in the King's Bench Division. On Nov. 14,

- A 1921, I made an order for the appraisal and sale of the vessel and reserved the rights of the execution creditors who were in possession by the sheriff under a writ of fi. fa. The execution creditors do not appear today. but the sheriff does appear, and asks that the first charge on the proceeds shall be his fees and expenses, in priority to the claim of the master. The total claim of the master considerably exceeds the net proceeds, which amount to £290 9s. 11d. But for the activities of
- B the marshal and the readiness of the dock company to fall in with his suggestion to reduce their dues, there would not have been any fund at all.

- The master asks for judgment, and that he must have. In ordinary course, the judgment would be subject to a reference, but, in the circumstances, I understand it is agreed that that is not necessary. But then comes the question who, in priority, has the first claim on the fund. The plaintiff master had a maritime
- C lien in respect of his claim, and his claim, to an amount more than sufficient to exhaust the whole of the proceeds, had arisen before the sheriff took possession under his execution. The master, therefore, to that amount had a maritime lien at the time the sheriff seized. A sheriff put in by an execution creditor can only seize that which is the property of the execution debtor. Therefore, he could seize the ship subject only to any maritime lien which was attaching to it. To
- D allow the sheriff to have first charge on the fund would be, it seems to me, to say that the sheriff is entitled to disregard the maritime lien on the property seized, and, in effect, to say that the sheriff's expenses are to be paid, not by the execution creditor, but by the master who has a maritime lien on the property of the execution debtor. The sheriff, in my opinion, has no such right. It is said that his expenses ought to be allowed as a first charge against the proceeds, because it was
- E by reason of his seizure that the fund was brought into court or the ship kept in this country so that she could be arrested in the master's action. I cannot find that any act of the sheriff or execution creditors has resulted in creating the fund for the benefit of the maritime lien holder in this case. The sheriff, of course, is not without remedy. He was employed by the execution creditors, who will remain liable for his costs and charges, but I cannot allow those costs and charges to be
- F paid out of the fund belonging to the maritime lien holder. There will be judgment for £962 and costs and an order for payment out to the plaintiff master of the fund in court.

Solicitors: *Downing, Middleton, & Lewis*, for *Downing & Handcock*, Cardiff;
Peacock & Goddard.

[Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.]

R. v. GODFREY

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Sankey, JJ.), October 18, 1922]

[Reported [1923] 1 K.B. 24; 92 L.J.K.B. 205; 128 L.T. 115; 86 J.P. 219; 39 T.L.R. 5; 67 Sol. Jo. 147; 27 Cox, C.C. 338]

Extradition—"Fugitive criminal"—Definition—Person never in country where offence committed—*Extradition Act, 1870* (33 & 34 Vict. c. 52), s. 26.

A person may be "accused or convicted of an extradition crime committed within the jurisdiction of any foreign State," and so may be a "fugitive criminal" within the meaning of the *Extradition Act, 1870*, s. 26, and liable to extradition under s. 6, even if he has never been in and has not fled from the foreign State, but throughout the material time has been in England.

R. v. Nillins (1) (1884), 53 L.J.M.C. 157, followed.

Notes. Referred to: *R. v. Secretary of State for India in Council, Ex parte Ezekiel*, [1941] 2 All E.R. 546.

As to who may be surrendered for extradition, see 16 HALSBURY'S LAWS (3rd Edn.) 564-565, and for cases see 24 DIGEST (Repl.) 988-990. For the *Extradition Act, 1870*, see 9 HALSBURY'S STATUTES (2nd Edn.) 874.

Cases referred to:

- (1) *R. v. Nillins* (1884), 53 L.J.M.C. 157, D.C.; 24 Digest (Repl.) 989, 7.
- (2) *R. v. Jacobi and Hiller* (1881), 46 L.T. 595, n., D.C.; 24 Digest (Repl.) 997, 50.
- (3) *State v. Hall* (1894), 44 American State Rep. 501.

Summons for a writ of habeas corpus, referred by ROMER, J., in chambers.

In July, 1922, a warrant was issued at Zurich, in Switzerland, for the arrest of the applicant, Sydney Godfrey, and of J. S. Aron and Goodman Phillips, on the charge of obtaining by false pretences a large quantity of silk from merchants in Switzerland. Aron had absconded, but the applicant and Phillips were arrested in England and orders for their extradition were made by the magistrate at Bow Street Police Court. According to the applicant's affidavit he was a British subject, and a silk merchant and partner in the firm of J. S. Aron, Godfrey & Co. He alleged that he had not left this country, and he contended that, although what was done in Switzerland was done by Aron and Phillips on behalf of the partnership, he had not done anything bringing him within the law of extradition.

The Attorney-General (Sir Ernest Pollock, K.C.), H. M. Giveen, and Roland Oliver for the Crown.

Whiteley, K.C., J. A. C. Keeves, and Erskine Harper for the applicant.

LORD HEWART, C.J.—This is an application for a writ of habeas corpus. On Sept. 13 last Sydney Godfrey, who describes himself in his affidavit as a silk merchant, was committed at Bow Street Police Court to be surrendered in pursuance of the *Extradition Act, 1870*, upon the request of the Swiss government, to take his trial in Switzerland upon a charge of obtaining goods by false pretences. He now seeks a writ of habeas corpus, which would have the effect, if it were granted, of defeating the warrant of committal for extradition.

There are two grounds upon which a writ of habeas corpus is sought. In the first place, it is said that upon the materials which were before the learned magistrate at Bow Street there was no evidence to support the charge against the applicant, and that, therefore, the magistrate, upon the question of fact, ought not to have granted the warrant. The evidence, or part of the evidence, has been laid before the court by the learned Attorney-General and by counsel for the applicant, and I think that there was, at any rate, evidence on which, if it was accepted, Sydney Godfrey might be found guilty of the charge which is made against him. I do not

A put it higher than that. The question for this court is not a question as to the weight of what is said to be evidence against the accused person. The only question on that part of the matter is whether there was any evidence, and I think that there was.

B The second and more substantial point which is urged is that this applicant is not a fugitive criminal within the meaning of the statute when that statute is read side by side with the treaty existing between this country and Switzerland. In order to see what exactly is the force of that submission it is necessary to look at the definition of fugitive criminal in s. 26 of the Extradition Act, 1870. It is as follows :

C "The term 'fugitive criminal' means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign State who is in, or is suspected of being in, some part of Her Majesty's Dominions."

I cannot help thinking that some confusion has arisen from the use of this word "fugitive." At the first blush it might appear that when a man is spoken of as being a fugitive criminal in this country what is meant is that he has fled from some other country to this country, but is that notion in the smallest degree necessary? Suppose that a man had indeed gone from this country to Paris or to Zurich, and had there committed a crime, and because he had committed the crime fled to this country, what he would be fleeing from in those circumstances would not be France or Switzerland. It would not be the amenities of France or Switzerland that he would be seeking to get away from. What he would be fleeing from would be the consequences of that which he had done. He would be fleeing from the trial and the punishment which he would fear might follow, and that word "fugitive" is, as it seems to me, equally capable of being satisfied whether the man has been in the other country or not. In the one case, as in the other, that which provides the content of the word "fugitive" is that he is seeking to escape the penal consequences of his act.

F The matter has been considered in more than one case. It has been considered to some extent in *R. v. Jacobi and Hiller* (2), and in *R. v. Nillins* (1). It is to be observed that in the latter case, which was heard in the year 1884, A. L. SMITH, J., in expressing his entire agreement with CAVE, J., used these words :

G "If there were no definition clause [in the statute] the question would admit of some argument, but s. 26 seems to me to put the matter beyond all doubt. The words are 'who is in' this country, not as the argument in support of the rule would make them be 'who has fled to this country.' "

What had been said by CAVE, J., was :

H "It is clear then, that the crime was committed in a foreign State. But against this it is urged, that to come within the definition [the accused person] must have fled from that State to some part of Her Majesty's Dominions, but there is nothing of that in the section. The words are 'who is in or is suspected of being in some part of Her Majesty's Dominions.' "

I In the argument which has been made before us attention has been directed to an American case of *State v. Hall* (3), where two things are to be observed. In the first place this decision of *R. v. Nillins* (1) was not referred to, and in the second place, ex concessis, there is no such definition in American law of a fugitive criminal as that which offers the stumbling block in the way of the applicant's argument here.

But it is said further upon that part of the matter that the definition in the Extradition Act, 1870, must, for the purposes of this case, be construed side by side with the relevant passages in the treaty between this country and Switzerland. Be it so, I cannot help thinking, on looking at the passages which have been cited, that the interpretation of the definition which was given in *R. v. Nillins* (1) is confirmed by the provisions in the Swiss Treaty. Article 1 of that treaty reiterates the expression "who shall be found within the territory," not "who has fled to."

It says "who shall be found within the territory," and, so far as our own government is concerned, the engagement is to deliver up in the circumstances and on the conditions stipulated in the treaty all persons who are charged with or convicted of certain crimes if they are found within our territory. It says "all persons," but, so far as the Swiss Federal Council are concerned, an exception is made. They agree to deliver up in the like circumstances and condition all persons excepting Swiss citizens, and that exception is further dealt within the second part of the article which provides that in the event of the Federal Council being unable, by reason of his Swiss nationality, to grant the extradition of an individual who, after committing in the United Kingdom one of the crimes or offences enumerated, may have taken refuge in Switzerland, the Federal Council engage to give legal effect, and so on, and to render certain assistance. The argument, if I follow it, is this, that because in dealing with that precise exception the language which the treaty employs is "should have taken refuge in Switzerland" it follows that the words "should have taken refuge in Switzerland" ought to be read into the first part of the article, and ought to be treated as limiting the operation of the Extradition Act, 1870, so as to cut down the definition of the term "fugitive criminal." It seems to me that there are at least two answers. There is another one, but I will mention two answers to that argument. In the first place the words which are employed in the first part of the article in the Swiss Treaty are the words "who shall be found within the territory of the other," but in the second place, and this is the second answer, even if the words had been "shall have taken refuge in," the argument, in my opinion, would still fail because it is not from the foreign country that refuge is taken. It is from the penal consequences of the act committed in the foreign country, and I cannot for myself see how, in any case, it is necessary to the idea of fugitiveness, if I may use such a word, that the person who is seeking to avoid punishment should have been physically in the country in which the crime was committed. The necessary ingredient of fugitiveness is supplied in all the cases by the circumstance that the culprit or the alleged culprit is seeking to escape the consequences of that which he is alleged to have done. I am not prepared myself to differ in the smallest degree from the finding of the learned judges in *R. v. Nillins* (1). Even if I were so disposed, I should still be bound by the authority of that decision. It appears to me, therefore, that there is nothing in either of the two grounds alleged on behalf of this applicant, and I think, therefore, that this summons should be dismissed.

AVORY, J.—I am of the same opinion. Two points have been taken by counsel in support of this application, and both of them have been well argued. The first point is that there was no such evidence before the learned magistrate at Bow Street Police Court as would justify him, if the offence had been one committed in this country, in sending this applicant for trial upon a charge of obtaining goods by false pretences with intent to defraud—the offence which is alleged to have been committed by him in Switzerland. Stated shortly, the question is whether there was *prima facie* evidence of the crime of obtaining goods by false pretences having been committed by this man Godfrey within the jurisdiction of the Swiss government. A man may commit a crime by means of an innocent agent, or he may commit it by means of a guilty agent. If he commits it by means of and through an innocent agent he is a principal. If he commits it by mean of or through a guilty agent he is, if it is a felony, an accessory before the fact. If it is a misdemeanour, he is a principal and is liable to be indicted as a principal. It is quite true, as counsel for the applicant says, that before one can indict him successfully as a principal in the misdemeanour there must be evidence that he was a party to the commission of the crime, either counselling it, or encouraging it, or assisting in the commission of it. In this case I cannot doubt that there was evidence from which any jury might reasonably infer that the applicant was a party to the commission of these offences in Switzerland, and from which they might infer that the partner in

A the business who made these false pretences and obtained the goods in Switzerland was doing that for the joint benefit of himself and the applicant who remained here in England, and who afterwards disposed of those goods for the benefit of that partnership. There being such evidence, the magistrate was justified, in my belief, in saying that *primâ facie* it appeared that the applicant had committed this crime within the jurisdiction of the Swiss government.

B The second point taken by counsel is that the applicant cannot be described as a fugitive criminal within the meaning of the Extradition Act, 1870, and it is necessary, as he says, that the Act should be read in conjunction with the treaty with Switzerland. It is clear that art. I of the treaty gives no colour or support to the contention that the applicant is not a fugitive criminal within the meaning of the Extradition Act, 1870, because, as has been pointed out by my Lord, it provides that this country undertakes to give up any person who has committed crimes in Switzerland, and who is found within the territory of this country. Counsel for the applicant suggests that the proviso to that article supports his contention, that this man cannot be described as a fugitive criminal, but the proviso to that article has no application to anybody but a Swiss subject. It is a provision inserted in consequence of the reservation in art. 1, that the Swiss government will not give up Swiss citizens to be tried in this country, and there is a kind of compensatory provision which provides that such persons shall nevertheless be liable to be tried in Switzerland for the offence which they have committed in this country. It seems to me it does not assist the argument in any way. The other matter which has been relied on in support of the contention has been already dealt with by my Lord. That is the case in America, *State v. Hall* (3), and with that decision I see no reason whatever to disagree. *Primâ facie* a man would not be described as a fugitive criminal unless he was fleeing from something, and I think that *primâ facie* the expression "fugitive criminal" would be understood to mean a person who is fleeing from some other country. That is the *primâ facie* meaning, but the definition in s. 26 of the Extradition Act, 1870 puts the matter beyond all doubt, because it defines a fugitive criminal as any person accused of an extradition crime committed within the jurisdiction of a foreign State who is in His Majesty's Dominions, and it is to be observed that there is a distinction drawn in that definition between the terms "fugitive criminal" and "fugitive criminal of a foreign State." Whereas the term "fugitive criminal" means any person accused of crime who is within the territory of this country, the term "fugitive criminal of a foreign State" means a fugitive criminal accused or convicted of an extradition crime committed within the jurisdiction of that State. The effect of that distinction being drawn there seems to make it impossible to uphold the contention that a fugitive criminal necessarily means a person who has fled from a foreign State. My own view of *R. v. Nillins* (1) is that we are bound by it. I prefer to say that, feeling bound by it, I should follow it without expressing any opinion as to whether it is worthy of further consideration. I express no opinion at all about it. It seems to me that the definition puts the matter beyond any question, and therefore I agree that this application should be dismissed.

SANKEY, J.—I agree, and on the first point taken by counsel for the applicant I do not desire to add anything. On the second point counsel invites us to reconsider *R. v. Nillins* (1), which was decided as far back as 1884. In my view we are bound by that decision, but also, in my view, that decision is correct. The question turns upon the meaning of the words "fugitive criminal," and, whatever might be the meaning to be attached to those words if they were not defined, as far as English law is concerned they have been defined by s. 26 of the Extradition Act, 1870. Whether they have been so defined by any American statute I am unaware, but as my Lord the Lord Chief Justice, has pointed out, the words "fugitive criminal" by s. 26 of the Extradition Act, 1870, mean "Any person accused or convicted of an extradition crime . . . who is . . . in some part of Her Majesty's Dominions." Now in

R. v. Nillins (1), A. L. SMITH, J., pointed out at the end of his judgment that the words are "who is in this country" and not "who has fled to this country," but my brother has pointed out also what appears to me to be a germane consideration, that the term "fugitive criminal" does not mean any fugitive person accused who is in any part of His Majesty's Dominions. The word "fugitive" is not repeated before the word "person," and it is repeated before the word "criminal." If, as has been suggested by an eminent writer as far back as 1888 (SIR E. CLARKE ON EXTRADITION (3rd Edn.) at p. 225), the judgment in *R. v. Nillins* (1) may lead to the possibility of a very serious political difficulty, the matter is, in my view, one to be remedied by an amendment of the law rather than by departing from a decision which has stood for very nearly forty years, and which, as I have already stated, appears to me to be right in view of the definition in s. 26 of the Act. I agree that this summons should be dismissed.

Summons dismissed.

Solicitors: *Treasury Solicitor; S. Myers & Son.*

[Reported by J. F. WALKER, ESQ., Barrister-at-Law.]

PARR v. SNELL AND OTHERS

[COURT OF APPEAL (Lord Sterndale, M.R., Scrutton and Younger, L.JJ.), July 20, 1922]

[Reported [1923] 1 K.B. 1; 91 L.J.K.B. 865; 128 L.T. 106]

Practice—Parties—Defendants—Joint contractors—Action for unliquidated damages—Judgment in default of defence for damages to be assessed against one defendant—Final judgment against that defendant after assessment—Effect on liability of other defendants.

A plaintiff claiming unliquidated damages against joint contractors who signs interlocutory judgment for damages to be assessed against one joint contractor in default of defence, and who then, after damages have been assessed, signs a final judgment against that contractor, thereby discharges the other joint contractors from their liability and so precludes himself from continuing the proceedings against them.

Kendall v. Hamilton (1) (1879), 4 App. Cas. 504, applied.

Notes. R.S.C. Ord. 27, rr. 2–5, have been altered by R.S.C. (No. 1), 1930, (No. 3), 1936, and (No. 1), 1957; despite these alterations, and the differences between the provisions of the r. 2, r. 4, and r. 5 considered in this case and the corresponding provisions of the present r. 3, and r. 4, this case remains authority for the proposition stated in the headnote.

Referred to: *The Koursk*, [1924] All E.R. Rep. 168; *Pirie v. Richardson*, [1927] 1 K.B. 448.

As to joint contractors as defendants, see 30 HALSBURY'S LAWS (3rd Edn.) 314; and for cases see DIGEST, Practice 389.

Cases referred to:

- (1) *Kendall v. Hamilton* (1879), 4 App. Cas. 504, 515, 516; 48 L.J.Q.B. 705; 41 L.T. 418; 28 W.R. 97, H.L.; Digest Practice 430, 1253.
- (2) *King v. Hoare* (1844), 13 M. & W. 494; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 14 L.J.Ex. 29; 4 L.T.O.S. 174; 8 Jur. 1127; 153 E.R. 206; 36 Digest (Repl.) 523, 870.

- A (3) *Brinsmead v. Harrison* (1871), L.R. 6 C.P. 584; 40 L.J.C.P. 281; 24 L.T. 798; 19 W.R. 956; affirmed (1872), L.R. 7 C.P. 547; 41 L.J.C.P. 190; 27 L.T. 99; 20 W.R. 784, Ex.Ch.; Digest Practice 154, 1368.
- (4) *Goldrei, Foucard & Son v. Sinclair and Russian Chamber of Commerce in London*, [1918] 1 K.B. 180, 191; 7 L.J.K.B. 271; 118 L.T. 151; 34 T.L.R. 74, C.A.; Digest Practice 154, 1369.
- B (5) *Moore v. Flanagan*, [1920] 1 K.B. 919; 89 L.J.K.B. 417; 122 L.T. 739, C.A.; 21 Digest 225, 581.
- (6) *Hammond v. Schofield*, [1891] 1 Q.B. 453; 60 L.J.Q.B. 539; 7 T.L.R. 300, D.C.; 21 Digest 219, 546.

Also referred to in argument :

- C *Morel Bros. v. Earl of Westmorland*, [1904] A.C. 11; 73 L.J.K.B. 93; 89 L.T. 702; 52 W.R. 353; 20 T.L.R. 38, H.L.; 21 Digest 244, 579.

Appeal by the defendant, D. N. Quertier, from a decision of SHEARMAN, J.

The plaintiff commenced this action against the three directors of a motor engineering company, known as the Kensington Light Car, Ltd., to recover £500, as being the agreed purchase price of 500 shares in the company previously purchased by him, and, alternatively, for £500 damages for breach of an undertaking in writing dated Feb. 9, 1920 and given to him, which was in the following terms :

- “We, J. S. Snell, R. Saxon Snell, and D. N. Quertier hereby undertake and agree with G. C. Parr, secretary of the Kensington Light Car, Ltd., that upon his relinquishing his position as secretary to the Kensington Light Car, Ltd., the five hundred ordinary shares of one pound each in the Kensington Light Car, Ltd., held by G. C. Parr, secretary to the Kensington Light Car, Ltd., if he shall so desire, shall be purchased from him by a person either appointed by us or through G. C. Parr, suitable to fulfil the vacant position vacated by G. C. Parr or by persons delegated by us at a minimum rate of one pound per share, or if the market value of the shares be higher than one pound per share then shall such shares be purchased from G. C. Parr, secretary to the Kensington Light Car, Ltd., at their market value.—(Signed) J. S. SNELL, R. SAXON SNELL, D. N. QUERTIER.”

- In May, 1920, the defendant Quertier, having charged the Snells with fraud, was suspended from a service agreement into which he had entered with them, and he resigned his directorship. Neither of the defendants Snell delivered any defence, and the plaintiff signed judgment against them in default of defence for damages to be assessed. Subsequently, the master assessed the damages and final judgment was entered for the amount assessed. After final judgment had been entered against the other two defendants the action was continued against the defendant Quertier. He pleaded (inter alia) that he was not liable on the agreement, and that it was a joint agreement and not a joint and several agreement. He also contended that, as the plaintiff had recovered final judgment against the two other defendants, the cause of action against him was merged in that judgment. SHEARMAN, J., gave judgment in favour of the plaintiff, holding that the undertaking of Feb. 9 was a joint and several undertaking, but expressed sympathy with the defendant Quertier, as it was evident that he was the victim of his co-directors. From this decision the defendant Quertier appealed.

- I *Hawke, K.C.* and *Walter Frampton* for the defendant.
Sir Cassie Holden for the plaintiff.

LORD STERNDALÉ, M.R.—I think that this appeal must succeed. I cannot say that I am ever very enthusiastic about purely technical points; but persons are entitled to take them. The point that is taken is this: that this was a joint contract, and, being a joint contract, there has been a final judgment signed against two of the joint contractors; and that it is not competent for the plaintiff, having obtained the final judgment against two joint contractors, to go against the third.

It is not necessary to go through the facts and the particular documents at length. A
I cannot agree with the learned judge that this was a joint and several contract.
I think it was a joint one: and I think it is only necessary to read it in order to
see that. It is not a matter that admits of much discussion, or indeed of any:
it entirely depends upon the conclusions to be drawn from the language of the
agreement, which is this [His LORDSHIP read the undertaking of Feb. 9, 1920]:
It is not a thing that admits of very much argument or discussion. The learned B
judge expressed some doubt about it, but it seemed to him that it was a joint
and several contract. It seems to me clear that it was a joint contract and not a
joint and several contract.

The next thing to look at is to see what was the object of the plaintiff in bring-
ing his action. He sets out the agreement and the circumstances under which it
was made; and then he alleges his readiness and willingness to transfer the shares C
to the defendants or as they may direct; and then he says that the defendants have
failed to provide for the purchase of the said shares from him. Then in his prayer
he makes an alternative claim: the first is for £500 the agreed purchase price of
the said shares. He cannot recover the purchase price of the shares without handing
over the shares, and he has recovered a judgment for £500 without having handed D
over the shares or without having any obligation placed upon him to do so. The
alternative is £500 damages for breach of the said agreement; that is, a breach of
an agreement to find a purchaser for the shares or to purchase them themselves. It
is quite clear that this is not necessarily the sum of £500 at all. Five hundred
pounds is the minimum price at which the shares were to be bought; but it does
not at all follow that the shares might not have been worth something—as a matter E
of fact I believe they were not, but they might have been worth something—and
in that case the damages to which he would have been entitled would have been the
difference between the £500 which he was to get and the value of the shares which
he had not got to part with because he did not get the £500. He had those two
alternative claims. Having had those two alternative claims he then elected or de-
cided upon which of them he was going to proceed, and he signed an interlocutory F
judgment against the two Snells, who had made default in delivering the defence
upon the second alternative, namely the claim for damages, because he signed an
interlocutory judgment to recover against the defendants, J. S. Snell and R. Saxon
Snell, damages to be assessed. He then proceeded with his action against the other
defendant, and obtained a judgment for damages against him. In my opinion that
claim upon which he proceeded, and on which he got these judgments, was not a G
claim for liquidated sum, it was a claim for unliquidated damages. Before he pro-
ceeded against the present appellant, and got this judgment for damages against
him, he had done this: he had got an assessment of the damages due under the
interlocutory judgment against the Snells for £516 12s. 3d. The master proceeded
and he assessed the damages, and then the plaintiff, having got the damages
assessed, signed final judgment against the Snells for the amount that had been H
assessed, and the question is whether that is a bar to his proceeding against the
other defendant.

Apart from any rules of court or any statutory provisions to the contrary, it is
quite clear that a judgment against one joint contractor or one tortfeasor is a bar
to proceeding against the others. It is not necessary to trouble to read the cases
about that. It is established in *Kendall v. Hamilton* (1), *King v. Hoare* (2), and
Brinsmead v. Harrison (3) quite clearly with regard to both contractors and joint I
tortfeasors. Therefore, apart from some special provision by statute or by rule,
it seems to me quite clear that this judgment is a bar to proceeding against the
other defendant. There are a certain number of rules contained in Ord. 27 which
have been passed to mitigate the hardship occasioned by the application of the
doctrine in *Kendall v. Hamilton* (1), *King v. Hoare* (2), and *Brinsmead v. Harrison*
(3); and, unless the plaintiff can bring himself within one of those rules, the

A general doctrine must apply. The learned judge seems to have thought that a dictum in a judgment of mine in *Goldrei, Foucard & Son v. Sinclair* (4) had something to do with this matter; but, in my opinion, it has nothing at all to do with it. We were considering a totally different matter, and it may be that a remark of one of my colleagues may have some bearing on this point; but that is not the judgment to which the learned judge referred; and in any case I do not think the opinions expressed by myself and the other members of the court in any way touch the matter that we have decided here. I think that Ord. 27, r. 5, is the only provision that affects this case at all; and that is to this effect:

C "When in any such action as in r. 4 mentioned [that is, for pecuniary damages only and some other alternative which does not concern this action] there are several defendants, if one or more of them make default, as mentioned in r. 2, the plaintiff may enter an interlocutory judgment against the defendant or defendants so making default, and proceed with his action against the others. And in such case the value and amount of damages against the defendant making default shall be assessed at the same time with the trial of the action or issues therein against the other defendants, unless the court or a judge shall otherwise direct."

D I think that the note in the YEARLY PRACTICE (1922), p. 362, to that latter part is probably right; it is this:

"If the action does not proceed to trial, or if for any other sufficient reason it is desirable to do so, a master may on summons order the damages to be assessed by writ of inquiry or otherwise."

E I think that is right in two ways. I think it is right as suggesting that the primary object of that provision for assessing at a different time was to provide for the case where the action did not proceed against the other defendant; but it certainly is applicable to where there is any other sufficient reason, as the note says; and I believe the ordinary practice would be, if the second part of the rule which provides that the assessment may be at a different time if the court or a judge shall so direct, to proceed by summons and ask him to direct a different time. It is because I see no reason to suppose that anything of the kind would have been done in this case that I think the assessment was probably irregular. Probably the gentleman who took the documents to the master had not observed the matter, and never called the master's attention to it; and the master was never asked in words to direct a different time, but was simply asked to give an appointment to assess the damages, and not having attention drawn to the fact that there was still a defendant against whom judgment was not given, he gave judgment in the ordinary course.

G What I want to point out in regard to that rule is this. It clearly provides that an interlocutory judgment may be signed, and the action may still proceed against the other defendant; but, in my opinion, if the assessment was not made at the same time, at the time of the trial against the other defendant, then I do not think obtaining assessment before would of itself have been sufficient to bar the action against the other defendant. It is, I think, pretty obvious from the provision that normally the damages against the defendant in default shall be assessed at the same time as the trial of the action against the other defendant; that the rule was not contemplating a final judgment against the defaulting defendant before the trial came on against the non-defaulting defendant; and there is no provision whatever in that rule that if the plaintiff chooses not to stop at an interlocutory judgment plus an assessment, but to go on and add to both those things a final judgment, that is not to be a bar. Therefore, in my opinion, the ordinary rule applies—that he is barred against the other defendant by having obtained the final judgment.

I It may be well to point out that where the rules are dealing with final judgment, there is an express provision that the plaintiff may sign final judgment (see rr. 2 and 3) and proceed against the others. Here in r. 5 the only provision is that he may

sign interlocutory judgment and go on; but there is nothing to protect him against the operation of the ordinary law, if he does not stop at that but gets a final judgment. Therefore I think by signing this judgment he has precluded himself from proceeding against the defendant against whom he afterwards obtained the judgment. The appeal will be allowed and judgment entered for the defendant with costs here and below.

SCRUTTON, L.J.—I would content myself with concurring in what the Master of the Rolls has said, but as we are differing from the learned judge I think it is right to express my opinion. We are dealing with a settled system of law; we are not entitled to mould it or disregard it because, as I think is the case in this case, the rule is a technical one which does not in any way affect the merits of the particular case. The technical rule of law which we have to apply is that where one has joint contractors, if one signs judgment against one one discharges the other. I have had occasion to deal with that rule in *Moore v. Flanagan* (5) ([1920] 1 K.B. at p. 925); and I there said, and I think it is right, that the basis of the rule is as stated by VAUGHAN WILLIAMS, L.J., in *Hammond v. Schofield* where he said ([1891] 1 Q.B. at p. 457):

“The basis of this defence is not the election or unconscious election, if there can be such a thing, of the plaintiff, but the right of the co-contractor when sued in a second action to insist, though not a party to the first action, on the rule that there shall not be more than one judgment on one entire contract. Another technical way of putting it is to say that the contract is merged in the judgment, and therefore the cause of action on the contract is gone. A more substantial way of putting the matter is that each joint contractor has a right to have his contractors joined as parties so as to have them all before the court.”

The first question here is: Is this a joint contract, because, if it is not, the technical rule does not apply? With great deference to the learned judge, it seems to me reasonably clear that this is a joint contract. The two Snells and Quartier agree that if the secretary relinquishes his position, his shares shall be purchased from him by a person either appointed by them or by persons delegated by them. That seems to me to be a contract to find a purchaser approved by the three, and to be clearly a joint contract and not a separate one. That being so, in this case judgment has been signed against two, and the third says: “I am discharged”; and he will be discharged under the technical rule in *Kendall v. Hamilton* (1) unless there is some rule or some statute which has prevented the operation of the old rule. There is a set of order and rules dealing with the question—Ord. 13, judgment signed in default of appearance; Ord. 14, judgment signed on Ord. 14; Ord. 27, judgment signed in default of pleading. In Ord. 13 and in Ord. 27, if it is a case of a debt or liquidation demand, one may sign judgment against one for default of appearance or default of pleading and yet go on and sign judgment against the others. The same applies to Ord. 14, which can only be brought for debt or liquidated demand; so for any debt or liquidation demand the old rule has been done away with by the rules under the Judicature Act, 1873. I think there is no doubt that this is not a liquidation demand. In the case of actions which are not for a debt or liquidated demand, but are for damages or unliquidated demands, the wording of the rule is altered. In the case of default of appearance or default of pleading the plaintiff may sign an interlocutory judgment and proceed against the other defendant and assess damages; but there is nothing to allow him to sign final judgment and yet go on against the remaining co-contractor. That means, in my view, that the old rule of *Kendall v. Hamilton* (1) still survives as to that class of case.

What has happened in this case is, I suspect, quite irregular. An interlocutory judgment has been regularly signed. The result of that is that the damages should

A be assessed at the trial of the action against the third contractor, as they might be, but the rule says that should be done unless otherwise ordered. No order is produced to us otherwise, but in fact the master has assessed damages, and I strongly suspect he was asked to given an appointment without it occurring to anyone that he should have had a summons and made an order on it; but he has assessed damages and then, instead of entering a separate final judgment, he has done that
 B which is provided for by the regular practice, the amount assessed has been entered up in the interlocutory judgment, which is thus converted into a final judgment. The effect of that appears to me to be, following the old technical rule to which I have referred, that the remedy against the third contractor has been destroyed by judgment being obtained against the first two, it being impossible to have two final judgments on the same contract. For these reasons, which I agree are technical,
 C but which are based on rules which we must enforce, I think the appeal must be allowed, with the consequences indicated by the Master of the Rolls.

YOUNGER, L.J.—I am of the same opinion.

Appeal allowed.

D Solicitors: *Elvy, Robb & Welch; Joynson-Hicks, Hunt, Cardew & McDonald.*
 [Reported by J. L. DENISON, Esq., Barrister-at-Law.]

E

R. v. PHILLIPS

[KING'S BENCH DIVISION (Lord Hewart, C.J., Darling and Branson, JJ.), July 28, 1922]

[Reported 128 L.T. 113; 86 J.P. 188; 38 T.L.R. 897; 67 Sol. Jo. 64; 27 Cox, C.C. 323]

Extradition—Bail—Remand—Charge of misdemeanour—Discretion of magistrate.

A person arrested on a warrant under the Extradition Act, 1870, and charged as a fugitive criminal with a crime for which he is liable to be extradited is
 G in the same position as a defendant under remand on a charge of misdemeanour in that he has no right to bail while under remand.

Notes. As to bail for fugitive criminals charged with extradition crimes see 16 HALSBURY'S LAWS (3rd Edn.) 571; and for cases see 24 DIGEST (Repl.) 1004–1006. For the Extradition Act, 1870, see 9 HALSBURY'S STATUTES (2nd Edn.) 874 and for the Habeas Corpus Act, 1679, see *ibid.* vol. 6, p. 83.

H

Cases referred to:

- (1) *Re Frost* (1888), 4 T.L.R. 757, D.C.; 14 Digest (Repl.) 178, 1430.
- (2) *R. v. Manning* (1888), 5 T.L.R. 139, D.C.; 14 Digest (Repl.) 179, 1434.
- (3) *R. v. Larkin* (1914), 48 I.L.T. 95; 14 Digest (Repl.) 178, *860.
- (4) *R. v. Spilsbury*, [1898] 2 Q.B. 615; 67 L.J.Q.B. 938; 79 L.T. 211; 62 J.P. 600; 14 T.L.R. 579; 42 Sol. Jo. 717; 19 Cox, C.C. 160, D.C.; 14 Digest (Repl.) 179, 1433.
- (5) *R. v. Foote* (1883), 10 Q.B.D. 378; 52 L.J.Q.B. 528; 48 L.T. 394; 48 J.P. 36; 31 W.R. 490; 15 Cox, C.C. 240, C.A.; 14 Digest (Repl.) 183, 1502.

I

Summons for bail, referred to the Divisional Court by LUSH, J., sitting in chambers.

The defendant, Goodman Phillips, had been arrested on a warrant issued on July 11, 1922, under s. 8 (2) of the Extradition Act, 1870, by a metropolitan

magistrate sitting at Bow Street Police Court. The defendant was brought before the magistrate on July 12, 1922, was charged with obtaining money by false pretences in Switzerland, and, owing to the non-arrival of information from that country, was remanded for a week. On July 19, 1922, the defendant was again remanded in custody. The magistrate declined to grant bail and stated that it was not the practice to grant it in extradition cases. On July 20, 1922, a summons for bail was taken out on behalf of the defendant before the judge in chambers. This summons came before LUSH, J., in chambers, on July 24, 1922 and he referred it to the court.

The Attorney-General (Sir Ernest Pollock, K.C.), H. M. Giveen, and Roland Oliver for the Crown.

Hemmerde, K.C., and F. S. Arnold Baker, for the defendant.

LORD HEWART, C.J.—It is said on behalf of the defendant, Goodman Phillips, in the first place, that, as the offence which is charged is a misdemeanour, this court must of necessity grant bail on application made on his behalf. It is said, secondly, that the position of an accused person charged with a misdemeanour under the provisions of the Extradition Acts is not in any respect different from the position of a person accused of committing a misdemeanour within the jurisdiction of these courts.

With regard to the first of those propositions, namely, that this court is bound, where the offence in question is a misdemeanour, to grant bail to the accused, certain authorities have been mentioned. They are *Re Frost* (1), a case which was mentioned but not in any way investigated; *R. v. Manning* (2) and an Irish case, *R. v. Larkin* (3). The proposition is obviously a remarkable one. It amounts, among other things, to this: that, although under s. 16 of the Summary Jurisdiction Act, 1848 [now Magistrates' Courts Act, 1952, s. 105 (1) (b), 2], justices dealing with an application for bail in a case of misdemeanour have a discretion to grant bail or to refuse it, this court can do nothing except grant it. This is a proposition which, speaking for myself, I should be very reluctant to accept unless it were made clear that there was binding and conclusive authority to support it. It would involve, for instance, this odd conclusion that the legislature had empowered justices to grant or refuse bail in a class of case in which, if they refused bail, the accused person had only to apply to this court and the order of the justices would, not upon discussion, not as a result of argument, but ipso facto and automatically, be reversed. In my opinion, the authorities cited in support of that proposition do not really support it. It is quite true that in *Re Frost* (1) there are particular words which, stripped from their context, do appear to lend support to the proposition, but the point was not fully argued. and in *R. v. Larkin* (3), a case heard by a single judge of great distinction in Ireland, it appears from the report that the two leading authorities which, in my opinion, establish the contrary proposition were not so much as mentioned. Those two authorities are *R. v. Spilsbury* (4) and *R. v. Foote* (5). *R. v. Foote* (5) was the earlier of the two, and in that case, the offence being a misdemeanour, application was made to the learned judge who had ordered, upon a disagreement of the jury, a fresh trial before a different jury, for admission of the prisoners to bail. The judge refused that application. The application then came before this court, consisting upon that occasion of GROVE and MATHEW, JJ., and it appears from the report that this proposition was stated by counsel in so many words. It was argued that the Queen's Bench Division had inherent jurisdiction to grant bail in all cases and that misdemeanour is always bailable as of right. The application was dismissed, and there was a further appeal to the Court of Appeal which was in vain, because it related to a criminal matter. In *R. v. Spilsbury* (4) a case which arose under the Fugitive Offenders Act, 1881, in the year 1898, judgment was delivered by LORD RUSSELL OF KILLOWEN, C.J., WRIGHT and KENNEDY, JJ. In my view, it is immaterial that the case arose under the Fugitive Offenders Act, 1881 because under this Act the power to grant bail stands upon the same footing with the power to grant bail in

A the case of offences committed within the jurisdiction. In giving judgment in that case WRIGHT, J., said this ([1898] 2 Q.B. at p. 624):

"I wish to add this observation, that cases arising under the Fugitive Offenders Act will not in all instances apply as precedents under the Extradition Acts. Under the Fugitive Offenders Act it is generally a question between different parts of Her Majesty's Dominions, but under the Extradition Acts the jurisdiction depends in all cases on treaties with foreign countries."

B I think, therefore, that that proposition cannot be sustained. It is not, in my view, the law that this court has no power to refuse an application for bail in a case of misdemeanour committed within the jurisdiction.

C Even if that were so, for my own part I do not assent to the second proposition—that under the Extradition Act a case of misdemeanour is, so far as the question of bail is concerned, upon the same plane with misdemeanour committed within the jurisdiction. The reason is the reason given by WRIGHT, J., in a single sentence in the case to which I have referred: "Under the Extradition Acts the jurisdiction depends in all cases on treaties with foreign countries." What does that mean? It does not mean, of course, that we are to extend to foreigners a consideration
D which we deny to our own fellow subjects. What it means I think is that this country has entered into an agreement with a foreign country under the comity of nations and has deliberately taken upon itself the obligation, upon a charge properly made, to hand over to that foreign country a person in this country who is charged with the commission of an offence in that country. That is an obligation which this country has entered into, and the scrupulousness of conduct with which that
E obligation is regarded and performed is not measured by any particular tenderness shown to the foreign country, but is measured by the duty which, having entered into an obligation of that kind, we conceive to be owing to ourselves. It becomes a point of honour when a treaty of that kind has been made that special care should be taken to fulfil it. That does not mean, nor did the learned Attorney-General so contend, that in no case under the Extradition Acts is the question of bail to be
F considered. What it does mean is that where a case is under the Extradition Acts there is, in addition to the normal considerations which apply to a question of bail, an added ingredient due to the fact that a treaty has been made with a foreign country. The learned Attorney-General did not say that the learned magistrate here had not the power to grant bail. He denied that the accused had the right to insist upon bail. In that contention I think the learned Attorney-General was
G right. It is a matter for the discretion in the first instance of the learned magistrate whether bail in such a case shall be granted or refused.

It is said here upon the facts of this case that, if the matter be regarded as one of discretion, the learned magistrate failed to exercise his discretion, and, on the contrary, applied unreflectingly a rule—I think counsel for the defendant called it a wooden rule—supposed to be of universal application in all cases arising under
H the Extradition Acts. I do not think that anything which the learned magistrate has said or done justifies that criticism. It is quite true that he said it was not the practice to grant bail in cases of extradition. That does not mean that it is the practice always to refuse bail. I think it meant no more than that which I have indicated already, that in such a case there are special grounds for care and caution. The case now comes before us upon these facts with a certain quantity of
I fresh material which was not before the learned magistrate at the time when he gave his decision, and in my view that material confirms the conclusion that he exercised a wise discretion in refusing bail in this case. It does not appear to me that it is true to say that he was bound to grant bail, nor does it appear to me that it is true to say that this court is bound to grant bail. For these reasons I think that this summons must be dismissed.

DARLING, J.—I agree. I entirely agree with what the Lord Chief Justice has said concerning the peculiar punctilio which this country observes when dealing

with applications which involve the consideration of a treaty made with a foreign country that we will surrender in certain circumstances British subjects to be tried abroad. I do not desire to add a word to what my Lord has said upon that subject, but merely to adopt what he has expressed. I only desire to say a word on *R. v. Larkin* (3). There is no dispute that, as reported, that case is directly contrary to what we are deciding to-day, but it is also directly contrary to *R. v. Foote* (5) and *R. v. Spilsbury* (4). Those are cases decided by a full Court of Queen's Bench. They do not appear to have been cited to the learned judge, *MOLONY, J.*, who decided *R. v. Larkin* (3), and in my opinion *R. v. Larkin* (3) was decided contrary to authority, and cannot be considered in any way binding upon this Court. It is rather curious that counsel who argued for Larkin put forward the contention which counsel for the defendant put forward here when he began his argument. On behalf of the Crown Mr. Riordan appeared, and he really did not effectively contest it, and I do not know that the Crown there meant to oppose bail being granted to Larkin. Mr. Riordan opposed the application on behalf of the Crown, and he said that it was a very serious responsibility to admit Larkin to bail if there was a danger of his continuing the conduct for which he was committed for trial, because it was alleged against him that owing to his speeches and owing to his general incitements to the people he had been the direct cause of riots and tumults that had taken place. He then stated that the Crown could not consent to the accused being admitted to bail. Then he went on to say that under the Habeas Corpus Act, 1679, every magistrate had a discretion to admit a prisoner to bail who had been charged with a misdemeanour. That is perfectly correct. Then he said that, so far as the King's Bench was concerned, under the Habeas Corpus Act, 1679, the Court might grant the application, and that accordingly the position which the Attorney-General took up was that he did not consent to the application and left the matter there, but Mr. Riordan did not say on behalf of the Attorney-General that he agreed that the Court of Kings Bench was bound to grant the application. The learned judge, *MOLONY, J.*, gave a judgment which I think shows that he thought that he was bound to grant the application, but, as I have indicated, the two cases which ought to have led him to another conclusion were never mentioned to him. Therefore, it is not very remarkable that he gave a decision which in the opinion of my Lord, I gather, and of myself, was a decision contrary to decided cases, cases decided in this Court which should have been binding.

BRANSON, J.—I agree.

Summons dismissed.

Solicitors: *Director of Public Prosecutions; Edells & Co.*

[*Reported by J. F. WALKER, ESQ., Barrister-at-Law.*]

A

BARCLAYS BANK v. TOM

[COURT OF APPEAL (Scrutton, L.J. and Eve, J.), November 21, 1922]

[Reported [1923] 1 K.B. 221; 92 L.J.K.B. 346; 128 L.T. 558]

Practice—Third party procedure—Right of third party to counterclaim against server of notice.

B

A person served with a third-party notice may defend himself against the person serving the notice in any way in which a defendant in an action may defend himself against the plaintiff, and so may counterclaim against the person serving the third party notice.

C

Dictum of COZENS-HARDY, L.J., in *McCheane v. Gyles* (1), [1902] 1 Ch. at p. 301, applied; *Eden v. Weardale Iron & Coal Co.* (2) (1887), 28 Ch.D. 333, distinguished.

Notes. The Judicature Act, 1873, s. 24 (3) has been repealed but the provisions contained therein are now reproduced in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 39 (2), and in R.S.C. Ord. 16A, r. 3.

D

As to the position of a third party in an action, see 30 HALSBURY'S LAWS (3rd Edn.) 446; and for cases see DIGEST, Practice 446. For the Supreme Court of Judicature (Consolidation) Act, 1925, see 18 HALSBURY'S STATUTES (2nd Edn.) 472.

Cases referred to :

(1) *McCheane v. Gyles*, [1902] 1 Ch. 287; 71 L.J.Ch. 183; 86 L.T. 1; 50 W.R. 376; 46 Sol. Jo. 175, C.A.; Digest Practice 447, 1358.

E

(2) *Eden v. Weardale Iron and Coal Co.* (1887), 35 Ch.D. 287; 56 L.J.Ch. 400; 56 L.T. 464; 35 W.R. 507, C.A.; Digest Practice 453, 1398.

Also referred to in argument :

Street v. Gover, Gover v. Street (1877), 2 Q.B.D. 498; 46 L.J.Q.B. 582; 36 L.T. 766; 25 W.R. 750, D.C.; 40 Digest (Repl.) 454, 393.

Re Salmon, Priest v. Uppley (1889), 42 Ch.D. 351; 62 L.T. 270; 5 T.L.R. 315, 583, C.A.; Digest Practice 459, 1454.

F

Interlocutory Appeal from an order of GREER, J., at chambers refusing to strike out a counterclaim by a third party.

The action was brought by the plaintiff bank as holders for value of certain bills of exchange drawn by Sir Bernard Oppenheimer and accepted by the defendant, Max Tom, which bills had been dishonoured. The defendant served upon the executrix of the drawer a third-party notice, whereby he claimed an indemnity, alleging that the bills had been accepted for the accommodation of the drawer. The third party in answer, alleged that the drawer had had numerous transactions with the defendant involving complicated cross-accounts between them; that at the date of his death they had not been settled; and that if an account were taken it would be found that the defendant was indebted to the estate of the drawer. She accordingly counterclaimed against the defendant for an account. The defendant applied at chambers to have the counterclaim struck out on the ground that a third party cannot counterclaim against the defendant in an action. The master dismissed the application, and his decision was affirmed by GREER, J. The defendant appealed.

H

R. J. White for the defendant.

Wallington for the third party.

I

SCRUTTON, L.J.—This appeal raises a question of considerable importance. The question whether a third party can counterclaim against the defendant requires careful consideration, because BOWEN, L.J., when deciding, in *Eden v. Weardale Iron and Coal Co.* (2), that a third party could not counterclaim against the original plaintiff, said (28 Ch.D. at p. 338) :

"If the application had been for leave to the third party to counterclaim against the defendant, I should have desired to consider the question. It appears to me an open question whether the court could have given leave."

It is important to keep clearly in mind what the third-party procedure is. A plaintiff has a claim against a defendant. The defendant thinks that if he is liable, he has a claim over against a third party. With that matter between the defendant and the third party the plaintiff has clearly nothing to do, not being concerned with the question whether the defendant has a remedy against somebody else. His remedy is against the defendant. But the defendant is much interested in getting the third party bound by the result of the trial between the plaintiff and himself, for otherwise he might be at a great disadvantage if, having fought the case against the plaintiff and lost, he had then to fight the case against the third party possibly on different materials, with the risk that a different result might be arrived at. The object of the third-party procedure is therefore, in the first place, to get the third party bound by the decision given between the plaintiff and the defendant. In the next place, it is directed to getting the question between the defendant and the third party decided as soon as possible after the decision between the plaintiff and the defendant, so that the defendant may not be in the position of having to wait a considerable time before he establishes his right of indemnity against the third party while all the time the plaintiff is enforcing his judgment against the defendant. And, thirdly, it is directed to saving the extra expense which would be involved by two separate independent actions. With these objects in view the third-party order usually provides that the third party may appear at the trial between the plaintiff and the defendant.

When the third party has so appeared, as party to the proceedings, various questions arise as to what he can do. Can he counterclaim against the plaintiff? The answer is "No," for such a counterclaim would have nothing to do with the issue in the action to which he is admitted as a party—*Eden v. Weardale Iron and Coal Co.* (2). Can he interrogate the plaintiff? The answer is "Yes," if the object of the interrogatories is to show that the plaintiff's claim against the defendant cannot be supported—*Eden v. Weardale Iron and Coal Co.* (2). I remember in one case in which I was counsel the third party was, on the same principle, allowed to raise a defence on behalf of the defendant which the defendant would not raise on his own behalf. When it has been ascertained that the defendant is liable to the plaintiff, the next step is to try, in such manner as the judge may direct, the question between the defendant and the third party. The defendant says, "You owe me so much by way of contribution or indemnity." How may the third party defend himself? Of course he may deny that he is under any such liability at all. But he may admit his liability and say that he has a cross-claim against the defendant which prevents any effective judgment being given against him. He may say, "Your right to contribution will result in £100 being due from me to you, but I have a set-off in another matter in respect of which £100 will be due from you to me." Or, again, he may, while admitting his liability to contribution, say that he has a claim against the defendant which cannot be made the subject of a set-off but will result in the defendant having to pay him so many pounds. It seems to me that the proper view to take on this part of the third-party procedure is that taken by COZENS-HARDY, L.J., in *McCheane v. Gyles* (1) ([1902] 1 Ch. at p. 301)—namely, that

"The Act, therefore, treats the third party procedure as analogous to a cause instituted by the defendant as plaintiff against the third party,"

with the result that the defendant may defend himself in any way in which any defendant in an action at the suit of a plaintiff may defend himself, among which modes of defence is included the making of a counterclaim. For these reasons it appears to me that GREER, J., came to a right decision, and that the appeal must be dismissed.

EVE, J.—I agree. I respectfully agree with the view expressed in *McCheane v. Gyles* (1) that the Judicature Act, by which the third-party procedure was created,

A treats that procedure "as analogous to a cause instituted by the defendant as plaintiff against the third party."

It is clear that the service of the third-party notice does not make the person on whom it is served a defendant to the action, but it seems to me that it does make him a defendant quoad the person serving the notice. That seems to be the reasonable view to take, because the main object of the procedure was to obviate the need for two actions. In the main action the rights of the plaintiff and the defendant are determined without reference to the defendant's claims over against the third party, but when those rights have been ascertained it is then open to the person brought in by the third-party notice to have all relevant disputes determined between him and the person serving the notice. I think that a third party being in the position of a defendant in relation to the person who served the notice, is entitled to counterclaim against him.

Appeal dismissed.

Solicitors: *Syrett & Son; A. & G. Tooth.*

[*Reported by W. C. SANDFORD, Esq., Barrister-at-Law.*]

E BOWKETT v. FULLER'S UNITED ELECTRIC WORKS, LTD.

[COURT OF APPEAL (Bankes and Scrutton, L.JJ. and Eve, J.), October 23, 1922]

[Reported [1923] 1 K.B. 160; 92 L.J.K.B. 412; 128 L.T. 203;

[1923] B. & C.R. 75]

F *Company—Winding-up—Stay of other proceedings—Grant unless exceptional circumstances—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 140.*

G By s. 140 of the Companies (Consolidation) Act, 1908 [now s. 226 of the Companies Act, 1948]: "At any time after the presentation of a petition for winding-up, and before a winding-up order has been made, the company, or any creditor or contributory, may (a) where any action or proceeding against the company is pending in the High Court or Court of Appeal . . . apply to the court in which the action or proceeding is pending for a stay of proceedings therein . . . and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit."

H A company being unable to discharge its liabilities, a petition was presented on Aug. 18, 1920, to wind it up. Proposals for a scheme of reconstruction and for an arrangement between the company and its creditors were then made, and a scheme was put forward with a view to obtaining the sanction of the court thereto under s. 120 of the Act of 1908—[now s. 206 of the Act of 1948.] On Aug. 28, 1920, a creditor brought an action for the price of goods sold and delivered, obtained judgment for the amount of his claim, and was about to issue execution, whereupon the company took out a summons under s. 140 to stay further proceedings in the action.

I **Held:** once a winding-up petition had been presented the court ought, unless there were very exceptional circumstances in the case, to stay all further proceedings in an action against the company where it was necessary to do so to protect the assets of the company and to secure equality among all creditors of the same class; there were no exceptional circumstances in the present case; and, therefore, the execution should be stayed.

Notes. The Companies (Consolidation) Act, 1908, has been repealed, but the provisions formerly contained in s. 140 and s. 120 of that act are now contained in s. 226 and s. 206 respectively of the Companies Act, 1948. A

As to the power to stay proceedings against a company in winding-up see 6 HALSBURY'S LAWS (3rd Edn.) 692, as to sanctioning a compromise or arrangement see *ibid.* 764-765; and for cases see 10 DIGEST (Repl.) 1020-1021. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452. B

Case referred to in argument:

Booth v. Walkden Spinning and Manufacturing Co., Ltd., [1909] 2 K.B. 368; 78 L.J.K.B. 764; 16 Mans. 225, D.C.; 10 Digest (Repl.) 1137, 7916.

Interlocutory Appeal by the defendant company from an order of GREER, J., in chambers refusing to stay further proceedings against the company by the plaintiff creditor. C

The defendants carried on business at Chadwell Heath, Essex, as manufacturers of wire and cable for telegraphs and telephones. The authorised capital of the company was £378,794 8s. divided into 98,493 ordinary shares of £1 each, 151,507 ordinary shares of 4s. each, and 250,000 cumulative preference shares of £1 each. All except fourteen of the preference shares, which had been forfeited, and all the ordinary shares of 4s. each had been issued and fully paid up. The 98,493 ordinary shares of £1 each had not been issued. The total capital paid up was £280,301 8s. The company had also issued short term notes for a total sum of £200,000 upon the terms that the notes should become immediately payable if execution either by writ or by the appointment of a receiver were levied on any part of the property or assets charged, and the debts for which the levy was made were not paid off in seven days. Owing to depression in trade the company was unable to discharge its liabilities. In an affidavit made by the secretary of the company, who was also a director, it was stated that the bankers of the company were creditors for over £160,000 and debenture holders for £150,000, that on Aug. 18, 1920 a petition had been presented to wind-up the company and that proposals for a scheme of reconstruction and for an arrangement between the company and its creditors were then made, and a scheme was put forward with a view to obtaining the sanction of the court thereto under s. 120 of the Companies (Consolidation) Act, 1908. On Aug. 28, 1920 the plaintiff brought an action for £41 2s. 6d., the price of goods sold and delivered. On Oct. 2, he obtained leave to sign final judgment, and on Oct. 6 he did, in fact sign final judgment for the amount of his claim. The secretary further stated in his affidavit that the bankers of the company had only refrained from applying for the appointment of a receiver in order to assist the reconstruction scheme, and that it would be extremely difficult to carry it through if any creditor were allowed to issue execution against the company's goods, and thus obtain a preference over the general body of creditors. Accordingly the defendant company took out a summons to stay further proceedings in the plaintiff's action under s. 140 of the Companies (Consolidation) Act, 1908. On Oct. 9, 1922, the master made an order that if notice of appeal were served there should be a stay of execution until the hearing of the appeal, but otherwise that no order should be made upon the application except that the costs should be the plaintiff's in any event. The defendant company appealed to the judge in chambers. GREER, J., made no order on the summons and affirmed the master's decision. The company appealed. D
E
F
G
H

The Companies (Consolidation) Act, 1908, provided, and the Companies Act, 1948, now provides; I

1948 Act, s. 206; 1908 Act, s. 120: (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the company, or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the

A company, or class of members, as the case may be, to be summoned in such manner as the court directs. (2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company. (3) In this section the expression "company" means any company liable to be wound up under this Act.

C 1948 Act, s. 226, 1908 Act, s. 140: At any time after the presentation of a petition for winding up, and before a winding-up order has been made, the company, or any creditor or contributory, may, (a) where any action or proceeding against the company is pending in the High Court or Court of Appeal in England or Ireland; apply to the court in which the action or proceeding is pending for a stay of proceedings therein; and (b) where any other action or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding; and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.

E *Maugham, K.C.* and *Cartwright Sharp* for the company.
J. B. Lindon for the plaintiff.

F **BANKES, L.J.**—In this case, after a petition had been presented to wind-up the company, the plaintiff issued a writ against the company claiming £41 2s. 6d. for the price of goods sold and delivered. He obtained judgment and was about to levy execution. Thereupon the company took out a summons to stay further proceedings by the plaintiff upon the ground that a winding-up petition had been presented, and that a scheme of arrangement was being proposed for acceptance by the general body of creditors. The question now raised in this appeal is whether in these circumstances the further proceedings by the plaintiff should be stayed. Under s. 87 of the Companies Act, 1862 (which is s. 142 of the Act of 1908) it was not possible to introduce a scheme of arrangement until after a winding-up order had been made, and it was undoubtedly the duty of the court to stay proceedings by individual creditors. But the law has been changed in that respect by the Act of 1908, and now a scheme of arrangement may be proposed or sanctioned, although no petition has been presented to wind-up the company. If such a petition is presented the court has power under s. 140 to stay or restrain further actions or proceedings in a case where an action or proceeding is pending.

H In my opinion, the court has the same power, whether the petition results in a winding-up order being made or in the approval of a scheme of arrangement. The general policy of the court in exercising this jurisdiction is to ensure that when a petition has been presented which may result in a winding-up order or a scheme of arrangement, no creditor shall thenceforward gain priority over others of his class, and when an application is made to stay further proceedings under s. 140, very exceptional circumstances must exist to justify the court in refusing to accede to that application, because if the plaintiff's action is not stayed, but is allowed to go on, he will obtain payment in full, whereas if his action is stayed he will rank together with the other creditors of his class. I see no exceptional circumstances in the present case. To allow the plaintiff to proceed would be in effect to allow, during the interval between the presentation of a petition and the elaboration of a scheme of arrangement, certain creditors to help themselves out of the assets of the company to the prejudice of others who were in a less fortunate position. The court has undoubtedly a discretion whether it will stay a plaintiff's action.

but it is against the policy of the court to exercise that discretion by allowing the plaintiff to proceed except in very special circumstances. In the present case that discretion should, in my opinion, be exercised in favour of the application. The result is that this appeal succeeds and the further proceedings by the plaintiff must be stayed.

SCRUTTON, L.J.—I am of the same opinion. The statutory powers conferred on the court by the Act of 1908 compel us to allow this appeal, having regard to the usual practice of the court. By s. 120 of the Act of 1908 it is provided that where a compromise or arrangement is proposed between a company and its creditors, the court may, on the application in a summary way of the company, or of any creditor, order a meeting of the creditors of the company to be summoned, and if a majority in number representing three-fourths in value of the creditors present either in person or by proxy at the meeting agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the court, is binding on the creditors. The result of this is that a *bonâ fide* creditor may be deprived of a part of his legal rights by a sufficient majority of the creditors of his class. The Act then goes on to provide by s. 140 that at any time after the presentation of a petition for winding-up the court has power to stay or restrain the proceedings pending in that court, thereby preventing a scramble by the creditors for the assets of the company while the court is considering whether or not it shall make the winding-up order, and also ensuring thereby that all creditors of the same class should be treated alike. If, however, a petition for winding-up has not been presented the court cannot stay proceedings on the ground that meetings with a view to a compromise or a scheme of arrangement are being held, and in the mere anticipation or hope that a petition will be presented; but where a petition has in fact been presented Parliament has given power to the court to stay or restrain all further proceedings therein. On the facts of the present case the court has that power, and it must be exercised unless special circumstances can be shown to exist which would induce the court to hold its hand. In such a case the Court of Appeal would be slow to interfere with the discretion exercised by the learned judge in chambers, but, in my opinion, something must be shown beyond a judgment and an impending execution to induce the Court to depart from what I understand to be the ordinary practice of the Chancery Division, which is to stay proceedings in the action in order that all creditors of the same class may be dealt with on equal terms. The result is that the appeal must be allowed.

EVE, J.—I am of the same opinion. It is to be observed that under s. 120 of the Act of 1908 a compromise or arrangement between a company and its creditors may be brought about either without or in the course of proceedings for liquidation. Under the Joint Stock Companies Arrangement Act, 1870 a winding-up either voluntary or by or under the supervision of the court was a necessary precedent to any such compromise or arrangement, but by s. 38 of the Companies Act, 1907 it was provided that the Joint Stock Companies Arrangement Act, 1870 should apply to a company which was not in the course of being wound-up in like manner as it applied to a company which was in the course of being wound-up, and s. 120 of the Act of 1908 reproduces in substance the joint effect of the Act of 1870 and of s. 38 in the Act of 1907. A composition or arrangement may therefore be made with or without having recourse to winding-up proceedings, but it has been shown by experience that it is often advisable, both in the interests of the company and of the creditors or class of creditors with whom it is proposed to effect a compromise, to present a petition to the court for winding-up the company in order to protect the assets and prevent any individual member of the class from obtaining any preference over the other members of the class by instituting proceedings for the recovery of his debt. This effected by an application to stay further proceedings under s. 140 of the Act of 1908. I merely add these observations in order to show that there is

A no substance in the point that the petition in this case was a mere pretence in order to cover up the real object of the petitioner. It is a perfectly legitimate means of securing equality amongst the creditors with whom it is intended to arrange a composition. I agree that the appeal should be allowed.

Appeal allowed.

B Solicitors: *Clifford, Turner, & Hopton; Cochrane & Cripwell.*

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.]

CONSETT INDUSTRIAL AND PROVIDENT SOCIETY v. CONSETT IRON CO.

D [COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), December 7, 8, 9, 12, 1921, April 10, 1922]

[Reported [1922] 2 Ch. 135; 91 L.J.Ch. 630; 127 L.T. 383; 38 T.L.R. 584;
66 Sol. Jo. 452]

Court of Appeal—Decision—Authority—Subsequent court bound—Construction of statute—Later case with same facts—Earlier case not overruled—“Overruled.”

E A decision of the Court of Appeal on the construction of a statute is binding in a subsequent case coming before the Court of Appeal unless it was arrived at on circumstances different from those of the later case or it has been overruled by the House of Lords. In order that a case may be treated as overruled one must find, either a decision of the superior court inconsistent with that arrived at in the case in question, or an expression of opinion on the part of that court as a whole that the case was wrongly decided on its own facts, and not merely that it ought not to be treated as an authority in a case arising out of different facts.

F *Statute—Construction—Inclosure Act—Reservation of right to mine—Right to let down surface.*

G In an Inclosure Act the reservation of mines, with wide general powers of working, will not confer on the owners of the mines the right to let down the surface unless the intention to confer such right appears by express terms or by necessary implication.

H **Notes.** Referred to: *Newcastle-upon-Lyme Borough Council v. Wolstanton, Ltd. and Duchy of Lancaster*, [1939] 3 All E.R. 190, 597.

As to the binding effect of decisions in the Court of Appeal see 22 HALSBURY'S LAWS (3rd Edn.) 799 et seq., and as to the reservation of mining rights on an enclosure see *ibid.*, vol. 5, pp. 395–397. For cases see 30 DIGEST (Repl.) 225–228, and 11 DIGEST (Repl.) 62 et seq.

I Cases referred to:

- (1) *Consett Waterworks Co. v. Ritson* (1889), 22 Q.B.D. 702; 64 L.J.Ch. 293, n.; 124 L.T. 818, n.; 59 J.P. 199; 43 W.R. 122, n.; 5 T.L.R. 435; 13 R. 123, n., C.A.; 11 Digest (Repl.) 65, 905.
- (2) *Butterknowle Colliery Co., Ltd. v. Bishop Auckland Industrial Co-operative Co.*, [1906] A.C. 305; 75 L.J.Ch. 541; 94 L.T. 795; 70 J.P. 361; 22 T.L.R. 516, H.L.; 11 Digest (Repl.) 66, 909.
- (3) *Blackett v. Bradley* (1862), 1 B. & S. 940; 31 L.J.Q.B. 65; 5 L.T. 832; 26 J.P. 358; 8 Jur. N.S. 588; 121 E.R. 963; 11 Digest (Repl.) 64, 903.

- (4) *Hilton v. Earl Granville* (1844), 5 Q.B. 701; 1 Dav. & Mer. 614; 13 L.J.Q.B. 193; 2 L.T.O.S. 419; 8 Jur. 311; 114 E.R. 144; 13 Digest (Repl.) 15, 134. A
- (5) *Rowbotham v. Wilson* (1860), 8 H.L. Cas. 348; 30 L.J.Q.B. 49; 2 L.T. 642; 24 J.P. 579; 6 Jur. N.S. 965; 11 E.R. 463, H.L.; 11 Digest (Repl.) 84, 1031.
- (6) *Gill v. Dickinson* (1880), 5 Q.B.D. 159; 49 L.J.Q.B. 262; 42 L.T. 510; 44 J.P. 587; 28 W.R. 415, D.C.; 11 Digest (Repl.) 65, 904. B
- (7) *Benfieldside Local Board v. Consett Iron Co.* (1877), 3 Ex. D. 54; 47 L.J.Q.B. 491; 38 L.T. 530; 26 W.R. 114; 11 Digest (Repl.) 66, 910.
- (8) *New Sharlston Collieries Co., Ltd. v. Earl of Westmorland* (1900), [1904] 2 Ch. 443, n.; 73 L.J.Ch. 338, n.; 82 L.T. 725, H.L.; 34 Digest 705, 933.
- (9) *A.-G. v. Dean and Canons of Windsor* (1860), 8 H.L. Cas. 369; 30 L.J.Ch. 529; 2 L.T. 578; 24 J.P. 467; 6 Jur. N.S. 833; 8 W.R. 477; 11 E.R. 472, H.L.; 30 Digest (Repl.) 215, 573. C
- (10) *Bell v. Love* (1883), 10 Q.B.D. 547; 52 L.J.Q.B. 290; 48 L.T. 592; 47 J.P. 468, C.A.; affirmed sub nom. *Love v. Bell* (1884), 9 App. Cas. 286; 53 L.J.Q.B. 257; 51 L.T. 1; 48 J.P. 516; 32 W.R. 725, H.L.; 11 Digest (Repl.) 67, 913.
- (11) *Hill v. Evans* (1862), 4 De G.F. & J. 288; 31 L.J.Ch. 457; 6 L.T. 90; 8 Jur. N.S. 525; Goodeve's Patent Cases, 248, 45 E.R. 1195, L.C.; 36 Digest (Repl.) 722, 672. D
- (12) *Beard v. Moira Colliery Co., Ltd.*, [1915] 1 Ch. 257; 84 L.J.Ch. 155; 112 L.T. 227; 59 Sol. Jo. 103, C.A.; 34 Digest 707, 943.
- (13) *Duke of Buccleuch v. Wakefield* (1870), L.R. 4 H.L. 377; 39 L.J.Ch. 441; 23 L.T. 102; 34 J.P. 724, H.L.; 11 Digest (Repl.) 63, 897. E
- (14) *Butterley Co., Ltd. v. New Hucknall Colliery Co., Ltd.*, [1910] A.C. 381; 79 L.J.Ch. 411; 102 L.T. 609; 26 T.L.R. 415, H.L.; 34 Digest 706, 940.

Appeal from an order of PETERSON, J., reported 124 L.T. 809.

The plaintiffs were owners of a part of Lanchester Moor, Durham, which, under the Lanchester Inclosure Act, 1773, had been allotted to their predecessors in title. In 1773 the lord of the manor was the Bishop of Durham, who before the Act was entitled to work the mines on the moor. The defendants were the mining lessees of the bishop's successors in title. The mining operations having let down the surface the plaintiffs brought an action for an injunction to restrain further damage. The same question, under the same Act, had come before the Court of Appeal in *Consett Waterworks Co. v. Ritson* (1), and it was then held that the Act gave the bishop and his assigns the right to work the mines so as to let down the surface without any liability to the allottees. PETERSON, J., held (i) that in 1773 and at the present day it was commercially possible to work the mines without letting down the surface; (ii) that at the date of the Act the established practice of mining in the district did not inevitably lead to subsidence, or indicate that the possibility of the subsidence had been contemplated in allotting the surface. He further held that the opinions expressed by the House of Lords in *Butterknowle Colliery Co., Ltd. v. Bishop Auckland Industrial Co-operative Co., Ltd.* (2) showed that *Consett Waterworks Co. v. Ritson* (1) was decided upon wrong reasoning, and no longer correct authority. He, therefore, gave judgment for the plaintiffs. The defendants appealed.

Hughes, K.C., Maugham, K.C., and F. K. Archer for the defendants.

Tomlin, K.C., McSwinnery, and Gavin Simmonds for the plaintiffs.

Cur. adv. vult.

April 10. The following judgments were read.

LORD STERNDALE, M.R. (read by WARRINGTON, L.J.).—This appeal from PETERSON, J., is concerned with a question as to the respective rights of the surface owners and the mineral owners under the Lanchester Inclosure Act,

A 1773. The plaintiffs, claiming through the allottees of the surface asked that the defendants, who claim through the mineral owners, should be restrained from working the minerals so as to let down or imperil the surface. The defendants, on the other hand, claimed a right to work the minerals as they chose, irrespective of whether damage was done to the surface or not. PETERSON, J., decided in favour of the plaintiffs, and this appeal is brought by B the defendants.

A lengthy, able, and interesting argument was addressed to us as to PETERSON, J.'s, decision upon the construction of the Act, and the consequent rights of the parties, and the learned judge considered himself at liberty to examine, and form his own opinion upon the Act. I hope I do not take too narrow a view of the case, but, in my opinion, we are not at liberty to form our own opinion C on the matter for the case is governed by authority. Whether we accept the argument of the defendants or that of the plaintiffs, of course the result will be different, but in each case it will, in my opinion, be a result at which we are bound by authority to arrive. My reasons for this conclusion are as follows.

In the year 1889 the Court of Appeal, then consisting of LORD ESHER, M.R., D LINDLEY and LOPES, L.JJ., in *Consett Waterworks Co. v. Ritson* (1), decided the same question that is now before us upon the construction of the same Act of 1773. They held that upon the true construction of the Act the lord and his assigns, that is to say, the mineral owners were entitled to work the minerals in such a way as to let down and injure the surface. This was a decision between different parties, and, therefore, no question of *res judicata* arises, but it was a decision of the identical question arising upon the construction of the identical E Act. It is, therefore, binding upon us unless it has been overruled, or unless it was given in circumstances different from those of the case before us.

I will deal with the question of the circumstances first. There are no additional circumstances suggested by the plaintiffs which could alter the construction of the Act in their favour, but the defendants did give evidence which they F allege proved a practice of mining so as to let down the surface to have been in existence of this district at the time of the passing of this Act. This was a circumstance, as they contended, existing at the time of the passing of the Act which had to be considered in construing it, pointing in the direction of a construction which would continue the right of that method of working to the lord and his assigns. I think the defendants fail on this point. Assuming the effect of such a custom to be what they allege, I agree with the learned judge that G the evidence did not establish such a recognised and established practice as to affect the construction of the Act.

I think, however, that the decision of this court in 1889 was given on the same point in respect of the construction of the same Act and in circumstances that did not for this purpose differ from those of the present case, and, therefore, H I think that decision governs our decision here. I wish to say what I think must be taken to be the meaning of overruled for this purpose. I think it must have been overruled in the sense that decisions of a superior court have shown it to be a wrong decision on the point, and in respect of the Act on which it was decided. If it be shown to have been so overruled, then we are bound to treat it as a wrong decision, and to construe the Act as the other decisions show it I should be construed, that is to say, so as not to give the lord and his assigns the right to let down the surface. I think, therefore, as I have said with respect to PETERSON, J., that, if we are to accept the defendant's contention that the case is not overruled, we are bound to allow the appeal, and if we accept that of the plaintiffs that it is overruled, we are bound to dismiss it, and that it is not open to us in either case to construe the Act for ourselves. I think it is essential to bear in mind the true meaning of the case being overruled because, if the decision on the identical point before us arising out of the construction of the

identical Act is not displaced, it binds us, although the reasoning upon which the decision is founded may have been so disapproved and displaced as to make the case no authority upon the construction of a distinguishable, though somewhat similar, Act. I do not in the least mean to say that the express term "overruled" need be used, but the effect of the decision of the superior court must be such as to show that the former decision cannot stand, even on its own facts, and in respect of the Act on which it was decided. It is by no means uncommon for a superior court to say that a case which it is considering is wrong in its reasoning, and cannot be used as an authority in other cases, but that on its own facts it can be supported, and this may be expressed by implication as well as expressly. In such a case the decision remains an authority on its own facts and circumstances, but they must be the same, and a very slight difference will take a subsequent case out of the authority of the former one. Here I can see no difference between the circumstances of the case before us and those of the case decided in 1889.

The true way to consider the authority of a case decided upon the identical circumstances of one under consideration is, I think, stated by COCKBURN, C.J., in delivering the judgment of himself, WIGHTMAN, and BLACKBURN, JJ., in *Blackett v. Bradley* (3). He says this:

"In this case, which was argued before my brothers WIGHTMAN and BLACKBURN and myself, on the argument on the demurrer to the plea it was admitted that if *Hilton v. Earl Granville* (4) was to be considered as law, the present case was within the decision in that case, and, so far as this court was concerned, must be governed by it. But it was insisted, on the part of the defendants, that the case of *Hilton v. Earl Granville* (4) had been so much impugned and shaken by subsequent cases that it must be considered as virtually overruled; at all events, sufficiently so to call upon the court to review the decision in that case, and, upon the arguments urged against its validity, now to overrule it. There can be no doubt that to some extent the authority of *Hilton v. Earl Granville* (4) has been shaken, inasmuch as a proposition assumed in the reasoning of the court as one of the grounds of its decision has since been distinctly overruled in the House of Lords in the case of *Rowbotham v. Wilson* (5), in which the question presented itself for adjudication. And it cannot be denied that the decision itself has not met with the universal approval of the profession, and that it may be desirable that the validity of that decision should be brought under the consideration of a court of error. At the same time, it is equally clear that, though the reasoning of this court in *Hilton v. Earl Granville* (4) has been impugned, the decision in that case has not been overruled. And the judgment having been a considered judgment of the court, and standing unreversed, we do not feel ourselves at liberty to consider ourselves as otherwise than bound by it."

There have been at least three decisions upon this Act besides the one in 1889, but for reasons I shall give I do not think they afford any help. Two of them, *Blackett v. Bradley* (3), which I have already mentioned, and *Gill v. Dickinson* (6) are directly opposed to one another, but they were both decided upon demurrer which involved the assumption of the correctness of the facts stated which were different from those of this case, and the former was decided also under a misconception as to the effect of an authority said to govern the case. The third case is that of *Benfieldside Local Board v. Consett Iron Co.* (7). This case was concerned with the question of letting down the surface of public roads set out under the Inclosure Act, and I think the decision turned a good deal upon a consideration of the bearing of public and private rights. In any case it was a decision of a court of first instance, and could not prevail against those which I am now about to mention.

A It was very forcibly argued before us that the authority of *Consett Waterworks Co. v. Ritson* (1) was entirely destroyed and the decision shown to be wrong by decisions in the House of Lords, notably *Butterknowle Colliery Co., Ltd. v. Bishop Auckland Industrial Co-operative Co., Ltd.* (2), and *Love v. Bell* (10). I think there is no doubt that the judgments in those cases disapprove of and displace the reasoning upon which the decision in the *Consett Waterworks Co. v. Ritson* (1) was founded and that they destroy the authority of that decision in any case depending upon a similar but distinguishable Act or upon similar but distinguishable circumstances. The question, however, remains whether they override it upon its own Act and its own circumstances. I do not say how I should decide this point if the case had not been considered upon it in this court and in the House of Lords, and I think it is necessary to see the manner in which it was then treated. I do not think I need do more than examine the way in which the case of *Butterknowle Colliery Co., Ltd. v. Bishop Auckland, &c., Co.* (2) dealt with it. In the court of first instance, FARWELL, J., expressed a doubt whether that case could stand with the subsequent decision of the *New Sharlston Collieries, Ltd. v. Earl of Westmorland* (8), but he distinguished it from the case then before him. When that case came before the Court of Appeal, the court's attention was expressly directed to the point, and it was asked to express the opinion that *Consett Waterworks Co. v. Ritson* (1) was not consistent with the cases mentioned, and, therefore, not an authority. If the court had held that view there would have been no necessity to distinguish *Consett Waterworks Co. v. Ritson* (1), it would have been enough to say that it was overruled, but VAUGHAN WILLIAMS, L.J., though expressing the same doubt as FARWELL, J., distinguished it from the case then before the court, and so did ROMER, L.J., intimating that he would have been bound to follow or would have followed it if not distinguishable. COZENS-HARDY, L.J., agreed. So far, then, I think the court did not hold the case to be overruled, but, of course, this may have been the courtesy of one court of co-ordinate jurisdiction to another. *Butterknowle Colliery Co., Ltd. v. Bishop Auckland, &c., Co.* (2), however, then came before the House of Lords, and there, even if the case were not up to that time overruled, it was open to the House of Lords to do so. The report of the argument in the LAW REPORTS is so scanty that the nature of the allusion to *Consett Waterworks Co. v. Ritson* (1) does not appear, and that in the LAW JOURNAL is worse for there is no report of the argument at all, but, from the report in the LAW TIMES REPORTS, it does appear that the House was directly asked to say that the case could not stand with the later decisions and so overrule it. In my opinion, the House did not do so. It is true that LORD MACNAGHTEN stated that the case could no longer be considered an authority, and I think he meant to say it was wrong, and not only that it was not an authority in a similar but not the same case. But the noble and learned Lord was only one of five members of the House then sitting. In spite of the direct appeal to the House to overrule the case, two of the noble and learned Lords, LORD LOREBURN and LORD DAVEY, did not mention it at all, LORD ATKINSON considered it with great care and distinguished it from the case then before the House on grounds similar to, but more detailed than, those mentioned in the Court of Appeal by VAUGHAN WILLIAMS, L.J., and LORD ROBERTSON expressed his agreement with the opinion of LORD LOREBURN and LORD ATKINSON. LORD LOREBURN, as I have pointed out, did not mention the case, but LORD ROBERTSON expressed his agreement with the opinion of LORD ATKINSON who distinguished it, and not with that of LORD MACNAGHTEN who considered it no longer as of authority. It seems to me that both the Court of Appeal and the House of Lords, though expressly asked to treat the case as overruled, declined to, or at any rate refrained from doing so, and treated it as distinguishable, and in the position I have mentioned of a decision founded on wrong reasoning, but not overruled on its particular facts. If this be the right conclusion, then, as

we have here to deal with the same facts and the same Act, I think we must follow the decision, however discredited in its reasoning, and that on this ground the appeal should be allowed with costs here and below. A

WARRINGTON, L.J., stated the facts, and continued: The identical question for determination in the present case was raised and determined by the Court of Appeal in favour of the successors of the lord of the manor in *Consett Waterworks Co. v. Ritson* (1) in the year 1889. Except that the surface and mineral owners respectively were not the same, all the material facts were identical with those in the present case, and the Act of Parliament, the construction of which was in issue, was the Act of 1773—the Act the construction of which is in issue here. In saying that all the material facts in the two cases are identical, I am not forgetting that the defendants set up the case that there was a special custom or practice in the neighbourhood at the date of the Act justifying working in such a manner as to injure the surface by subsidence, but I agree with the learned judge that this case was not established. Even if it had been, the additional fact would have been favourable to the defendants and would not affect the question of the effect of the decision in *Consett Waterworks Co. v. Ritson* (1). *Prima facie*, it would be the duty of the judge of first instance, and of this court, to follow the decision of the Court of Appeal in the previous case, leaving to the higher tribunal to say, if they should be so advised, that that decision was incorrect. But it is contended by the plaintiffs, and **PETERSON, J.**, has accepted their contention, that the House of Lords has already overruled, not expressly but as the necessary result of their action, the decision in *Consett Waterworks Co. v. Ritson* (1) by their own decision in *Butterknowle Colliery Co., Ltd. v. Bishop Auckland, &c., Co.* (2). B C D E

The first question, therefore, is, in my opinion, whether this court ought to treat the decision in *Consett Waterworks Co. v. Ritson* (1) as having been overruled, and, therefore, not binding upon them, and it would only be after answering that question in the affirmative that they would be entitled to determine for themselves the question raised in the present action. It must, I think, be conceded that a decision of an inferior court may be treated as having been overruled by a decision of a superior court with which it is shown to be inconsistent, although it is not expressly so stated by those who concur in such decision. But it is the decision of the court, not the dicta of individual members, unless they be essential to the ratio decidendi, which has to be considered in determining such a question. **LORD CAMPBELL**, in advising the House in *A.-G. v. Dean and Canons of Windsor* (9) (8 H.L. Cas. at p. 391) makes the following observations on the cognate question as to the binding nature on the House itself of its decisions: F G

“The decisions are authoritative and conclusive declarations of the existing state of law and are binding upon itself when sitting judicially as much as upon all inferior tribunals. The observations made by members of the House beyond the ratio decidendi which is propounded and acted upon in giving judgment, although they may be entitled to respect, are only to be followed in so far as they may be considered agreeable to sound reason and prior authorities.” H

In *Blackett v. Bradley* (3) **COCKBURN, C.J.** (1 B. & S. at p. 954), in answer to the contention that a previous decision of the Court of Queen’s Bench in *Hilton v. Earl of Granville* (4) must be considered as virtually overruled, said: I

“There can be no doubt that to some extent the authority of *Hilton v. Earl of Granville* (4) has been shaken, inasmuch as a decision assumed in the reasoning of the court as one of the grounds of its decision has since been distinctly overruled in the House of Lords in the case of *Rowbotham v. Wilson* (5), in which the question presented itself for adjudication. And it cannot be denied that the decision itself has not met with the universal approval of the profession; and that it may be desirable that the validity of that decision should be brought under the consideration of a court of error. At the same time, it is

A equally clear that, though the reasoning of this court in *Hilton v. Earl of Granville* (4) has been impugned, the decision in that case has not been overruled."

The court then gave judgment following *Hilton v. Earl Granville* (4) and expressing no opinion of their own one way or the other.

B The conclusion I draw is that in order that a case may be treated as overruled one must find, either a decision of a superior court inconsistent with that arrived at in the case in question, or an expression of opinion on the part of that court as a whole that such case was wrongly decided on its own facts, and not merely that it ought not to be treated as an authority in a case arising out of different facts. The decision said to be overruled in the present case is a decision on the true construction of a particular Act of Parliament—the Lanchester Inclosure Act, 1773 (13 Geo. 3, c. 67). The decision by which it is said to have been overruled is one on the true construction of another Act of Parliament—the Hamsterley Inclosure Act, 1857 (31 Geo. 2, c. 32). The provisions of the two Acts are not identical in their terms, and there is, I think, no question that those of the Act of 1857, especially those relating to compensation for damage, were more favourable to the existence of the right to support than those of the Act of 1773. At first sight it is difficult to see how a decision on the true construction of one Act can be said to have overruled a decision on the true construction of another Act materially different in its terms. The two decisions, as decisions, might well stand together for the reason indicated in the previous sentence. But it is necessary to consider the question a little more closely, inasmuch as it is contended that there are certain principles of construction laid down by the House of Lords as applicable to all Acts of Parliament of that particular class, and that these principles have been misunderstood or misapplied by the learned judges which decided the case in question—*Consett Waterworks Co. v. Ritson* (1). The decision was that of the Court of Appeal, consisting of LORD ESHER, M.R., and LINDLEY and LOPES, L.JJ. It was decided in the year 1889. The authority most strongly relied upon by the then plaintiffs as laying down principles applicable to the case before the court was *Bell v. Love* (10), and particularly the speech of LORD SELBORNE in that case. I think it is clear that the learned judges in the Court of Appeal realised the general nature of the views as to the construction of such Acts of Parliament expressed by LORD SELBORNE and adopted by the House and intended to act upon them. Their decision was plainly not inconsistent with the decision in *Bell v. Love* (10) for the Act there in question, but that it was also an Inclosure Act, was in its terms infinitely more favourable to the contention of the allottees than the Act of 1773. LINDLEY, L.J., was a party to the decision *Bell v. Love* (10), which was affirmed in the House of Lords, and his reasons, consistent with the principles laid down in the House of Lords, are clearly stated in 10 Q.B.D. at pp. 563–567. I think the principle of construction may be summed up in this, that in an Inclosure Act the reservation of mines, with wide general powers of working, will not confer on the owner of the mines the right to let down the surface unless the intention to confer such right appears by express terms or by necessary implication. In *Bell v. Love* (10) the court came to the conclusion that the lord had not made out his right under the Act then in question. In *Consett Waterworks Co. v. Ritson* (1) the Court of Appeal, on another Act of Parliament, came to the opposite conclusion.

H I am clearly of opinion so far, if nothing else had happened, that this court would be bound to follow *Ritson's Case* (1), leaving it to the House of Lords to say whether the decision was correct or not. But it is contended that the House of Lords have already, in effect, said that it is incorrect by their decisions in two cases, first *New Sharlston Collieries Co. v. Earl of Westmorland* (8), and, secondly, *Butterknowle Colliery Co. Ltd. v. Bishop Auckland, &c., Co.* (2). I think it is really only necessary to consider the second of these two cases, for if that did not overrule *Consett Ironworks Co. v. Ritson* (1) the other certainly did not. In the

first place, the two decisions, as such, are not inconsistent with each other, owing to the differences in the provisions of the two Acts of Parliament. Did, then, the noble Lords who took part in the decision of the later case, or a majority of them, expressly or by implication express the view that the decision in the earlier case was incorrect on its own facts? I think not. The decision had been criticised adversely in the court of first instance and in the Court of Appeal, and was relied upon in the House of Lords, the Act of 1773 and the judgments of the Court of Appeal being included in the appendix. The noble Lords who took part in the decision were LORD LOREBURN, LORD MACNAGHTEN, LORD DAVEY, LORD ATKINSON, and LORD ROBERTSON. LORD LOREBURN makes no reference to the case in question, nor does LORD DAVEY, who, however, does say that the cases run very fine, and that the question for decision must ultimately depend on the proper construction of the words of the statute. LORD MACNAGHTEN does observe in passing that, in his opinion, the case in question can no longer be regarded as an authority. He does not say that it was wrongly decided on its own facts, but I will assume that this is what he meant. LORD ROBERTSON said he had read the judgments of LORD LOREBURN and LORD ATKINSON and agreed with them. He had apparently not read LORD MACNAGHTEN'S. LORD ATKINSON took the trouble to distinguish *Consett Waterworks Co. v. Ritson* (1) from the case before the House, first, in respect of the words of the clause reserving the rights of the lords as to working coal, and, secondly, in respect of the provisions as to compensation. It cannot, in my opinion, be said that this learned lord said that the case in question must be treated as overruled. The result is that one member of the House may be said to have treated the case as overruled, two treated it as distinguishable, and two did not refer to it. In these circumstances PETERSON, J., was not, in my opinion, justified, nor would this court be justified in refusing to follow the decision in *Consett Waterworks Co. v. Ritson* (1), but should leave it to the superior court to overrule, if they think fit. Following then that case, and expressing no opinion as to its correctness or the reverse, I think the present appeal ought to be allowed and judgment entered for the defendants with costs here and below.

YOUNGER, L.J.—The Master of the Rolls and WARRINGTON, L.J., have stated in detail the considerations which have led them to the conclusion that the decision of this court in *Ritson's Case* (1) should have been in the present litigation treated by the learned judge, and must be regarded by us, as an authority to be accepted and applied without further question. I am entirely of the same opinion and for the same reasons. In my judgment, *Ritson's Case* (1) has, in no sense relevant for present purposes, been overruled by any court competent to overrule it. In this connection the words of LORD WESTBURY in *Hill v. Evans* (11) may be recalled where he says (31 L.J.Ch. at p. 461):

“I cannot repeat too often that what is said by a noble and learned lord in moving the judgment of the House of Lords does not by any necessity enter into the judgment of that House.”

The judgment of my Lord just delivered indicates the relevance of that observation of LORD WESTBURY'S as applied to the judicial history of *Ritson's Case* (1). It may, indeed, even be true that no individual judge who has subsequently canvassed or distinguished that case has so far committed himself as to declare that the decision as a decision on the terms of its own statute, was wrong, and the very searching and detailed examination of the provisions of that statute which has been made before us—an advantage which I feel sure no other court since *Ritson's Case* (1) has yet enjoyed—has at least served to show how perilous such a declaration would have been, had it, in a case under another statute, been hazarded. It is, however, enough now to say that no authoritative deliverance upon *Ritson's Case* (1) propounded since that decision was given justifies us in denying to it in this court full effect, and especially so in an appeal which raises, as this appeal does, the same issue under the same statute, and raises it in circumstances and supported by

A evidence certainly not less favourable to the conclusion reached in *Ritson's Case* (1) than were the circumstances under the consideration of the court there. I need put it no higher than that. In a word, we are, in my judgment, in duty bound to treat that decision as an authority conclusive of the present appeal in this court, whatever we ourselves might think of it, and there I would be content to stop but for one thing.

B As a result of the very careful examination of the Act of 1773 undertaken before us, there have been brought into prominence certain provisions of that statute, which, in the light of the *Butterknowle Case* (2) itself, may, as it seems to me, go far of themselves to justify the conclusion there reached; although they in no way entered into the reasoning on which that conclusion was based. I refer to the set of provisions—not paralleled or reproduced in any other Inclosure Act, to which our
C attention was directed—relating to what, in the statute, are referred to as the less improvable parts of the moors or commons thereby intended to be divided, set out, and allotted. The provisions of the Act with reference to these are in striking contrast to its provisions with reference to the so-called residue or more improvable parts of the same moors or commons, but while this is so it will be found that the section of the Act reserving the mines to the bishop and the right to work them,
D in the extremely wide terms which are referred to in the judgment of the learned judge, apply equally to the mines lying under the less improvable parts of the said moors or commons, and to those lying under the more improvable parts, and the question which I desire still to consider is whether, in view of the application of that section to the mines under the less improvable parts of the moors or commons, an inconsistency would not at once be created if there were introduced into it a
E clause to the effect that these mines must nevertheless be worked so as not to let down the surface. In so phrasing the question I am, of course, referring to that which the learned judge describes in his judgment as LORD LOREBURN's test in the *Butterknowle Case* (2). It is convenient to quote the Lord Chancellor's exact words. They are these:

F "If the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would not create an inconsistency with the actual clauses of the instrument, then it means that the surface may not be let down."

LORD LOREBURN, of course, intends to lay it down that the converse also is true. If such an introduction would create such an inconsistency, then it means that the
G surface may be let down.

Would the introduction of such a clause create that inconsistency in the present case, having regard to the special position of the surface of the less improvable parts as left by the Act? That is the question I now desire to consider. The statute in the first paragraph of its preamble states that the large moors, commons, or tracts of waste land within and parcel of the parish and manor of Lanchester contain
H together by estimation 20,000 acres or thereabouts, and then goes on to recite that the Bishop of Durham, in right of his church and see of Durham, is lord of the manor of Lanchester, and as such is seised of or entitled to the soil of and royalties within and under the moors, commons, or tracts of waste lands. The statute then gives the names of the owners of hereditaments within the manor who with others not named in respect of or as appendant, appurtenant, or belonging to their said
I hereditaments, are entitled

"to have and enjoy right of common in, upon, and throughout all the said moors, commons, or tracts of waste land."

There is then a recital that the said moors, commons, or tracts of waste land in their present state are of little use or service, but that considerable parts thereof are capable of cultivation and improvement, and that it would be of advantage to the bishop and to the several persons entitled to the right of common aforesaid to have

"the said moors, commons, or tracts of waste land divided and inclosed, and specific shares thereof allotted to them according to their several rights and interests therein."

The preamble to the statute, it will be observed, while stating that considerable parts only of the moors, commons, or tracts of waste land are capable of cultivation and improvement, foreshadows the division and inclosure and allotment of the whole of them, and the first operative section accordingly in terms provides that

"all the moors or commons lying within and being part and parcel of the said parish and manor of Lanchester shall be divided, set out, and allotted by the commissioners [thereby appointed] unto and amongst or for the benefit of the several persons having right of common thereon."

The distinction between the less and the more improvable parts of the moors and commons is first indicated in s. 19. By that section the commissioners are required on or before May 13, 1755, or so soon after as conveniently may be, in the first place to "set off, ascertain, and appoint such part or parts of the said moors or commons as shall" in their judgment "appear to be little capable of cultivation and improvement (so as the residue thereof to be divided, allotted, and inclosed by virtue of this Act shall not be less than 12,000 acres), which shall be divided and allotted and shall or may be accepted and inclosed upon such conditions as are hereinafter mentioned." The details of that division and allotment of that residue, that is to say, of the more improvable parts of the moors or commons, are then prescribed, a rent of 4d. per acre being immediately made payable annually to the bishop in respect thereof.

The directions as to the allotment of the less improvable parts of the moors or commons are contained in a later section of the Act, s. 50. By that section the commissioners, after they have set off, ascertained, and appointed such part or parts of the said moors or commons as shall in their judgment be little capable of cultivation, and before they have prepared and made their general award, are directed and empowered to set out, mark, ascertain, divide, and allot the same by proper stakes, motes, and land marks, unto and amongst the bishop and the several other persons having right of common upon the said moors or commons, according to the rents or values of their respective estates having rights of commons thereon in the same manner as had been prescribed with reference to the more improvable parts of the moors or commons, and all such allotments are in like manner to be specified in the commissioners' general award and in the plan to be made and annexed thereto. But, with reference to these allotments, the allottees are at liberty to accept and inclose their allotments at any time within twenty years next after the date and execution of the commissioners' general award; they are under no obligation to accept them at all; from the date of acceptance only is any rent in respect of an allotment payable to the bishop; and all such allotments are, until acceptance and inclosure, and after the expiration of the said term of twenty years all such parts thereof as shall then remain unaccepted and uninclosed, are for ever thereafter to

"be deemed and adjudged to be part and parcel of the said moors and commons in their original state and as such shall or may be used and enjoyed by the several persons who are now entitled to right of common thereon . . . anything hereinbefore contained to the contrary notwithstanding."

The compensation clause, s. 48, is also illuminating in the present connection. That section recites the inconvenience and damage that may be done to particular persons

"by reason of . . . working the said mines and quarries within and under their respective allotments, not only of the more improvable parts of the said moors or commons, but also of the less improvable parts thereof, after the same may

A be accepted and inclosed by virtue of this Act as hereinafter is directed and provided,"

but not before, and then proceeds to provide compensation for these persons. The directions for the preparation and as to the content of the general award and plan are given in s. 34 of the statute, and those for its execution and deposit are contained in s. 35, and by s. 36 it is provided that from and immediately after
B its execution and deposit the award and plan and all matters and things therein contained shall be final and conclusive and

"that all rights of commons upon the more improvable parts of the said moors or commons which are so to be divided allotted and inclosed shall from thenceforth cease and be for ever extinguished, and that from and immediately
C after the accepting and inclosing of any allotment or allotments of the less improvable parts of the said moors or commons or of any part thereof according to the conditions and directions hereinafter prescribed and mentioned all right of common upon the grounds so accepted and inclosed shall cease and for ever be extinguished."

It is with reference to lands in the position just set forth that the powers reserved to the bishop by s. 45 must be read, inasmuch as that clause relates to his
D mines and the working of his mines "lying and being within or under the said moors or commons intended to be allotted as aforesaid," that is to say, to all his mines lying and being there, including, it may be, even the Roughside, Charland, and Findon Hill commons, notwithstanding the provision of s. 28 that the surface of these is not to be allotted by the commissioners. I assume, however, in what
E follows, that this section does not deal directly with these commons. It is safer so to do. There are some things about this section which are not, I think, open to serious doubt. First, its provisions are amply extensive enough, so far as the reasonable construction of language is concerned, to include a power in the lord in the course of working his mines to let down the surface. In any instrument other than an Inclosure Act the language used would be sufficient for that purpose.
F The contrary was not, I think, seriously contested by counsel for the plaintiffs, and *Beard v. Moira Colliery Co.* (12) is an authority in favour of that view. Secondly, the rights reserved to or conferred upon the lord by that section are reserved or conferred in respect of all his manorial minerals; these rights are equally extensive with regard to all of them and with reference to interference with all the surface above them; they are reserved as from the passing of the Act;
G their comprehensiveness at the beginning continues thereafter unabridged and unchanged. That which at the passing of the Act the lord may do anywhere with reference to the working of his minerals and the effect thereof on the surface he may do for all time and he may do it everywhere. The section, so far as language can make it so, is, on this, quite clear. But the section extends to and includes
H mines and the working of mines lying, it may be, under, according to the statement in the Act, of as many as 8,000 acres out of the 20,000 acres included in it, with respect to the surface of which 8,000 acres no allotment need have had any effect for twenty years; indeed no allotment need ever have been effective at all. With respect to all that surface, the then existing right of common might not have been extinguished for twenty years; indeed, it might never have been extinguished at any time. Further, with reference to that same 8,000 acres, the bishop might not
I for twenty years, or he might never receive any rent whatever; and with reference to them before they are accepted there is no provision at all made for surface damage with reference to them. They are so far excluded from the provision which is made.

Why is it that, as shown by the authorities, the words of this section, authorising the bishop and his successor to work the minerals and enjoy the property "as fully and freely as he or they might or could have had held used and enjoyed the same in case this Act had not been made," have attributed to them a restricted meaning

when they are found in an Inclosure Act. An examination of the authorities will, I think, show—the matter is very succinctly dealt with in the judgment of this court in *Beard v. Moira Colliery Co.* (12)—that that rule of construction so far as it exists rests upon the necessity of recognising, if possible, the change in the commoners' interest effected by the inclosure, a view propounded possibly for the first time with distinctness by LORD SELBOURNE in *Bell v. Love* (10), but applied since in many cases. There is, so far as I am aware, however, no authority—none certainly was quoted to us—for adopting that restricted construction in the case of powers as wide as are the powers here either where no such change has taken place, or in respect of a period where the surface rights enjoyed before the Act remain unaltered by the Act, and this observation brings me to the point which I desire to emphasise. Here we have a case in which 8,000 acres out of 20,000 acres of surface under which the minerals lie might never have been inclosed at all; the rights of common over them might never have been extinguished. The existing right of the lord, if the Act had not passed, to let down the surface in the course of working the minerals under these 8,000 acres a sufficiency of pasture being left to the commoners is conceded. Words amply sufficient to permit the continuance of such working are found in the Act. No change of interest in respect of that surface is necessarily affected by the Act. Any change if effected at all might be effected after an interval of as long as twenty years. Yet the rights in respect of the working of the minerals and the interference with the surface reserved by s. 45 are the same, neither more nor less, both with reference to these 8,000 acres and with reference to the 12,000 acres; no distinction whatever is drawn between the two; and what these rights were at the beginning they were to remain to the end.

From that point of view does it not follow, paraphrasing the words with which I commenced this inquiry, that the introduction into s. 45 of a clause to the effect that the mines must not be worked so as to let down the surface would create, first of all, an immediate inconsistency with the words of the Act so far as the rights of the lord in respect of the working of the minerals under the 8,000 acres are concerned; and this done, does it not follow, on the frame of the clause itself, which in no way distinguished between the lord's rights of enjoyment and working at one time as contrasted with another, or at one place as contrasted with another, that the whole reservation must be given its full effect in accordance with the actual sense of the words employed and that the introduction of such a clause would produce an inconsistency with reference not only to a part but, in the result, with reference to the whole of the surface? Even in cases under Inclosure Acts, as LORD DAVEY observed in the *Butterknowle Case* (2) "the decision must ultimately depend on the proper construction of the words of the statute." LORD MACNAGHTEN in the same case observed that the rule of construction adopted in *Bell v. Love* (10) had led the House to treat the words I have quoted as a dead letter for any practical purpose, though these words would seem at first sight to be the keynote of the section. May it not be for the reason I have suggested that on the construction of this particular Act it is permissible, and, if permissible, incumbent upon us to attribute to these words their natural signification. It will not be forgotten that to such cases as the *Duke of Buccleuch v. Wakefield* (13), there attaches, in LORD WESTBURY's words, "that irreversible and unchangable quality that belongs to a decision of the House of Lords" (*Hills v. Evans* (11)) just as much as the same quality attaches to such cases as *Bell v. Love* (10). To quote LORD DAVEY again:

"No doubt there is some difficulty in reconciling the *Duke of Buccleuch v. Wakefield* (13) and *Bell v. Love* (10) but the words of the Acts in question in the two cases are not the same, and LORD SELBOURNE in the latter case was able to distinguish them."

Duke of Buccleuch v. Wakefield (13) may once again become, for the purposes of this case, the governing authority, if once it is established, as I suggest it may be,

A that what LORD MACNAGHTEN in the *Butterknowle Case* (2), described as "the refined and subtle distinctions which the noble and learned lords who decided *Bell v. Love* (10) found between the *Duke of Buccleuch's Case* (13) and the case before them," cannot be applied to the present statute. The learned judge, treating *Ritson's Case* (1), as overruled, decided here in favour of the plaintiffs on the ground that this case was governed by the *Butterknowle Case* (2) notwithstanding the marked differences between the statutes in question in the two cases, differences to which attention was directed by LORD ATKINSON in the *Butterknowle Case* (2), and in more detail by the learned judge himself. In other words, he further extended the principle of the *Butterknowle Case* (2), accepting I think, the argument addressed to us by counsel for the plaintiffs in support of his judgment that, in arriving at the meaning of an Inclosure Act with reference to any question of support for the surface, ordinary principles of construction applicable to any other case go by the board. I have the gravest doubts whether, on any view of this case, it was permissible so as to extend that principle. *Butterley Co., Ltd. v. New Hucknall Colliery Co., Ltd.* (14) seems to me to show that, in the opinion of the House of Lords, the *Butterknowle Case* (2) registered the limit in favour of the surface owner. That limit is not lightly to be extended. I rather suspect that if anything the inevitable reaction has set in. Be that as it may, however, if that limit can only be extended to cover the present case by the application of such principles of construction as was contended for on behalf of the plaintiffs, then that step should only, I think, be taken by the House of Lords itself, and I cannot myself think of any Inclosure Act with reference to which the House of Lords could have a better opportunity of finally attempting, once for all, to settle this great controversy, so serious to the many interests concerned while it continues to rage, than the present statute now canvassed in a litigation in which all the surrounding circumstances at the date of its passing have been so carefully collected in evidence.

E To sum up the whole matter. The learned judge decided this case in favour of the plaintiffs, because in his view the defendants here were defeated by the application of the principles laid down in the *Butterknowle Case* (2). These observations of mine have been directed to show that the appellants here might well succeed by the application to the present statute of the very test set by LORD LOREBURN in that case. In my view, the conclusion upon this case at which this court has felt impelled to arrive, deferring to authority binding upon it, might quite well have been reached on the construction of the Act itself, altogether from the decision by which we are bound. In my judgment, this appeal should be allowed.

F

Appeal allowed.

Solicitors: *Rawle, Johnstone & Co.*, for *Cooper & Goodger*, Newcastle-upon-Tyne; *Rider, Heaton, Meredith & Mills*, for *G. W. Jennings & Son*, Bishop Auckland.

[Reported by G. T. WHITFIELD HAYES, ESQ., Barrister-at-Law.]

WALLWORK v. FIELDING

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Scrutton, L.JJ.), March 8, 1922]

[Reported [1922] 2 K.B. 66; 91 L.J.K.B. 568; 127 L.T. 131; 86 J.P. 133; 38 T.L.R. 441; 66 Sol. Jo. 366; 20 L.G.R. 618]

Police—Discipline—Suspension—Borough police force—Power of watch committee to suspend—Power to withhold pay during suspension—Municipal Corporations Act, 1882 (45 & 46 Vict., c. 50), s. 191 (4).

Statute—Repeal—By implication—Repugnancy—Later Act not dealing with subject-matter of earlier Act.

A watch committee acting under a power given them by s. 191 (4) of the Municipal Corporations Act, 1882, suspended the appellant, a police constable, from duty and stopped his pay. The appellant thereupon brought an action against the watch committee alleging that they had no power to suspend him as s. 191 (4) of the Act of 1882 had been impliedly repealed by the Police Act, 1919 and the regulations made thereunder, which provided a method of procedure in cases of charges made against police officers and did not refer to suspension.

Held: there was nothing in the regulations made under s. 4 of the Police Act, 1919, repugnant or inconsistent with the provisions of s. 191 (4) of the Municipal Corporations Act, 1882, and, so, that subsection had not been impliedly repealed; the appellant, therefore, had been rightly suspended from duty and since the power to suspend a contract suspends the whole operation of it he was not entitled to pay during the period of suspension.

Notes. Regulations made under s. 4 of the Police Act, 1919, now in force are: Police Regulations, 1952, S.I. 1952 No. 1704, as amended; the Police (Discipline) Regulations, 1952 No. 1705 as amended; and the Police (Discipline) (Chief Constables) Regulations 1952 S.I. 1952 No. 1706 as amended. [17 HALSBURY'S STATUTORY INSTRUMENTS.] A member of a police force if punished with dismissal or by being required to resign as an alternative to dismissal or by reduction in rank or pay, has a right of appeal to a Secretary of State under the Police (Appeals) Act, 1927 [18 HALSBURY'S STATUTES (2nd Edn.) 135.]

Explained and Distinguished: *Fisher v. Oldham Corpn.*, [1930] All E.R. Rep. 96. Considered: *Cooper v. Wilson*, [1937] 2 All E.R. 726; *Rodwell v. Minister of Health*, [1947] 1 K.B. 404. Referred to: *Bird v. Celanese, Ltd.*, [1945] 1 All E.R. 488.

As to suspension and disciplinary procedure see 30 HALSBURY'S LAWS (3rd Edn.) 104 et seq., and for repeal of statutes by implication see *ibid.*, (2nd Edn.) Vol. 31, p. 561. For cases see 37 DIGEST 180, 42 DIGEST 763 et seq. For the Municipal Corporations Act, 1882 see 14 HALSBURY'S STATUTES (2nd Edn.) 114, and for the Police Act, 1919, see *ibid.* Vol. 18 p. 122.

Cases referred to:

- (1) *Flannagan v. Shaw*, [1920] 3 K.B. 96; 89 L.J.K.B. 168; 122 L.T. 177; 84 J.P. 45; 36 T.L.R. 34; 64 Sol. Jo. 51; 18 L.G.R. 29, C.A.; 42 Digest 765, 1922.
- (2) *Hanley v. Pease and Partners, Ltd.*, [1915] 1 K.B. 698; 84 L.J.K.B. 532; 112 L.T. 823; 79 J.P. 230, D.C.; 34 Digest 111, 830.
- (3) *Kutner v. Phillips*, [1891] 2 Q.B. 267; 60 L.J.Q.B. 505; 64 L.T. 628; 56 J.P. 54; 39 W.R. 526; 7 T.L.R. 441, D.C.; 42 Digest 768, 1950.

Appeal from a decision of a Divisional Court reversing a judgment of the judge of the Blackpool County Court.

In November, 1920, the appellant, a sergeant in the Blackpool Police Force, wrote a letter to the Home Office with respect to an application made by another member of that force. The letter was sent to the Blackpool authorities. They considered it

A to be an improper letter, and on Dec. 13 they ordered the appellant to be reduced to the rank of a third-class constable. The appellant, acting upon legal advice, did not parade as a third-class constable when ordered to do so, and in consequence the watch committee on Dec. 17 suspended him from duty until further orders purporting to act under s. 191 (4) of the Municipal Corporations Act, 1882, which provides that

B “the watch committee or any two justices having jurisdiction in the borough, may at any time suspend, and the watch committee may at any time dismiss, any borough constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same.”

C The appellant thereupon brought an action in the county court against the watch committee. He contended that there was no power to suspend him, and that s. 191 (4) of the Act of 1882 was impliedly repealed by the statutory Rules and Orders 1920, No. 1484 made by the Secretary of State under s. 4 of the Police Act, 1919. The rules provide for a written complaint to be made against a constable for any offence against discipline, for consideration of the complaint by the chief officer of police and for an appeal by the constable to the watch committee. They also
D provide for the punishments to be imposed, but make no reference to suspension. The appellant also claimed pay as from Dec. 13 the last day in respect of which he had been paid. He contended that even if the suspension were justified, the watch committee had no power to stop his pay. The county court judge entered judgment for the appellant. The Divisional Court (HORRIDGE and SHEARMAN, JJ.) reversed this decision.

E *Maddocks, K.C.* and *A. R. Thomas* for the appellant.

Miller, K.C. and *Gilbert Jordan* for the respondent were not called on to argue.

LORD STERNDALE, M.R. (stated the facts and continued.)—The appellant now claims his pay between Dec. 13, 1920 and Feb. 16, 1921. He claims it on one or two grounds. The first is that there was no power in the watch committee on
F Dec. 17 to suspend him from duty, because the power to do so which is given to them by the Municipal Corporations Act, 1882 has, he contends, been impliedly repealed by being superseded by the regulations made under the Police Act, 1919.

The power given by s. 191 (4) of the Act of 1882 is very clear and specific. By a previous sub-section an obligation is laid upon every member of the police force to obey the lawful commands of any justice having jurisdiction in the
G borough, and for that reason and perhaps also for the reason that in case of suspension it may be necessary to act at once, power to suspend is given to two justices as well as to the watch committee, because it might take some time to have a meeting of the watch committee and for them to act; but nobody but the watch committee has any power under that sub-section to dismiss. The power given to the justices is only a power to suspend, and that is given both
H to the justices and to the watch committee, indicating as it seems to me, that suspension is a matter in which it may be necessary in the interests of the public to act quickly, or indeed to act at once. The Police Act, 1890, has not, I think, any bearing at all on the matter, but the Police Act, 1919, and the regulations made under it, are said to have a very considerable effect upon the case. Section 4 is the important section. It provides that:

I “It shall be lawful for the Secretary of State to make regulations as to the Government, mutual aid, pay, allowances, [pensions] clothing, expenses, and conditions of service of the members of all police forces within England and Wales, and every police authority shall comply with the regulations so made.”

Under the powers conferred by that section, the Secretary of State has made regulations, and in those regulations has provided the method of procedure in the case of charges made against members of the police force, and, speaking roughly, it amounts to this: when a charge is brought against a police officer, he

shall have written information of the charge made against him, and shall have an opportunity of being heard on that charge, and of making any answer he may wish to make, and then the charge will be heard before the chief constable, who will adjudicate upon it. If the officer charged feels aggrieved by the decision of the chief constable, he has a right of appeal to the watch committee. Now, it is perfectly obvious that all that may take a considerable time, and therefore it is not at all to be wondered at that the regulations do not deal with the question of suspension. The power of suspension is one which, as I have said, it may be necessary to exercise at once, pending the final decision of the matter, and the procedure laid down by the regulations is quite inconsistent with any acting at once, or any procedure that can be employed in a question of suspension, and therefore we do not find in the regulations or in the Act of 1919 any reference to suspension.

It was said that an alleged offence committed before these regulations came into operation must be governed as to the method of its investigation by the regulations. That seems to me by no means so clear, because not only do the regulations provide that a written charge must be made, but the written charge must disclose an offence against discipline as defined in the code of offences against the discipline of the force, and the code is the one which is mentioned in the regulations. In the case of an offence committed before the regulations came into force, it is at any rate arguable that it cannot be an offence defined in a code of offences against discipline which was not in existence at the time when the offence in question was committed. It is not necessary to express a definite opinion upon the point, but I am by no means convinced that these regulations would apply at all to an offence committed before they came into operation. However that may be, I entirely agree with the Divisional Court that one cannot find here anything that is in any way inconsistent with or repugnant to the power of suspension given in the Act of 1882. I do not think it necessary to discuss the principles upon which a subsequent Act has been held to repeal the provisions of a previous Act. They were discussed in *Flannagan v. Shaw* (1), and it is not necessary to repeat them, but it seems to me pretty obvious, on any principles, that when the subsequent Act does not deal with the subject-matter of the previous Act at all, and contains nothing whatever that affects it, there can be no implied repeal of the earlier Act by the later one. That disposes of the first point.

But a second point was taken, and it is this: Granted the power to suspend, that does not import the power to withhold pay during the suspension. I should have thought that the power to suspend the operation of a contract necessarily suspended the whole operation of the contract, and did not mean a power of suspending the servant, if I may so call him, from the performance of his duty, but entitling him to receive pay during the time that he is so suspended. It seems to me that *Hanley v. Pease and Partners, Ltd.* (2), to which we were referred, states that extremely clearly. I think that it was stated as clearly as possible by LUSH, J., when he said that if the master chooses to treat the contract as a continuing contract, notwithstanding the misconduct of the servant, "then the contract is for all purposes a continuing one." That was a case in which there was no power of suspension, but only power of dismissal. The master had not exercised his power of dismissal, but had purported to suspend without having any power to do so, and the court held that the master having no power of suspension pending an investigation of the charge, there was no power to withhold payment during the time that he chose to prevent the man from working. ATKIN, J., said:

"I entirely agree that in the circumstances of this case the master had no power to suspend the contract in the sense which really means the fining of the employee in the sum of one day's wages for his previous default."

A And ROWLATT, J., said :

"As regards the point of substance, it is obvious that the employer has no implied power to punish the workman by suspending him for a certain period of his employment, the contract subsisting all the time."

B Those learned judges, as it seems to me, treat it as indisputable that if there is a power of suspension, the whole contract is suspended; the obligations on both sides are suspended. It seems to me that that is the inevitable meaning of suspension, and there was here express statutory power to suspend the man from duty; that, in my opinion, means to suspend him from duty, and from payment for his duty. It suspends the contract with regard to the performance of it by both sides, and not by one only. I think, therefore, that that point also fails, and that the appeal should be dismissed with costs.

C **WARRINGTON, L.J.**—I am of the same opinion. It is clear that to disobey orders by refusing to parade would be a sufficient ground within that section for suspension, but it is said that the power of suspension is abrogated by the Police Act, 1919, and the regulations made thereunder. The Police Act, 1919, provides in s. 4 that the Secretary of State may

D "make regulations as to the government, mutual aid, pay, allowances, [pensions] clothing, expenses and conditions of service of the members of all police forces in England and Wales, and every police authority shall comply with the regulations so made."

E In pursuance of that Act, the Secretary of State made certain regulations, dated Aug. 20, 1920, which came into operation on Oct. 1, 1920. Among those regulations there is a series dealing with the procedure to be taken against an officer charged with an offence against what is called the code of offences in the appendix to the regulations, and the nature of the punishment which can be inflicted on a member of the police force if a breach of the code is established against him. It is said that those regulations have impliedly repealed the power of suspension contained in the Act of 1882. In order that a subsequent statute not expressly repealing a previous Act, or the provisions of a previous statute, may operate by implication as a repeal, it must be found that the provisions of the subsequent statute are so inconsistent with those of the previous one that the two cannot stand together. The principle was expressed by A. L. SMITH, J., in *Kutner v. Phillips* (3) in the passage which is quoted by SCRUTTON, L.J., in *Flannagan v. Shaw* (1). He said ([1891] 2 Q.B. at pp. 271, 272):

G "Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, in which case the maxim *leges posteriores priores contrarias abrogant* applies. Unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two acts standing together."

H In my opinion, there is no such inconsistency here. Suspension and disciplinary procedure followed by punishment seem to me to be two entirely different things. I Suspension is a power which in the nature of things, if it is to be of any use, has, to be exercised summarily, whereas disciplinary procedure followed by punishment, may well be subject to a more deliberate and formal process, and in my opinion it would be most disastrous if we were to hold that legislation dealing with the procedure and the punishment for offences established in accordance with that procedure were to repeal this useful summary power given by the Act of 1882, to suspend a constable pending an inquiry as to his conduct. In my opinion, therefore, the first point made by the appellant fails.

The second point, in my opinion, also fails. That is this. It is said that the power to suspend does not involve the power to abstain from paying. That argument is, in my opinion, unfounded, and for this reason. The relations are those of employer and employed. If the employed is suspended from his functions as an employed person, it seems to me that the effect is to suspend the relation of employer and employed for the time being, to excuse the employed person from performing his part of the contract, and at the same time to relieve the employer from performing his part of the contract. It would be a most extraordinary thing if suspension (assuming that there is power to effect suspension) were to be so one-sided that the servant was to be excused from performing his part of the contract while the employer remained liable to perform his part. It seems to me that suspension suspends for the time being the contractual relation between the two parties on both sides. Therefore, suspension by the watch committee does involve suspension of payment by them, as well as suspension of the performance of the duty by the police constable. I think that the appeal must fail.

SCRUTTON, L.J.—I agree.

Appeal dismissed.

Solicitors: *Indermaur & Brown*, for *Callis & Woosnam*, Blackpool; *Sharpe, Pritchard & Co.*, for *D. L. Harbottle*, Blackpool.

[*Reported by FITZROY COWPER, Esq., Barrister-at-Law.*]

MARSHALL AND SNELGROVE, LTD. v. J. F. GOWER. A. L. GOWER (CLAIMANT)

[KING'S BENCH DIVISION (Avory and Salter, JJ.), November 10, 1922]

[*Reported* [1923] 1 K.B. 356; 92 L.J.K.B. 499; 128 L.T. 829;

[1923] B. & C.R. 81]

Bill of Sale—Registration—Need of registration—Deed giving effect to agreement—Former bill paid off by claimant—Security taken on same goods—Bills of Sale Act, 1878 (41 & 42 Vict., c. 31), s. 10.

In June, 1921, a bill of sale, which was duly registered, was given to secure the sum of £400, with interest. Subsequently, after a part of the principal sum secured had been paid off, an agreement was entered into between the grantor and the present claimant whereby the claimant agreed to pay to the grantee of the bill of sale the balance then owing, amounting to £450, and to lend the grantor a further sum of £550, making £1,000 in all, on having the payment of this total sum of £1,000 with interest secured by the transfer of the securities and assignment of the same goods to the claimant. In November, 1921, a deed was made between the grantor and grantee of the bill of sale and the claimant, giving effect to this agreement. This deed was not registered as a bill of sale.

Held: the deed of November, 1921, was not a "transfer or assignment" of the registered bill of sale within the meaning of the Bills of Sale Act, 1878, s. 10, but was a new bill which must be registered.

Notes. As to the transfer of a registered bill of sale, see 3 HALSBURY'S LAWS (3rd Edn.) 323, 324; and for cases see 7 DIGEST 155-157. For the Bills of Sale Act, 1878, s. 10, see 2 HALSBURY'S STATUTES (2nd Edn.) 566.

A Case referred to :

- (1) *Horne v. Hughes* (1881), 6 Q.B.D. 676; 44 L.T. 678; 45 J.P. 604; 29 W.R. 576, C.A.; 7 Digest 155, 831.

Appeal from an order of a master on an interpleader issue.

- B On Apr. 8, 1920, the plaintiffs, Marshall & Snelgrove, Ltd., commenced an action in the High Court claiming the sum of £41 6s. 7d. from Mrs. Forbes Gower, the price of goods sold and delivered. On Apr. 25, 1920, the plaintiffs recovered judgment against her, in default of appearance, for the sum claimed. Under a bill of sale dated June 23, 1921, John Forbes Gower, in consideration of the sums therein mentioned paid by the company to him, assigned to the National Guardian Investment Co. and their assigns the goods and chattels specifically
- C described in the schedule annexed thereto by way of security for a loan of £400 and interest thereon at 24 per cent. per annum. The grantor agreed to repay the principal sum, with interest, by equal monthly instalments of £16 4s. The bill of sale was duly registered as such. An indenture, made on Nov. 16, 1921, between the company of the first part, the grantor of the second part, and Miss A. L. Gower of the third part, and expressed to be supplemental to the bill of sale of June 23, recited (inter alia) that the principal sum of £394 15s. 2d. only remained owing on the bill of sale, with interest amounting to £55 4s. 10d., making a total of £450; that Miss A. L. Gower had agreed with the grantor to pay to the company the said sum of £450 and to lend to him a further sum of £550 on having the payment of the said sums with interest secured by a transfer of the said sum of £394 15s. 2d. and interest and the securities for the same.
- E The indenture witnessed that, in pursuance of the said agreement and in consideration of the sum of £450 paid to the company by Miss A. L. Gower, the company, as mortgagees, assigned to Miss A. L. Gower the principal sum of £394 15s. 2d. secured by the aforementioned bill of sale and the interest due and to become due thereon and the benefit of all securities for the same. It further witnessed that, in pursuance of the said agreement and for the said consideration, the company, as mortgagees, at the request of the grantor, assigned to Miss A. L. Gower the goods and chattels comprised in or subject to the said bill of sale, subject to the proviso for redemption therein contained. The indenture further contained a covenant by the grantor to repay to Miss A. L. Gower the aggregate sum of £1,000 with interest at the rate of six per cent. from the date thereof. The judgment recovered by the plaintiffs against Mrs. Forbes
- G Gower, the grantor's wife, not having been satisfied, a writ of *fi. fa.* was subsequently issued against her and the sheriff seized the goods and chattels comprised in the bill of sale and indenture already referred to. Miss A. L. Gower then claimed the goods under the bill of sale of June 23, 1921, which she alleged had been transferred to her by the indenture of Nov. 16, 1921, and an interpleader issue was directed.
- H On the hearing of the interpleader issue, the master held that the indenture of Nov. 16, 1921, was not a transfer or assignment of the original bill of sale within the meaning of s. 10 of the Bills of Sale Act, 1878, but was itself a new bill of sale which had destroyed the original bill of sale and required to be registered, and that, therefore, the claimant was not entitled to the original bill of sale. The claim was, accordingly, barred. The claimant appealed, and
- I alleged as grounds of the appeal that (i) the claimant was entitled to the bill of sale date June 23, 1921, on the goods; (ii) the bill of sale was validly transferred to the claimant by the indenture dated Nov. 16, 1921; (iii) the bill of sale was a valid security for the money secured thereby, and (iv) the master was wrong in holding that the original bill of sale was destroyed by the later indenture.

Section 10 of the Bills of Sale Act, 1878, enacts that "A bill of sale shall be . . . registered under this Act . . . transfer or assignment of a registered bill of sale need not be registered."

J. W. F. Beaumont for the claimant, the appellant. A

J. W. Manning, K.C., and *P. B. Morle* for the respondents.

AVORY, J.—In my opinion, the master was right in holding that the claimant was barred. The question for our decision is whether or not the deed of Nov. 16, 1921, was a “transfer or assignment” of a registered bill of sale within the meaning of s. 10 (3) of the Bills of Sale Act, 1878. If it was, it did not require to be registered under the Bills of Sale Acts. If it was not, it was in effect a new and different bill of sale and required itself to be registered. In my opinion, it cannot be properly described as a transfer or assignment of a bill of sale. I do not think that *Horne v. Hughes* (1) is by any means conclusive to show that this view is wrong. On the contrary, I find that it is an authority in favour of the respondents in the present case. It appears from the judgment of **WATKIN WILLIAMS, J.**, in the Divisional Court in that case that there the new deed of Feb. 20, 1880, was found to be for “a further sum, which with the expenses would bring up the amount then advanced by *Horne* substantially to the same amount as that originally secured by the bill of sale.” As for the argument in the Divisional Court, the similarity of the amounts for which the deeds were given was the point mainly relied on on behalf of the plaintiff. *Mr. Charles, Q.C.*, for the plaintiff, said (6 Q.B.D. at p. 680): B

“The maximum amount secured by the mortgage was substantially unaltered by the transfer, so that other creditors of the mortgagor could not be prejudiced by it.” C

Mr. Edward Pollock, for the defendant, said (*ibid.*, at p. 681) that D

“by a transfer was intended merely a handing over of the same security from one person to another, and that here there were substantial variations, and among other things an alteration of the amount secured, the plaintiff getting security for the sums of £113 and £40, over and above the sum at that time secured by the prior bill of sale.” E

WATKIN WILLIAMS, J., in delivering the judgment of the Divisional Court, said (*ibid.*, at p. 683): F

“This appears to us to be in substance, as well as in strict form, a transfer of the bill of sale within the meaning of s. 10 of the Act. Had it been attempted under the colour of a transfer and assignment of the existing mortgage to have extended the security and to have made it available for a larger advance than that for which the original mortgage had been given, such a transaction would not, in our opinion, have been a transfer of a duly registered bill of sale within the meaning of s. 10 of the Act, but substantially a new bill of sale which would have required registration under the Act.” G

The defendant appealed to the Court of Appeal, and that court heard argument on his behalf but did not call on the plaintiff’s counsel. The Court of Appeal I think, agreed with the view which had been expressed in the Divisional Court. They were of opinion (*ibid.*, at p. 684) “that the effect of the deed was to transfer the former security for £348 7s. 4d. on it, and that, such a transfer being valid without registration, the plaintiff was entitled to the goods and that it was not necessary to determine whether he had a right to hold them as security for any larger sum than £348 7s. 4d., since he was at all events entitled to hold them as security for that sum.” H

That case is an authority for the proposition that the deed here in question, looked at as a whole, is not a transfer or assignment of the original bill of sale, but a new bill of sale which itself required registration. The claim must, therefore, be barred and the appeal must be dismissed. I

SALTER, J.—I agree. The document dated Nov. 16, 1921, was not a transfer or assignment of the rights and liabilities of the company as grantee under the

- A** bill of sale of June 23, 1921. The claimant, as grantee under the later document, does not stand in the same position in regard to Mr. Forbes Gower, the grantor, as that which the company as grantees under the original bill of sale occupied in regard to him. The true position is that Mr. Forbes Gower by means of a larger sum of money borrowed from the claimant, his sister, paid off the debt owing by him to the company and thus redeemed the original bill of sale and released the chattels therefrom, and at the same time by the later document he in effect made an assignment of the chattels to the claimant as security for the larger loan which he had obtained from her. The later document is not a transfer or assignment of the original bill of sale, but is itself a bill of sale, and, as it is not registered, it is invalid.

Appeal dismissed.

- C** Solicitors : *Beaumont & Son; Boyce & Evans.*

[*Reported by T. W. MORGAN, Esq., Barrister-at-Law.*]

D

L. OPPENHEIM & CO. v. MOHOMED HANEEF

- E** [PRIVY COUNCIL (Viscount Cave, Lord Shaw, Lord Phillimore, Sir John Edge and Mr. Ameer Ali), February 17, March 7, 1922]

[*Reported* [1922] 1 A.C. 482; 91 L.J.P.C. 205; 127 L.T. 196]

Arbitration—Award—Enforcement—Action—Defence—Irrregularity in arbitration—Arbitration Act, 1889 (52 & 53 Vict., c. 49), s. 11.

- F** By a contract made between buyers and a seller which was to be performed in England, it was provided that "Any differences arising out of this contract, failing amicable adjustment, to be submitted to arbitration in London in the usual manner, and the award of such arbitration to be final and binding on both buyer and seller." Differences having arisen, the buyers appointed an arbitrator to act on their behalf and he proceeded with the arbitration, the seller, who was a merchant carrying on business in India, having refused to take part in the arbitration, and made an award in favour of the buyers. Judgment having been recovered in England against the seller for the amount of the award, a suit was instituted by the buyers in the High Court at Madras claiming the sum due under the judgment. The seller pleaded, *inter alia*, that the English judgment was not binding on him as it was not given on the merits, and, further, that the award was not binding on him on the ground of irregularity.

- H** **Held:** any objection to the award on the ground of misconduct or irregularity on the part of the arbitrator must, since the arbitration clause provided for arbitration in London in accordance with English law and procedure, be taken by motion to set aside or remit the award under the Arbitration Act, 1889, s. 11, made within the time limited by R.S.C. Ord. 64 r. 14; no such motion having been made, the award became as fully binding on both parties as if it had been incorporated in the contract.

Thorburn v. Barnes (1) (1867), L.R. 2 C.P. 384, approved.

- I** **Notes.** The Arbitration Act, 1889, has been repealed by the Arbitration Act, 1950, s. 44 (3). Section 11 of the 1889 Act has been replaced by s. 23 (1) and (2) of the 1950 Act.

Applied : *Scrimaglio v. Thornett and Fehr*, [1924] All E.R. Rep. 802.

As to the enforcement of an arbitration award, see 2 HALSBURY'S LAWS (3rd Edn.) 50 et seq.; and for cases see 2 DIGEST (Repl.) 700 et seq. For the Arbitration Act, 1950, s. 23, see 29 HALSBURY'S STATUTES (2nd Edn.) 108.

Cases referred to:

- (1) *Thorburn v. Barnes* (1867), L.R. 2 C.P. 384; 36 L.J.C.P. 184; 16 L.T. 10; 15 W.R. 623; 2 Mar. L.C. 459; 2 Digest (Repl.) 563, 980.
- (2) *Keymer v. Reddy*, [1912] 1 K.B. 215; 81 L.J.K.B. 266; 105 L.T. 841, C.A.; 16 Digest 122, 209.

Also referred to in argument:

- Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202; 71 L.T. 1; 58 J.P. 540; 10 T.L.R. 479; 6 R. 188, H.L.; 2 Digest (Repl.) 448, 173.
- Bindessuri Pershad Singh v. Jankee Pershad Singh* (1888), I.L.R. 16 Calc. 482; 2 Digest (Repl.) 719, *1837.
- Surjan Raot v. Bhikari Raot* (1893), I.L.R. 21 Calc. 213.
- Ghellabhai Atmaram v. Nandubai* (1895), I.L.R. 20 Bom. 238; 2 Digest (Repl.) 435, *69.

Appeal by L. Oppenheim & Co. from a decree, dated Nov. 6, 1918 of the High Court of Judicature at Madras (SIR JOHN WALLIS, C.J., and NAPIER, J.), in the exercise of its appellate jurisdiction allowing the appeal of the respondent against a decree, dated Feb. 19, 1918, of COUTTS TROTTER, J., in the exercise of the ordinary original civil jurisdiction of the court. The facts appear in the judgment of the Board.

De Gruyther, K.C., and *Harold Morris, K.C.*, for the appellants.
The respondent did not appear and was not represented.

Mar. 7. **VISCOUNT CAYE**.—This is an appeal from a decree of the High Court of Judicature at Madras, in the exercise of its appellate jurisdiction, allowing an appeal from a decree made by COUTTS TROTTER, J., in the exercise of the ordinary original civil jurisdiction of the same court.

The appellants are merchants carrying on business in London, and the original respondent (who has died during the pendency of this appeal and is represented by the present respondents) was a merchant carrying on business in Madras. By a contract in writing made in London and dated Oct. 23, 1913, the appellants bought from the respondent 20,000 tanned Madras sheepskins of a specified quality to be shipped to the appellants in London. The contract contained the following clause:

"Any differences arising out of this contract, failing amicable adjustment, to be submitted to arbitration in London in the usual manner, and the award of such arbitration to be final and binding on both buyer and seller."

Certain skins were shipped to London, and the appellants paid to the respondent £1,495 15s. 4d. in respect of those skins. When the skins arrived in London, the appellants alleged that they were of inferior quality and refused to accept delivery. They were ultimately sold, with the consent of the respondent, at the price of £1,242 10s. thus leaving a deficiency of £253 5s. 4d., which the appellants demanded from the respondent and which the respondent refused to pay. Thereupon the appellants, in pursuance of the arbitration clause contained in the contract and of the English Arbitration Act, appointed Mr. R. H. Pringle as arbitrator on their behalf in the difference which had arisen, and caused the respondent to be served at Madras with a notice, dated Feb. 3, 1916, whereby they informed him of the appointment of Mr. Pringle and required him, within seven days from the service of the notice, to name to the appellants or their agents in Madras an arbitrator to act on his behalf in London in the matter of the difference which had arisen, the notice stating that otherwise the difference would stand referred to Mr. Pringle alone as sole arbitrator. The

A respondent refused to appoint an arbitrator to act on his behalf or to take part in the arbitration; and thereupon Mr. Pringle, at the request of the appellants, proceeded with the arbitration. He gave no opportunity to either party to appear and give evidence before him, but, having read the contract and correspondence and inspected the skins, he made his award in writing, dated July 11, 1916, and thereby awarded that the respondent should pay to the appellants the sum of £258 5s. 9d., with interest and costs. On July 15, 1916, the appellants brought an action in the King's Bench Division of the High Court of Justice in England for the amount payable under the award, and, the writ of summons having been served by leave on the respondent at Madras and no appearance having been entered, the appellants, on Nov. 28, 1916, recovered judgment against the respondent for the sum of £286 2s. 9d., being the amount of the award with some interest and costs.

The appellants then brought the suit out of which this appeal arises against the respondent in the High Court of Judicature at Madras, claiming the sum of £286 2s. 9d. due under the judgment of the King's Bench Division, or in the alternative, £263 10s. 9d., being the amount of the award and costs, with interest, or, as a further alternative, £253 5s. 4d., being the loss on the contract. The respondent pleaded (among other pleas which are not now material) that the judgment of the High Court of Justice in London was not binding on him, as it was not given on the merits, that the claim under the contract was barred by limitation, and as to the award, that it was not binding on him as no notice was given to him by the arbitrator that he was proceeding to arbitrate. The suit was heard by COURTS TROTTER, J., who held that, having regard to the decision of this Board in *Keymer v. Reddy* (2), the action on the judgment could not be maintained, as the judgment had been entered in default of appearance and the action had not been tried on its merits, and that the claim under the contract was statute-barred. This part of the judgment has not been challenged and need not be further referred to. With regard to the award, the learned judge in a lucid judgment held that the plea of want of notice could not be raised by defence in the suit. After observing that the grievance of the respondent was more imaginary than real, the award having been made by a commercial man who took the commercial documents with which he was familiar and saw the goods and gave his opinion on the spot, he added that, if the objection could have been raised in the proceedings, he would have felt constrained to give effect to it. But he referred to *Thorburn v. Barnes* (1) as a complete authority for the proposition that, according to the English law, any objection relating to an irregularity in bringing an award into existence must be taken by motion under the Arbitration Act, 1889, to set aside or remit the award, and, if not so taken, could not be raised by way of defence to an action on the award. He, therefore, held that the defence that the award was tainted with irregularity by the fact that the respondent had not had an opportunity of being present at the arbitration, was not open to him in the suit. An application having been made by counsel for the respondent to treat the written statement as an application to the court at Madras to set aside the award, the learned judge held that he had no jurisdiction to entertain such an application, adding:

I "How a judge in Madras is supposed to have jurisdiction to upset an award made by an arbitrator in London passes my comprehension, and it is perfectly clear that the court which is given jurisdiction by the English Act is the English court."

He added that, even if he had had jurisdiction, he would have declined to exercise it. Against this judgment an appeal was brought and was allowed by the Appellate Division, the learned judges of that Division holding that the rule in *Thorburn v. Barnes* (1) did not apply in India. Thereupon the present appeal was brought.

In their Lordships' opinion, **COUTTS TROTTER, J.**, came to the right decision and this appeal should succeed. The contract of Oct. 23, 1913, was made and was to be performed in England; and the arbitration clause provided for an arbitration which was to take place in London and in accordance with English law and procedure. Under that law, by which both parties agreed to be bound, any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator must be taken by motion to set aside or remit the award, and, if not so taken, cannot be pleaded in answer to an action on the award. In the present case, no such motion was made within the time limited by Ord. 64, r. 14, of the Rules of the Supreme Court, England, or at all, and, accordingly, the award became as fully binding on both parties as if it had been incorporated in the contract. No doubt any defence going to the root of the award—for instance, that the arbitrator had no jurisdiction or that the matter was tainted with fraud—could have been pleaded in the suit; but a defence on the ground of irregularity not appearing on the face of the award was excluded by the law by which both parties had agreed to be bound. On this view of the case, the Indian law as to arbitration is irrelevant, and their Lordships accordingly express no opinion on the question whether, if the arbitration had taken place in India, the defence on the ground of irregularity could have been pleaded. It is plain that the Indian court could not set aside an English award on that ground. In order to prevent misconception, it appears desirable to add that it was not pleaded or contended at any stage of the proceedings that the award had merged in the English judgment, and, accordingly, their Lordships do not deal with that point.

For the above reasons, their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the order of **COUTTS TROTTER, J.**, should be restored, the respondents to pay the costs in both courts in India and the costs of this appeal.

Appeal allowed.

Solicitors : *Morris, Veasey & Co.*

[*Reported by* **EDWARD J. M. CHAPLIN, ESQ., Barrister-at-Law.**]

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KING v. MILLEN

[KING'S BENCH DIVISION (Bailhache and Shearman, J.J.), July 28, 1922]

[Reported [1922] 2 K.B. 647; 92 L.J.K.B. 123; 128 L.T. 280;
67 Sol. Jo. 48; 20 L.G.R. 715]

B

Rent Restriction—Furnished letting—"Attendance"—Agreement by landlord to keep hall and staircase cleaned—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12 (2), proviso (i).

C

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2) proviso (i), that Act is not to apply to a dwelling-house "bonâ fide let at a rent which includes payments in respect of board, attendance, or use of furniture." A flat was let to a tenant, together with the use, jointly with other tenants, of the main entrance hall and staircase of the premises, and the landlord agreed, *inter alia*, to keep the hall and staircase properly cleaned.

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Held: this service did not amount to "attendance" within the meaning of s. 12 (2), proviso (i), and, therefore, the flat came within the protection of the Act.

Nye v. Davis (1), [1922] 2 K.B. 56, distinguished.

Notes. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, has been amended by the Rent Act, 1957, s. 26 (3) and Sch. VIII, Part I.

Considered: *Wood v. Carwardine*, [1923] All E.R. Rep. 57. Referred to: *Dick v. Duncan* (1923), 92 L.J.Ch. 320; *Palser v. Grinling, Property Holding Co. v. Mischeff*, [1948] 1 All E.R. 1.

E

As to dwelling-houses let at a rent including attendance and furniture, see 23 HALSBURY'S LAWS (3rd Edn.) 748 et seq.; and for cases see 3 DIGEST (Repl.) 650 et seq. For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12; see 13 HALSBURY'S STATUTES (2nd Edn.) 998.

F

Case referred to:

(1) *Nye v. Davis*, [1922] 2 K.B. 56; 91 L.J.K.B. 545; 126 L.T. 537; 20 L.G.R. 483; 31 Digest (Repl.) 651, 7545.

Appeal from West London County Court.

G

By an agreement of tenancy dated May 31, 1921, the landlord let to the tenant for a term of three years at an annual rent of £140 six rooms on the second and third floors of No. 37, Collingham Place, London, W., together with the use, jointly with other tenants, of the main entrance hall and staircase of the premises, and of the bathroom and lavatory on the landing between the first and second floors, with right of access to and from the basement. The landlord agreed, *inter alia*, to keep such parts of the premises as were used, jointly or otherwise, by the tenant in a proper state of repair and to keep the hall and staircase properly cleaned. The rateable value of the premises on Aug. 3, 1914, was £105. On May 11, 1922, the landlord made an application for leave to distrain on the premises for rent, alleging that the tenant was in arrear. At the hearing of the application, it was contended on behalf of the tenant that the rent was excessive and that, if adjusted in accordance with the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, no rent, or only a small amount, would be found due. On behalf of the landlord, it was contended that the premises let to the tenant did not come within the protection of the Act as they consisted of a dwelling-house bonâ fide let at a rent which included payments in respect of attendance within the meaning of s. 12 (2) proviso (i) of the Act. The county court judge was referred to *Nye v. Davis* (1) and, being pressed by that case, he came to the conclusion that the undertaking by the landlord to clean the common hall and staircase amounted to "attendance" within the meaning of the proviso, and that, therefore, the premises were not

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within the protection of the Act. He accordingly gave leave to distrain. The tenant appealed. A

H. G. Robertson for the tenant.

F. J. Tucker for the landlord.

BAILHACHE, J.—The only point for decision in this case is whether the flat in question is excluded from the operation of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, by reason of s. 12 (2), proviso (i), which states that the Act is not to apply to a dwelling-house “bonâ fide let at a rent which includes payments in respect of board, attendance, or use of furniture.” Was this flat let at a rent which includes payments in respect of “attendance”? B

By the tenancy agreement certain rooms on the second and third floors of the house were let to the tenant, and it is argued that, because the landlord, as part consideration for the rent, agreed to keep the hall and staircase properly cleaned, the premises are, therefore, let at a rent which includes payment in respect of “attendance.” The learned county court judge, being pressed by *Nye v. Davis* (1) held that the undertaking by the landlord to keep the hall and staircase cleaned was “attendance” within the meaning of the proviso. In *Nye v. Davis* (1), there were similar covenants by the landlord, but he undertook, in addition, to remove the house refuse from the tenant’s flat and to carry the tenant’s coals to the flat once a week free of charge. The court held that the removal of house refuse and the carrying of coals to the flat was “attendance” within the meaning of the section. But in this case there is no undertaking by the landlord to remove the house refuse or to carry coal. There is only the agreement to keep the common hall and staircase clean. There is no demise of the hall and staircase to the tenant, who has only an easement over them, and, in my view, a contract merely to keep clean something which is not demised to the tenant, is not a contract for “attendance” within the meaning of the proviso. There is nothing in the nature of personal service rendered by the landlord to the tenant such as there was in *Nye v. Davis* (1). In my opinion, therefore, the county court judge was wrong in thinking that he was bound by the decision in *Nye v. Davis* (1), and, but for that decision, he would have decided this case as we do. *Nye v. Davis* (1) is distinguishable from this case and the appeal must, therefore, be allowed. C D E F

SHEARMAN, J.—The learned county court judge did not have a full report of *Nye v. Davis* (1) before him when he decided this case, and he thought he was bound by it. It has been contended on behalf of the landlord in this case that the agreement by him to keep the hall and staircase clean was an agreement for “attendance” within the meaning of s. 12 (2), proviso (i). But the word “attendance” in the collocation of words used implies, in my view, something in the nature of personal service in the flat just as “board” and “use of furniture” involve something in the flat itself. In this case, the access to the hall and staircase is common to all the occupants of the flats. There is nothing in *Nye v. Davis* (1) which constrains us to hold that what the landlord in this case agreed to do amounts to “attendance.” I agree, therefore, that the appeal must be allowed. G H

Appeal allowed.

Solicitors: *F. Stanley Culver; Gibson & Weldon*, for *E. Francis Watts*, Portsmouth.

[Reported by T. W. MORGAN, Esq., Barrister-at-Law.]

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LA ROCHE v. ARMSTRONG

[KING'S BENCH DIVISION (Lush, J.), January 19, 1922]

[Reported [1922] 1 K.B. 485; 91 L.J.K.B. 342; 126 L.T. 699;
38 T.L.R. 347; 66 Sol. Jo. 351]

B

Evidence—Admissibility—Letters written by solicitor “without prejudice”—Negotiations for settlement of dispute between solicitors' client and plaintiff—Admissions by client—Privilege.

Letters written by solicitors without prejudice during negotiations for the settlement of a dispute between their clients are inadmissible in evidence, not only against the client on whose behalf they were written, but also against the solicitor who wrote them.

C

Evidence—Admission—Right to sum of money—Money in hands of solicitor—Admissions by client—Action brought against solicitor.

Although in cases where title to a chattel is in question, admissions made by persons from whom the title is derived which qualify or affect their title are admissible in evidence against the person who has acquired the title, such evidence is not admissible where there is no title in question.

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Notes. Considered: *McTaggart v. McTaggart*, [1948] 2 All E.R. 754; *Pool v. Pool*, [1951] 2 All E.R. 563.

As to admissions and as to the admissibility in evidence of communications without prejudice, see 15 HALSBURY'S LAWS (3rd Edn.) 295 et seq., 407, 408; and for cases see 22 DIGEST (Repl.) 75 et seq., 368 et seq.

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Action tried by LUSH, J., without a jury, in which the plaintiff claimed a sum of money which he alleged was money had and received by the defendant to the use of the plaintiff, who sued as administrator of the estate of his deceased son, Godfried La Roche.

The plaintiff claimed that the money in question had remained the property of his deceased son in the circumstances alleged in the statement of claim which were as follows. Godfried La Roche was for some time before his death engaged to marry one Margaret Barbour, and in March, 1920, he sent to her in London from West Africa two drafts for £100 each. On Mar. 28, 1920, the deceased's sister informed Miss Barbour of his death. In May, 1920, the plaintiff, as administrator of his son's estate, demanded from Miss Barbour the proceeds of the two drafts, on the ground that they had been sent to her by the deceased for the purpose of providing and furnishing on his behalf a home for their joint occupation after their marriage, and that the drafts remained the property of the deceased until his death, and thereafter became part of his estate, to be held in trust for and/or as money received for the use of the administrator of the estate. Miss Barbour refused to pay the proceeds of the drafts to the plaintiff, and on July 24, 1920, she handed £115, part of the proceeds, to the defendant, her solicitor. The plaintiff alleged that this sum was received by the defendant with notice of the fact that it was part of the proceeds of the drafts in question or that the foregoing facts come to his notice before the issue of the writ in the present action on July 27, 1920; and that it was, therefore, his duty to hand over this sum of £115 to the plaintiff as administrator of his son's estate. The defendant denied the statements of fact alleged in the statement of claim and pleaded that he was at all material times Miss Barbour's solicitor, in which capacity he acted professionally on her behalf. On May 3, 1920, Miss Barbour wrote to the plaintiff a letter in which she refused to hand over to him the proceeds of the two drafts on the ground that they were given to her for her own personal use and benefit. The defendant, in answer to interrogatories, admitted (i) that Miss Barbour handed to him on July 24, 1920, the sum of £115; (ii) that on or before that date he had had notice of the death of the plaintiff's son Godfried La Roche; and (iii) that the sum of £115 was still in his hands at the date of

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the service of the writ in the action. The plaintiff's solicitor having written to Miss Barbour demanding payment of the money and threatening proceedings in the event of her not paying by a specified day, Miss Barbour retained the defendant to act for her. The defendant wrote to the plaintiff's solicitor on Miss Barbour's behalf two letters in the course of negotiations, with a view to a settlement of the dispute. Both letters were marked "without prejudice." At the trial, the plaintiff's counsel sought to put in evidence the two letters in question. The first one was dated July 19, 1920, and in it he offered on behalf of Miss Barbour to pay over to the plaintiff the "balance of the £200 which she received from the deceased." There was also a statement that "the balance now in her hands is £115." In the second letter, dated July 24, the defendant wrote that he had seen his client again that day, and "she has handed over to me the £115. She informs me that this is all she has, and if you like to take this sum you can have it." He added that, in the event of the plaintiff not accepting that sum, he proposed to return it to Miss Barbour as he (the defendant) was instructed to accept service on her behalf. There was an interview between the plaintiff's solicitor and the defendant, in consequence of the two letters in question, and it was also sought to put in evidence certain admissions made by Miss Barbour at an interview at which the defendant was not present, as being the admissions of a person through whom the defendant was "derivatively interested." Objection was taken to the letters being admitted on the ground that the words "without prejudice" protected not only the client, but her solicitor (the defendant) as well. Counsel for the defendant also objected to the evidence of the oral admissions at the two interviews referred to being given.

Walter Hedley for the plaintiff.

C. M. le Breton, K.C., and *A. E. Woodgate* (*Havers* with them) for the defendant.

LUSH, J., stated the facts, and continued: In the first place I think that the two letters of July 19 and 24, 1920, having been written without prejudice, cannot be admitted as evidence either against the client on whose behalf they were written or against the solicitor who actually wrote them. There is no authority on the point, but my reason for thinking that this is the correct view is that to rule otherwise would in many cases make negotiations for the settlement of litigation almost impossible. Unless parties to such negotiations can feel safe in making an offer and in stating the facts on which it is based, the door to negotiation is closed. It is for the benefit of litigants and others, that statements should be freely made in order to settle litigation where possible. That being so, it is necessary for me to hold that the solicitor who makes statements in the course of the negotiations "without prejudice" is similarly protected. If the solicitor cannot place before the other side all the material facts which make the offer of settlement reasonable without fear of an action if the offer is refused, it would be difficult to negotiate at all. The defendant wrote in his capacity as solicitor for Miss Barbour, and identified himself with her for the purpose of the offer, and it would be wrong to hold that a solicitor so acting should be exposed to an action by the other side because the letter contained a statement which could be used against him. The general principle applies as much to the solicitor as to the client for whom he acts, and I hold that these letters cannot be read as evidence against the defendant. If that is so there is no evidence before me that the defendant received this money knowing it to be trust money. In his answer to interrogatories, the defendant admitted that he had deceived £115 from Miss Barbour on July 24, 1920, but he stated that he did not know whether that was the £115 referred to in his letter to the plaintiff's solicitor dated July 19, 1920, as "the balance now in her hands." He received that money from her for the purpose as I gather, of her defence in the proceedings which were then threatened against her by the plaintiff. Therefore, I must infer that her case was that she was under no duty

A to refund the money; in other words, that it was not trust money. It would be both unreasonable and impossible to say that her solicitor could not take steps to defend her or use the money otherwise than by paying it over to the plaintiff. There is no evidence before me either that the defendant knew it to be trust money or that it was in fact trust money.

Counsel for the plaintiff has also sought to put in evidence statements made by **B** Miss Barbour at an interview between herself and the plaintiff's daughter, at which the defendant was not present. Miss Barbour is not the agent of the defendant to make admissions for him. It is said that where "title" is in question, statements made by persons from whom the title is derived, are evidence against those who have acquired the title. It is, I think, true that, if a chattel is transferred, admissions made by the transferor at the time of, or prior to, the transfer, which **C** qualify or affect his title, are admissible in evidence against the transferee; but no title is in question in this case. It is a simple case of money paid by the deceased to Miss Barbour and by her to the defendant. It is true that the money came from the deceased, but it cannot be said that the defendant derived title from Miss Barbour, or—to use the expression cited from TAYLOR ON EVIDENCE (11th Edn.) paras. 750 and 759—that he was "derivatively interested" through her. **D** It follows that this second branch of evidence also fails. The only course open to the plaintiff would have been to call Miss Barbour, and this he elected not to do. I would add this. Here the solicitor has received a sum of money from his client for the purpose of his resisting on her behalf a claim by the plaintiff, who says it is trust money, and that the client is under a duty to return it. In such circumstances, I should be very loth to say that the solicitor, who cannot know the real truth of the matter, inasmuch as he hears one story from his client and another from the plaintiff, is bound to hold the money not for his client, but for the plaintiff whose claim is not yet established. This is not an ordinary case of the misuse of trust money. The defendant has used the money for the purpose for which he received it. Even if the difficulty of the onus of proof were surmounted, it would be hard for the plaintiff to succeed, and in this case there must be judgment for the defendant. **E**

Judgment for defendant.

Solicitors: *Frank Patteson; Gustavus Thompson & Sons.*

[*Reported by T. W. MORGAN, ESQ., Barrister-at-Law.*]

L. FRENCH & CO., LTD. v. LEESTON SHIPPING CO., LTD.

[HOUSE OF LORDS (Lord Buckmaster, Lord Dunedin, Lord Atkinson, Lord Sumner and Lord Carson), March 10, 1922]

[Reported [1922] 1 A.C. 451; 91 L.J.K.B. 655; 127 L.T. 169; 38 T.L.R. 459; 15 Asp. M.L.C. 544; 27 Com. Cas. 257]

Shipping—Charterparty—Shipbroker—Commission on hire paid and earned during time charter—Sale of ship to charterer during charter period—Right of shipbroker to commission for whole charter period.

The appellants carried on the business of shipbrokers, and the respondents were shipowners. By a charterparty made between the respondents and J. H. & Co., as charterers, it was provided that a commission of 2½ per cent. on the hire paid and earned under the charter, and on any continuation thereof, should be payable to the appellants. The charter was a time charter for the period of eighteen months. After four months had expired, the respondents sold the vessel to the charterers, with the result that the charter came to an end. In an action by the appellants to recover commission in respect of the period subsequent to the sale of the vessel,

Held: there was no implied term that the respondents would not terminate the charterparty by the sale of the ship to the charterers; there was no evidence that the respondents had sold the ship for the express purpose of relieving themselves from liability for payment of any further commission; and, therefore, the action failed.

White v. Turnbull, Martin & Co. (1) (1898), 78 L.T. 726, approved.

Notes. Applied: *Howard Houlder and Partners v. Manx Isles Steamship Co.*, post, p. 579. Referred to: *W. H. Gaze & Sons v. Port Talbot Corpn.* (1929), 93 J.P. 89; *Bentall, Horsley and Baldry v. Vicary*, [1931] 1 K.B. 253.

As to a brokerage clause in a charterparty, see 20 HALSBURY'S LAWS (2nd Edn.) 363-365; and for cases see 41 DIGEST 349 et seq.

Case referred to:

(1) *White v. Turnbull, Martin & Co.* (1898), 78 L.T. 726; 14 T.L.R. 401; 8 Asp. M.L.C. 406; 3 Com. Cas. 183, C.A.; 41 Digest 351, 2005.

Appeal by the plaintiffs from an order of the Court of Appeal, affirming a judgment of ROCHE, J., in favour of the respondents. The appellants were shipbrokers carrying on business in London. The respondents were owners of the steamship *Clematis*. In May, 1919, the appellants were employed by the respondents as brokers in connection with the chartering of the vessel, and, after considerable efforts, they succeeded in arranging a charter for the vessel to John Holt & Co., Ltd., for eighteen calendar months for the sum of 28s. 9d. on the steamer's dead weight on summer marks. By cl. 30 of the charterparty it was provided that "A commission of 2½ per cent. on the hire paid and earned under this charter and on any continuation is payable to [the appellants] for division." The respondents, having paid to the appellants commission on four months' hire of the vessel, negotiated with the charterers for the sale of the vessel and eventually sold it to the charterers. As a consequence, the charterparty was cancelled and no further hire was paid or earned thereunder. The appellants accordingly brought the present action claiming to be entitled to recover from the respondents £2,876 6s., being commission at 2½ per cent. on hire for the remaining fourteen months of the charterparty period. The appellants contended that the respondents, having received the full benefit of the appellants' services, were not entitled so to act to deprive the appellants of part of their remuneration for such services, and the commission claimed was the agreed and/or fair and reasonable remuneration. The appellants further alleged that there was an implied term in the charterparty that the respondents would not

A by their wilful act prevent any commission from becoming payable thereunder, and that the chartered hire for the fourteen months was taken into account in fixing the sale price of the steamship.

D. C. Leck, K.C., and C. T. Le Quesne, for the appellants.

F. D. MacKinnon, K.C., and W. A. Jowitt, for the respondents.

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LORD BUCKMASTER.—The appellants are a company that carry on the business of shipbrokers, and the respondents are a shipping company owning a line of steamers. The action out of which this appeal has arisen was brought by the appellants against the respondents claiming commission on freight that ought to have been earned by one of their steamships known as the *Clematis*. The commission was payable under a charterparty dated May 30, 1919, and made between the respondents as the owners and John Holt & Co. as charterers of the vessel. The charter was a time charter for the period of eighteen months, and it contained among other clauses a clause No. 30, which provided that "A commission of 2½ per cent. on the hire paid and earned under this charter and on any continuation" was to be payable to the present appellants. There are other provisions in the charter to which it is not necessary to refer, for none confer any larger rights on the appellants. There is no other document in the case and no claim made or indicated by the evidence based on any other contract. The rights, therefore, as between appellants and respondents are to be found in the terms of that document and nowhere else, and the initial difficulty due to the fact that the appellants are suing on a contract to which they were not parties has been overcome by assuming that the charterers were trustees for them of the benefits of it. I accept, without any opinion for the purpose of this appeal, that that assumption is well founded. Freight was earned under the charterparty and commission was paid, but on April 16, 1920, the vessel was sold, and from that time no further freight was earned and no further commission was paid. It is to recover the balance of commission for the remainder of the term that proceedings were originally brought.

Those proceedings have met with uniform ill success. The appellants' action failed before ROCHE, J., and an appeal from his decision was dismissed by the Court of Appeal. The Court of Appeal have, quite rightly, based their judgment on the fact that *White v. Turnbull, Martin & Co.* (1) is a complete and conclusive authority on the point which, at any rate, bound their judgment. My Lords, that decision does not bind your lordships' House, and it becomes necessary to consider whether you agree with its effect. I have no hesitation in saying that I agree entirely with the conclusion that was then reached and with the reasoning on which it was based. It is pointed out by CHITTY, L.J., in that case, in which the facts were closely similar to the present, and where the charterparty had been cancelled, though under different conditions from the conditions which have caused the cessation here, that, in order to enable the plaintiff to succeed, it would be necessary to introduce into the charterparty an agreement by which the shipowner must be taken to say, "I will not terminate the charterparty under any circumstance by agreement," and he adds, "It seems to me that that implication cannot be maintained."

I agree that it is always a dangerous matter to introduce into a contract by implication provisions which are not contained in express words, and it is never done by the courts except under the pressure of conditions which compel the introduction of such terms for the purpose of giving what LORD BOWEN once described as "business efficacy" to the bargain between the parties. There is no need whatever in the present case for the introduction of any such term. The contract works perfectly well without any such words being implied, and, if it were intended on the part of the shipbroker to provide for the cessation of the commission which he earned owing to the avoidance of the charterparty, he ought to have arranged for that in express terms between himself and the shipowner.

I have not referred, in what I have said, to the circumstances that would need to be regarded provided it were established that the destruction of the position on which the right to commission arose was expressly effected by the person bound to pay the commission for the purpose of relieving himself from liability for payment. There is no evidence of anything of the kind before your lordships in this case; we only know that in the exercise of the undoubted rights of ownership which the respondents possess, the vessel in this case was sold, and the charterparty came to an end. A B

LORD DUNEDIN.—My Lords, I concur. I would only like to add one observation as to the reservation which was made in *White's Case* (1), and which seems to have rather troubled BANKES, L.J., in this case, as to wilful default. I think that wilful default would only arise if it could be shown that the act which had been done, and which should have had as its sequel the non-earning of further commission, had been done by the doer of it, not *primâ facie* for a purpose of his own, but simply and solely to avoid payment of the commission. C

LORD ATKINSON.—My Lords, I concur.

LORD SUMNER.—My Lords, the words which define the subject-matter, on which this commission is to be paid, are to be found in the print in cl. 30, namely, "On the hire paid and earned under this charter." As no hire was paid and earned in respect of the period in question, it appears to me to be clear that debt could not lie for the sum sued for. It must, therefore, be damages, that is to say, the appellants must satisfy your lordships that there has been a breach by the respondents of some obligation in their favour to be implied from the charter. D E That obligation virtually is that the shipowner will not sell his own ship during the chartered term. No authority has been produced for the implication of such a stipulation. It would be all the more curious, because it is not suggested that there is any stipulation that the other parties, the charterers, to whom, on behalf of the appellants, the promise to pay commission is given, will not buy the ship during the term of the charter, and the odd part of it is that, there being no direct contract between the brokers and the shipowners (the contract being made on their behalf by the charterers), it is supposed that the undertaking arises only between the shipowner, who is deemed to be the employer, and the charterer, who is neither broker nor employer, although the charterer equally with the shipowner puts an end to further commission by joining in the purchase and sale. F

I see no reason to doubt that *White v. Turnbull, Martin & Co.* (1) was correctly decided, or to think that it can be distinguished from the present case. I agree that the appeal fails. G

LORD CARSON.—My Lords, I concur.

Appeal dismissed.

Solicitors: *Charles Lightbound & Co.; Holman, Fenwick & Willan.*

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.]

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Re LUCAS. RHYS v. ATTORNEY-GENERAL

[CHANCERY DIVISION (Russell, J.), February 24, 1922]

[Reported [1922] 2 Ch. 52; 91 L.J.Ch. 480; 127 L.T. 272; 66 Sol. Jo. 368]

Charity—Relief of poverty—Aged persons—Gift to “oldest respectable inhabitants . . . to the amount of five shillings per week each.”

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A testator by his will, after providing that the income of his estate should go to a niece during her life, directed as follows: “And after the decease of my said niece I desire . . . all income derived from the investments to be given to the oldest respectable inhabitants in Gunville to the amount of five shillings per week each.”

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Held: the element of poverty could be read into the gift owing to the smallness of the sum contemplated, and that, coupled with the use of the word “oldest,” constituted a good charitable gift.

Re Dudgeon (1) (1896), 74 L.T. 613, applied.

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Notes. Considered: *Re Forster, Gellatly v. Palmer*, [1938] 3 All E.R. 767; *Re Lewis, Public Trustee v. Allen*, [1954] 3 All E.R. 257. Referred to: *Re Roadley, Iveson v. Wakefield*, [1930] 1 Ch. 524; *Re Sanders' Will Trusts, Public Trustee v. McLaren*, [1954] 1 All E.R. 667.

As to the relief of the aged, impotent and poor, see 4 HALSBURY'S LAWS (3rd Edn.) 213 et seq.; and for cases see 8 DIGEST (Repl.) 316 et seq.

Cases referred to:

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(1) *Re Dudgeon, Truman v. Pope* (1896), 74 L.T. 613; 12 T.L.R. 465; 8 Digest (Repl.) 317, 35.

(2) *Thompson v. Corby* (1860), 27 Beav. 649; 3 L.T. 73; 24 J.P. 581; 8 W.R. 267; 54 E.R. 257; 8 Digest (Repl.) 322, 61.

(3) *A.-G. v. Comber* (1824), 2 Sim. & St. 93; 57 E.R. 281; 8 Digest (Repl.) 322, 60.

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(4) *Re Wall, Pomeroy v. Willway* (1889), 42 Ch.D. 510; 59 L.J.Ch. 172; 61 L.T. 357; 37 W.R. 779; 8 Digest (Repl.) 319, 43.

(5) *Re Gosling, Gosling v. Smith* (1900), 48 W.R. 300; 16 T.L.R. 152; 44 Sol. Jo. 196; 8 Digest (Repl.) 320, 49.

(6) *A.-G. v. Haberdashers' Co.* (1832), 2 L.J.Ch. 33; 5 Sim. 478; affirmed (1834), My. & K. 420; 39 E.R. 741, L.C.; 8 Digest (Repl.) 357, 357.

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(7) *A.-G. v. Duke of Northumberland* (1877), 7 Ch.D. 745; 47 L.J.Ch. 569; 26 W.R. 586; varied (1878), 38 L.T. 245, C.A.; 8 Digest (Repl.) 410, 1020.

Also referred to in argument:

Income Tax Special Purposes Comrs. v. Pemsel, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, 1.

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Adjourned Summons.

By his will dated Sept. 17, 1915, the testator, Edwin Lucas, after providing that the income from his estate was to go to a niece of his, Agnes Eliza Yeatman, during her life (who was also his sole next-of-kin, i.e., his sole heiress-at-law) provided as follows:

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“And after the decease of my said niece I desire that trustees shall be appointed consisting of not less than seven at any time to be appointed in the first place by the trustees of this my will as I desire all income derived from the investments to be given to the oldest respectable inhabitants in Gunville to the amount of five shillings per week each, and I also request that a tablet shall be prepared at my decease and placed in or on the outside of the church at Gunville stating that at the decease of my niece the income derived from all

my investments will be given to the oldest respectable inhabitants of Gunville aforesaid to be selected by my trustees as aforesaid."

This summons was taken out for the determination of the question whether the gift in favour of the oldest respectable inhabitants in Gunville was or was not a good charitable gift.

G. D. Johnston for the summons.

Dighton Pollock for the Attorney-General.

W. H. Horsley for the heiress-at-law and next of kin.

RUSSELL, J.—In this case the point I have to determine is whether a particular gift contained in the will of Edwin Lucas is or is not a good charitable gift. The gift is in these terms. [His Lordship stated the terms of the gift, and continued]: This is a gift of income in perpetuity in favour of the persons above mentioned, and, of course, if the bequest is not a good charitable bequest it would fail, and, as the tenant for life under the will is sole next of kin and sole heiress-at-law, she would be entitled to the whole of the testator's estate. I confess that when the will was first read to me it did not strike me as being capable of being construed as a good charitable bequest, because the beneficiaries are to be "the oldest respectable inhabitants," words which, by themselves, do not in any way connote poverty. But counsel for the Attorney-General has referred me to various authorities, and he puts his case in this way: "In the first instance," he says, "I can claim it as a good charitable bequest, it being for the benefit of aged persons and coming within the statute of Elizabeth, or alternatively I can read out of this gift in the will the element of poverty, in which case the gift would then equally be a good charitable gift." Speaking for myself, I am not satisfied that old age merely of itself would be sufficient to constitute the gift a good charitable bequest, although there are several dicta to that effect in the books. I can find no case, and none has been cited to me, where the decision has been based on age and nothing but age. In *Thompson v. Corby* (2), the gift was this:

"And I give the interest of the remaining £600 of the aforesaid £1,600 to be divided equally, twice in the year, between twenty aged widows and spinsters of the parish of Peterborough."

In giving judgment, the Master of the Rolls (SIR JOHN ROMILLY) says this (27 Beav. at p. 650):

"If the matter had depended upon the statute alone, I should have thought that the word 'aged' would have been sufficient to create a good charitable bequest; but the case of *A.-G. v. Comber* (3) determines that a bequest to the widows and orphans of a parish necessarily implies that it is for such as are suffering from destitution or privation."

There we get a statement by the Master of the Rolls that, in his view, the word "aged" would have been sufficient, but he does not base his decision on that view; he bases his decision on the authority of the case which says that such a bequest implies destitution or privation.

In *Re Wall, Pomeroy v. Willway* (4), we get a decision of KAY, J., very much on the the same lines. The gift there was:

"I desire the interest of this £2,500 absolutely and for ever to be divided into annuities of £10 each, and to be paid half-yearly to an equal number of men and women not under fifty years of age, Unitarians, and who attend Lewin's Mead Unitarian Chapel or Chapels in Bristol; a tablet to be placed in Lewin's Mead Chapel to give the information of gift, otherwise how should the deserving know of it?"

KAY, J., commences his judgment by saying (42 Ch.D. at p. 511):

"I confess I think that this is a matter of some difficulty, but looking at the words of the statute which expressly mentions 'aged' people, I do not see how I can avoid the conclusion that this is a charitable gift."

A Pausing there, that is an indication of the view of the learned judge that "aged" by itself would probably be enough, but again it will be observed that he does not base his judgment on that. He goes on (*ibid.* at p. 512) :

B "I find in the statute of Elizabeth that one of the classes of persons who are objects of charitable gifts are 'aged persons.' Without straining language, I cannot say that where there is a gift to persons not under fifty years of age those persons are not 'aged' within the statute. I think they are. I think there is enough in this will to indicate that the objects of the gift are aged persons, members of one or other of these congregations; and in dealing with such a trust I conceive the duty of the trustees would be to give the benefit of it to the deserving of the class, and although 'deserving' would not of itself indicate that they were to be poor, yet when I couple all these facts together, that they are to be not under fifty years of age, deserving, members of a congregation of Unitarians, and that the annuities are only £10 each, I cannot help thinking that the true construction of these words must be that poor members of the congregation who have passed that age, and are less able to provide for themselves than they would be if they were younger, are intended to be benefited. I hold, therefore, that the gift is charitable."

Again, it will be observed that the learned judge really bases his decision on the element of poverty.

E BYRNE, J., had to consider a gift in favour of old and worn-out clerks in *Re Gosling, Gosling v. Smith* (5). The gift there was to form a fund for the purpose of pensioning off old and worn-out clerks of a particular firm, and it was held to be a good charitable bequest. BYRNE, J., in his judgment, uses this language (48 W.R. at p. 301) :

F "Amongst other objects enumerated in the preamble to the statute of Elizabeth, are the 'aged' and 'impotent.' Poor persons are especially mentioned there, and also the supportation, aid, and help of young tradesmen and handicraftsmen and persons decayed. There is some authority for saying that a gift to the aged of a parish generally without expressing that they are also the poor is not good: see *A.-G. v. Haberdashers Co.* (6). But in *A.-G. v. Comber* (3) it was held that a gift to widows and orphans of a parish was a good charitable gift. In *Thompson v. Corby* (2), LORD ROMILLY followed the case of *A.-G. v. Comber* (3), and also expressed a clear opinion that in the case of a gift of the interest of £600 to be divided between twenty aged widows and spinsters of the parish of Peterborough, the word 'aged' would have been sufficient to create a good charitable bequest."

Then he refers to the decision of KAY, J., in *Re Wall* (4), to which I have also referred. BYRNE, J., then continues :

H "The aged are, as I have said, expressly mentioned in the statute, as also are the impotent. I think 'worn-out' and 'aged' clerks come also within the description 'impotent.' I think, moreover, having regard to the phrase 'pensioning off' and to the frame of the gift, that poor clerks of the firm and those unable to properly provide for themselves and their families are intended to be benefited."

I So that the learned judge there, again, brings in the element of poverty and relies on it.

The last case which was referred to was *Re Dudgeon, Truman v. Pope* (1), which in many respects is like the present case. The gift there was :

"Upon trust to pay the same to the rector and churchwardens for the time being of the parish of St. Nicholas in the said town of Nottingham, who shall invest the same and distribute the income to be derived therefrom in their absolute and unfettered discretion amongst respectable single women of good

character above the age of sixty years, to be paid by monthly instalments, but so that no recipient shall receive more than £10 per annum."

STIRLING, J., held that that was a good charitable gift. He said (74 L.T. at p. 613):

"I quite agree with the proposition of law stated on behalf of the next of kin that, if objects as defined by a testator go beyond those defined by or by analogy to the Statute of Charitable Uses, the gift is bad. But it appears to me that the cases cited on behalf of the charity do show this, that it is not absolutely necessary to find poverty expressed in so many words, but that the court will look at the whole gift, and, if it comes to the conclusion that the relief of poverty was meant, will give effect to it, although the word 'poverty' is not to be found in it. I do not see how otherwise the decision of SIR JOHN LEACH in *A.-G. v. Comber* (3) and of LORD ROMILLY in *Thompson v. Corby* (2) can be explained. Those cases come very closely to the present one. Here there is a gift to the rector and churchwardens for the time being of the parish of St. Nicholas, Nottingham, being persons much drawn into contact with poverty, to invest and distribute the income among respectable single women of good character above the age of sixty years in such manner that the total in each case shall not exceed 4s. a week. I cannot imagine that any sane testator had anything in his mind in such a case if it were not the relief of distress. I come to the same conclusion as was arrived at in the two cases to which I have referred, that it was meant for the benefit of the poor. It is, therefore a good charitable gift."

On these authorities, I do not feel myself justified in holding that it has been decided that age and age alone would constitute a gift a good charitable bequest. But I find this: that, though the court takes the view that on the construction of the gift the object of it was to benefit persons in necessitous circumstances, one would not necessarily look for those words expressly in the will. But, if one can construe the gift in such a way as to hold that the testator meant that the persons to be benefited should be in necessitous circumstances, then that introduces the ingredient of poverty and will turn a gift which might otherwise be not a charitable gift into a good charitable gift.

Turning to this will, one gets the words "the oldest respectable inhabitants," and it was suggested to me that that means not old as regards the number of years the person has spent on this planet, but only old in regard to the number of years he or she has spent in Gunville, that is to say, the oldest inhabitant. I think the testator here, when he says "oldest," meant very old, just as, in *A.-G. v. Duke of Northumberland* (7), where the testator said "poor" he meant very poor. Here the testator directs that these old people shall receive five shillings a week and no more. That, to my mind, indicates quite clearly that the class of persons who were to be benefited were persons to whom the receipt of that sum would be of importance and a benefit. In my view, he had in his mind the benefiting of old people who were in straitened circumstances, and to whom five shillings a week would bring comfort and relief. To my mind, the gift here is singularly like the gift in *Re Dudgeon* (1) where STIRLING, J., was able to read into the will the element of poverty, owing to the smallness of the sum contemplated in that case. There it was four shillings, and in this case the amount is five shillings.

On these authorities, I am prepared to hold, and I do hold, that this gift is a good charitable gift.

Solicitors: *E. M. Tringham*, for *Barrett & Thomson*, Slough; *The Treasury Solicitor*; *Peacock & Goddard*, for *Luff & Raymond*, Wimborne.

[Reported by J. L. DENISON, Esq., Barrister-at-Law.]

Re FOWLER. BISHOP v. FOWLER

[CHANCERY DIVISION (Sargant, J.), May 31, 1922]

[Reported 128 L.T. 620; 66 Sol. Jo. 595]

Administration of Estates—Administration action—Sale of mortgaged property—Consent of mortgagee—Waiver of provision for twelve months' notice of repayment—Right to interest from date of consent to date of completion.

The practice, in an administration action, with regard to the sale of mortgaged property out of court with the mortgagee's consent is the same as that on a sale under the court with the mortgagee's consent.

Held, accordingly: by consenting to a sale out of court a mortgagee had waived a provision of the mortgage deed for twelve months' notice of repayment and so was entitled only to interest for the shorter period from the date of his consent to the sale to the date of completion.

Day v. Day (1) (1862), 31 Beav. 270, applied.

Notes. As to effect of steps taken by a mortgagee, see 27 HALSBURY'S LAWS (3rd Edn.) 242, and for cases see 35 DIGEST 363.

D Case referred to:

(1) *Day v. Day* (1862), 31 Beav. 270; 31 L.J.Ch. 806; 7 L.T. 122; 8 Jur. N.S. 1166; 10 W.R. 728; 54 E.R. 1142; 35 Digest 363, 1048.

Summons to determine whether mortgagees were entitled only to interest to the date of completion of a sale out of court, or to twelve months' interest from Mar. 1, 1922, the date on which they first received actual notice of sale.

An action had been brought to determine questions in connection with the administration of the estate of J. Fowler, deceased, and for an administration order. It was compromised by a conditional agreement of May 5, 1920, by which it was provided that certain leases should be treated as part of the testator's estate, and that if a proposed conditional contract for the sale of that property was not entered into, sanctioned by the court and completed, the premises should be realised subject to the approval of the court. The property was subject to a mortgage dated June 15, 1917, to secure the sum of £20,000 and interest. By the mortgage deed it was agreed and declared that if the interest on the mortgage debt was punctually paid and the covenants by the mortgagor other than those for the payment of the principal money duly performed, the mortgagees should not have liberty to call in the principal for ten years. A proviso followed that the mortgagor should be at liberty at any time at his discretion to pay off the whole of the principal moneys if he should give the mortgagees not less than twelve calendar months' notice in writing. The mortgagees were not parties to the compromise, but were added as defendants in the action, and were parties to an order dated June 8, 1920, confirming the compromise. The proposed conditional contract for the sale of the property was never signed, and on May 26, 1921, the court made an order in the action that the property should be sold out of court subject to a reserve price, the remuneration of the auctioneer to be fixed by the judge. The mortgagees were parties to this order. The property was put up for auction and sold, the purchase being completed on May 26, 1922.

Rolt, K.C., and *R. Peel*, for the persons having the conduct of the sale.

Pattisson for the plaintiffs.

A. C. Ellis for a beneficiary.

Grant, K.C., and *Timins*, for the mortgagees.

SARGANT, J., after stating the facts, said: The practice with regard to a sale of property in an administration action with the consent of mortgagees is clearly stated in *Day v. Day*. In that case **SIR JOHN ROMILLY, M.R.**, said:

"The practice in these cases is perfectly clear; it occurs every day when there is nothing else in the case as a tender or a mere attempt to sell. In the

administration of the assets, if the mortgagee be not a party to the suit the decree directs a sale of the mortgaged property discharged of the mortgage if the mortgagee consent, or subject to the mortgage if he does not. The plaintiff then applies to the mortgagee, and if he consent to the sale, he has six months' interest from that time. If he is paid within the six months, he is entitled to the additional interest to make up the six months' interest; but if the time of payment exceeds six months, he gets interest down to the time of payment."

It is said that this does not apply, first because the sale is not made under the court, and, secondly, because of the special provision in the mortgage for twelve months' notice. There is no substance in the first point. It is quite true that the sale was not made under the court, but it was made by an order of the court, to which the mortgagees assented, and they received the same advantages as if it were a sale under the court. There is no reason for differentiating the practice on a sale out of court with the mortgagees' consent, and a sale under the court with the same consent. The reasoning in *Day v. Day* (1) applies just as much in the one case as the other, and that decision has been accepted as authoritative ever since by the leading text-books. Further, the provision for twelve months' notice can make no difference. It is just as competent for a mortgagee to waive that provision as the ordinary rule requiring six months' notice. In any case, the proviso for twelve months' notice is a proviso on the provision that the mortgagees cannot call in their money for ten years. It was evidently intended to be a proviso for the benefit of the mortgagor and not, as was contended by the mortgagees, for their benefit. It was not a provision having a general operation and has no such effect as has been contended. The practice in *Day v. Day* (1) must be followed, and the mortgagees are only entitled to interest up to the day of completion.

Solicitors: *Cooper, Bake, Roche & Fettes; Llewellyn Gwynne, Jones & Son; Wing & Eade; C. J. Nicholls.*

[*Reported by L. MORGAN MAY, ESQ., Barrister-at-Law.*]

A

Re FIFE'S SETTLEMENT TRUSTS

[CHANCERY DIVISION (Russell, J.), March 24, 28, 1922]

[Reported [1922] 2 Ch. 348; 91 L.J.Ch. 818; 127 L.T. 291; 66 Sol. Jo. 452]

Settled Land—Improvement—Application of capital money—Re-building of mansion house—Expenditure of not more than "one-half of annual rental of settled land"—Deductions—Property tax—Income tax—Supertax—Estate duty—Date for ascertaining annual rental—Settled Land Act, 1890 (53 & 54 Vict., c. 69), s. 13 (iv).

B

C

D

In ascertaining the annual rental of settled land for the purpose of determining, pursuant to the Settled Land Act, 1890, s. 13 (iv) [now Settled Land Act, 1925, Sched. 3, Pt. I, (xxv)] the maximum sum which may be applied thereunder towards re-building the principal mansion house, no deduction should be made for property tax, income tax, supertax [now surtax], or estate duty, and so the annual rental for this purpose is the annual rental payable by the tenants of the estate plus the income of capital moneys which might otherwise be invested in land and producing rent. The proper time for ascertaining the annual rental of an estate for the purposes of a scheme of this nature is the time when it was authorised by the trustees or approved by an order of the court.

Re Windham's Settled Estate (1), [1912] 2 Ch. 75, not followed.

E

Notes. Section 13 (iv) of the Settled Land Act, 1890, has been replaced by the Settled Land Act, 1925, s. 83 and Sched. 3, Pt. I, (xxv).

As to payment of the cost of re-building the mansion house on settled land see 23 HALSBURY'S LAWS (3rd Edn.) 120; and for cases see 30 DIGEST (Repl.) 327. For the Settled Land Act, 1925, see 23 HALSBURY'S STATUTES (2nd Edn.) 273.

Cases referred to :

F

(1) *Re Windham's Settled Estate*, [1912] 2 Ch. 75; 81 L.J.Ch. 574; 106 L.T. 832; 30 Digest (Repl.) 326, 169.

(2) *Re Kensington Settled Estates* (1905), 21 T.L.R. 351; 30 Digest (Repl.) 326, 163.

(3) *Re Sturmeys Motors, Ltd., Rattray v. Sturmeys Motors, Ltd.*, [1913] 1 Ch. 16; 82 L.J.Ch. 68; 107 L.T. 523; 57 Sol. Jo. 44; 31 Digest (Repl.) 319, 4551.

G

(4) *North London and General Property Co., Ltd. v. Moy, Ltd.*, [1918] 2 K.B. 439; 87 L.J.K.B. 986; 119 L.T. 230; 34 T.L.R. 227, C.A.; 31 Digest (Repl.) 320, 4559.

(5) *Duke of Beaufort v. I.R. Comrs., I.R. Comrs. v. Marquess of Anglesey*, [1913] 3 K.B. 48; 82 L.J.K.B. 865; 108 L.T. 902; 29 T.L.R. 534, C.A.; 31 Digest (Repl.) 317, 4540.

H

Also referred to in argument :

Bowles v. A.-G., [1912] 1 Ch. 123; 81 L.J.Ch. 155; 105 L.T. 870; 76 J.P. 57; 28 T.L.R. 137; 56 Sol. Jo. 176; 5 Tax Cas. 685; 28 Digest (Repl.) 402, 1787.

Brooke v. I.R. Comrs., [1918] 1 K.B. 257; 87 L.J.K.B. 279; 118 L.T. 321; 34 T.L.R. 142; 7 Tax Cas. 261, C.A.; 28 Digest (Repl.) 332, 1471.

I

Originating Summons issued for the determination of the questions (inter alia) whether, in arriving at the annual rental of certain settled land, there were to be included certain "scheduled investments" without any deduction in respect of (a) income tax, and (b) supertax; whether property tax ought to be deducted from the rents payable by tenants, for the purpose of ascertaining the annual rental in connection with a scheme for the re-building of a mansion house; and whether certain capital moneys and income of unsold property ought to be

treated as reduced in respect of certain estate duty which had become payable. A
By s. 13 of the Settled Land Act, 1890 :

"Improvements authorised by the Act of 1882 shall include the following, namely . . . (iv) The re-building of the principal mansion house on the settled land : Provided that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land."

The facts are fully stated in the judgment. B

R. G. Nicholson Combe for the Public Trustee.

Clauston, K.C. and *Leeke* for the tenant for life.

H. S. Howard for the remainderman.

RUSSELL, J.—This summons raises two questions under the Settled Land C
Act, 1890, s. 13. A settlement dated Apr. 28, 1913, was executed on the marriage of Ronald D'Arcy Fife and Margaret Albert Rutson. At the date of that settlement she was entitled under the will of her grandfather, William Rutson, to two estates, one being known as the Nunnington Hall Estate and the other the Newby Wiske Estate. She was also entitled to a base fee in remainder expectant on the death of her uncle, Henry Rutson. In these circumstances she executed D
a settlement and under the settlement she conveyed to the Public Trustee the land in fee to the use, after the premises should have fallen into possession, that her husband, Ronald D'Arcy Fife, should, during his life, receive the yearly rent charge of £2,000 per annum, and subject to that to the use of herself for life with remainder to her issue as she should appoint, and then in default of issue to her mother, one of the respondents to this summons, in fee simple if E
living at Mrs. Fife's death. As matters are at present in default of issue Mrs. Rutson is entitled contingently on her surviving Mrs. Fife in remainder in fee to the land. Henry Rutson, the uncle, died in November, 1920, unmarried, and in pursuance of a covenant contained in the settlement Mrs. Fife executed a confirming deed enlarging the base fee in pursuance of the covenant contained in the settlement of 1913, that enlargement being effected by a disentailing F
assurance of Nov. 15, 1920. The tenant for life executed various improvements under the Settled Land Act, some of which involved works to the mansion house on the Nunnington Hall Estate. No scheme has been prepared, but an application was made by her under the Settled Land Acts for the approval of that extension and a rebate in respect of that extension.

The matter came before me on July 27, 1921, and I made an order authorising G
the respondent trustees to apply out of capital moneys various sums in paying the amounts incurred in respect of various items set out in the scheme. There was the proviso that the respondent, the Public Trustee, was not to expend on the mansion house a sum greater than one-half of the annual rental of the estate, including as part of the annual rental the income derived from capital H
moneys. I pause here for a moment to say that Newby Wiske, which is one of the settled estates, was sold for some £72,000 in March, 1921, and the completion took place in October, 1921. There are also in hand capital moneys in the strict sense, namely, capital moneys arising from sales of other properties. There are also certain investments referred to as "scheduled investments," and I
they are capital moneys in this sense. By the settlement which Mrs. Fife made she assigned to the trustee various investments specified in the schedule, hence the name, "scheduled investments," upon trust to sell the same with her consent and

"invest the moneys arising thereby in the purchase of freehold hereditaments for an estate in fee simple to be conveyed and settled to the uses upon the trusts and with and subject to the powers and provisions hereinbefore declared and contained concerning the freehold hereditaments hereby settled (but not so as to increase or multiply charges or powers of charging) with power to

- A postpone the sale of the said investments and the purchase of freehold hereditaments for such period (extending to any number of years) as may be thought desirable, and so that the said investments and the moneys and investments for the time being representing the same or any part thereof respectively may in the meanwhile be dealt with and applied as if the same were capital moneys arising under the Settled Land Acts."
- B So there are three classes of properties. There is the unsold Nunnington Hall Estate. There are the proceeds of sale of Newby Wiske, which are capital moneys strictly within the Settled Land Acts; and there are scheduled investments which are settled so as to be covered. Section 13 of the Settled Land Act, 1890, provides that: "Improvements authorised by the Act of 1882 shall include the following, namely," and sub-s. (iv) provides for "The re-building of the principal mansion house on the settled land." It was works of that nature which were
- C put into my order providing that the sum under this section should not exceed one-half of the annual rental of the settled land. For the purpose of arriving at the annual rental it is clear from the authorities one must include with the annual rental of the settled land strictly so-called the annual income from the capital moneys. But the question raised on this summons is whether, in arriving
- D at the annual rental, certain sums are to be deducted. The first two questions raised by the summons are whether the gross income of investments representing capital moneys should be included without deduction of income tax and supertax and whether the gross rentals should be included or only the net rentals after deduction of income tax by the tenants.
- E The first thing I direct my attention to is whether one should deduct income tax. As regards that question one case has been cited as an authority for the proposition that one should deduct income tax—a case which came before WARRINGTON, J., of *Re Windham's Settled Estate* (1). The relevant words of the headnote are as follows ([1912] 2 Ch. 75):
- F "The words 'annual rental' in the proviso to sub-s. (iv) must be read literally and means the total amount of the rents payable by the tenants to the landlord as appearing in the estate rent book, subject to the modification that, if any part of the land is temporarily unlet, it must, for the purpose of the sub-section be treated as producing the rent which an occupying tenant would usually pay for it. In estimating the amount, therefore, of the 'annual rental' no deductions can be made for mortgage interest, tithes, land tax,
- G drainage rates, or rent charges. Property tax, however, may be deducted."
- Turning to the body of the report we find that counsel, who appeared for the tenant for life, conceded the point. Whether it was not worth disputing, owing to the rate of income tax in those days, I do not know. The figures in the case are puzzling. The amount expended by the tenant for life was £5,127. It is stated that the "gross income" of the estate was £4,265. It is further stated
- H that after deducting certain outgoings (viz., tithes, land tax, drainage rates, a rent charge, and mortgage interest) there was a "net income, exclusive of property tax and cost of repairs of £2,171 19s. 3d." After stating these figures, WARRINGTON, J., in his judgment, proceeds as follows:
- I "The question is whether the annual rent referred to in sub-s. (iv) of s. 13 of the Act of 1890 is the £4,265 or whether it is the £2,171 19s. 3d. In the first place the word is 'rental.' It is not 'income' or 'revenue' or any expression of that kind, which points to the personal enjoyment by any person, and in accordance with that view it has already been decided in *Re Kensington Settled Estates* (2) that the costs of repairs is not to be deducted in ascertaining what is the 'annual rental.' On the other hand, I am of opinion that property tax may be deducted because that is retained by the tenant before he pays his rent. It seems to me that the only principle on which one can proceed in interpreting this sub-section is to read the word

'rental' literally as it stands, and I think 'rental' means the total amount of the rents payable by the several tenants to the landlord or his agent, that is to say the total amount appearing in the rent book, which I suppose most landlords would keep, showing the rents paid by their several tenants. In this particular case that amount will be the £4,265. It seems to me that when the sub-section speaks of 'annual rental'—not gross rental or net rental, but simply 'annual rental'—it means the sum of the rents paid by the several tenants, with, of course, this modification, that if any part of the land is temporarily vacant then one is entitled, for the purpose of applying the sub-section, to treat it as producing the rent which a tenant occupying it usually pays. I think, therefore, the mortgage interest, at all events, ought not to be deducted before ascertaining the rental. I also think that there ought to be no deductions for tithes, land tax, drainage rates, or the rent charge. The tenant for life will, therefore, be allowed one-half of the £4,265, that is £2,132 10s. in respect of the re-building of the mansion house."

The learned judge has expressed his opinion that the property tax may be deducted. If, as I must assume to be the case, the £4,265 had been arrived at (although described as gross income) after deducting the property tax, he is giving effect to that view; but this view seems to me inconsistent with his opinion that "rental" means the total amount of rents payable by the tenants and appearing in the landlord's rent-book. At all events, I cannot consider this as a decision of the learned judge after argument upon the point. The point was conceded, and upon that concession he expressed his own view that the income tax was properly deducted. Speaking for myself I do not share that view, and if the learned judge's attention had been called, as it was called in a subsequent case, to what the true position is when the tenant pays income tax and then deducts it from the rent, he would, I think, have taken a different view. If this is to be treated as a decision upon the point I do not agree with it, and in the circumstances of its having been given without argument I do not feel bound in any way to follow it.

That the learned judge was fully aware of the true position appears from other cases which came before him raising this point of the payment of income tax by a tenant. In *Re Sturmeys Motors* (3) the headnote says ([1913] Ch. 16):

"By a lease dated in 1907, certain premises were demised to a company, and the company thereby covenanted to pay the rent and taxes in respect thereof, except land tax and landlord's property tax. The company never paid any of the rent reserved but made certain payments in respect of landlord's property tax. In 1911 a debenture-holder's action was commenced and a receiver was appointed. Subsequently the lessor threatened to distrain for the rent in arrear, and in order to avoid distress the receiver signed an undertaking by which he undertook to pay an occupation rent, and also to pay the 'arrear of rent' then owing out of a particular fund. The receiver paid one year's landlord's property tax, and subsequently made a payment of occupation rent without deducting anything for property tax.—Held, that the joint effect of sched. A. No. IV, r. 9 of the Income Tax Act, 1842, and s. 40 of the Income Tax Act, 1853, was to treat the payment by a tenant of landlord's property tax as a pro tanto payment of rent. Held, therefore, that the receiver was entitled to deduct the payments made by the company and himself in respect of landlord's property tax from any future payments of rent to be made by him under his undertaking."

The learned judge, having cited the material provisions of the Act, said:

"Therefore, the effect of that provision is that the tenant paying the tax is, under the last words I have read, to be acquitted and discharged of so much money as if it had been actually paid to the person to or for whom his rent shall have been due and payable, and the rent to that extent is discharged and no longer payable to the landlord."

A In a later case, *North London and General Property Co. v. Moy Ltd.* (4), the learned judge states the point in this way :

“ On the language of the section [that is the section of the Income Tax Act] by proving that the tax had been paid the defendants proved that the rent had been paid and that it had been paid to the person entitled to demand it.”

B In other words, payment of tax is a payment of the rent. Or as BUCKLEY, L.J., put it in delivering judgment in *Duke of Beaufort v. I.R. Comrs.* (5), the effect of the statute is that the property tax is a portion of the rent.

It appears to me that the true view is that, in ascertaining the annual rental of the settled land, property tax should not be deducted from it, because payment of the property tax is a payment pro tanto of the rent and the annual rental

C means the gross amount of the rent reserved as payable by the tenant. It was said that the *Duke of Beaufort's* case (5) was against that view. The Finance Act, 1910, imposed a mineral rights duty upon the rental value of all rights to work minerals, and rental value was defined in the Act as being the amount of rent paid by the working lessee in the last working year in respect of the right.

D The court held that, under the special definition in that particular Act, one was to ascertain the rental value, not by reference to the gross rent reserved, but by reference to the actual amount paid in the last year, which would be the gross rent less the income tax. That case is of no assistance to me in construing the words “ annual rental of the settled land.” In my opinion, notwithstanding the decision in *Re Windham's Settled Estate* (1), in ascertaining the annual rental of the settled land under s. 13 (iv) of the Settled Land Act, 1890,

E the property tax ought not to be deducted. No distinction can be drawn between income tax and supertax. My remarks about income tax and supertax apply to the income derived from investments representing capitals moneys.

The next question to be raised is as regards the deduction of the jointure rent charge of £2,000 a year payable to Ronald D'Arcy Fife, the settlor's husband. Counsel appearing for the remainderman has not contested or suggested

F that any deduction should be made in respect of that, and, in my opinion, he adopted a perfectly correct attitude in that regard.

The next point arises in this way. It is in reference to estate duty which will have to be paid shortly, and with reference to the interest on other estate duty which is payable, I am told by instalments. The facts as regards these points

G stand as follows. Henry Rutson died in November, 1920. Newby Wiske was sold, and estate duty was payable in respect of Henry Rutson's death on the proceeds of sale of Newby Wiske; estate duty will also be payable as regards the scheduled investments. Secondly, with regard to the Nunnington Hall estate, duty will also have to be paid in respect of that, and the question I am asked

H in the summons is whether one ought to treat (a) the capital moneys “as reduced by the amount of the estate duty paid thereout in respect of the death of Henry Rutson, deceased, subject to whose life estate the property settled by the said settlement was settled,” and “(b) the income of the said Nunnington Hall Estate

as reduced by the interest on the amount of the estate duty payable thereon in respect of such death.” In my opinion, neither the capital moneys nor the income of the Nunnington Hall estate ought to be treated as being so reduced. These

I matters appear to me to stand exactly in the position of mortgages upon the estate; and as regards mortgages *Re Windham's Settled Estate* (1) is a decision, after argument, that the interest on the mortgages should not be deducted in ascertaining the rent. I think the true view of s. 13, is that, for the purpose of fixing the maximum sum which you may spend upon re-building the mansion house,

you must look at the annual amount of the rent roll. The figure is not fixed by reference to net value at all; it is fixed by reference to the rent roll of the estate, the annual rental payable by the tenants. Under other decisions one includes in the figure the income of capital moneys which might otherwise be invested

in land, and producing rent. Accordingly, I answer the last two questions raised by the summons by declaring that the capital moneys and the income referred to ought not to be treated as reduced in the manner suggested by the summons. A

The only other point which remains is not specifically referred to in the summons. It is the question as to what point of time is to be taken in ascertaining the annual rental of the estate under s. 13. It appears to me that the proper time to take is the time when the particular scheme becomes an authorised scheme. If it is a scheme submitted to the trustees and authorised by them the date of authorisation would, in my opinion, be the proper time to take. In the case before me, the scheme having been brought before the court, the proper time at which to ascertain the annual rental of the estate, is the date of the order of the court approving the scheme, which is some date in July, 1921. B

Solicitors : Trotter, Goodhall & Patteson. C

[Reported by J. L. DENISON, Esq., Barrister-at-Law.] D

Re YATES. SINGLETON v. POVAH E

[CHANCERY DIVISION (Sargant, J.), May 4, 1922]

[Reported 128 L.T. 619; 66 Sol. Jo. 523]

Will—Legacy—Amount—Implication of additional gift—Inconsistency between amount (£2,000) stated in will and amount stated in codicil as having been stated in will (£3,000). F

By a codicil to his will a testator stated that he added £8,000 to “£3,000 already bequeathed” to A. by his will, when in fact he had only bequeathed £2,000 to A. by his will.

Held: on construction of the codicil an additional gift was to be implied so as to make up a total legacy of £11,000.

Jordan v. Fortescue (1) (1847), 10 Beav. 259, applied. G

Morgan v. Middlemiss (2) (1866), 35 Beav. 278, not applied.

Notes. As to the effect of confirmation of a will by codicil, and the effect of recitals or other statements in testamentary documents, see 34 HALSBURY'S LAWS (2nd Edn.) 98–101, and 225, 226; and for cases see 44 DIGEST 387 et seq., 603 et seq. H

Cases referred to :

- (1) *Jordan v. Fortescue* (1847), 10 Beav. 259; 16 L.J.Ch. 332; 9 L.T.O.S. 290; 11 Jur. 549; 50 E.R. 582; 44 Digest 605; 4321.
- (2) *Morgan v. Middlemiss* (1866), 35 Beav. 278; 55 E.R. 903; sub nom. *Re Simmond's Estate*, *Morgan v. Middlemiss*, 14 W.R. 414; 44 Digest 596, 4211. I
- (3) *Farrer v. St. Catharine's College, Cambridge* (1873), L.R. 16 Eq. 19; 42 L.J.Ch. 809; 28 L.T. 800; 21 W.R. 643; 44 Digest 636, 4697.

Originating Summons to determine whether legatee took one amount or another amount under gifts both in a will and codicil.

By his will dated June 21, 1916, F. Yates left a sum of £2,000 to his niece E. E. Povah. On July 26, 1917, he made a codicil to his said will which contained the following gift: “I add a further £8,000 to my niece E. E. Povah in

A addition to £3,000 already bequeathed." The question to be determined by the summons was whether on the true construction of the will and codicil the defendant E. E. Povah was entitled to a legacy of £2,000 in addition to the legacy of £8,000 bequeathed to her by the codicil or whether she was entitled to a legacy of £3,000 in addition to the said £8,000. There was authority both ways, viz., *Jordan v. Fortescue* (1) and *Morgan v. Middlemiss* (2).

B *Farwell*, for the plaintiff.

Rooke Reeve, K.C., for the legatee.

M. Potter, for the next of kin.

Dighton Pollock for the Attorney-General.

C **SARGANT, J.**, after stating the facts: This codicil was the codicil to the last will of the testator, and it appears from it that he intended to give the legatee a total sum of £11,000. The fact that he refers to £3,000 as having been already given by his will does not affect this indication. There is a decision to this effect in *Jordan v. Fortescue* (1). There the testator had given two sums of £500 to a legatee by his will and a first codicil, and by his third codicil he said that he gave a further sum of £500 in addition to the £1,500 already bequeathed by him. It was held that the legatee took in all £2,000. That case was approved in principle by LORD SELBORNE in *Farrer v. St. Catharine's College, Cambridge* (3). LORD SELBORNE had not the present point to decide, but he said that, if the facts had been different so that *Farrer v. St. Catharine's College, Cambridge* (3) would have applied, he would have followed it. The decision in *Morgan v. Middlemiss* (2) is to a different effect. There the testator had given £500 to his wife by his will and then by his codicil gave her a "further sum not exceeding £300, making altogether a legacy of £1,000 given to her by will and this codicil." I would have said this was an easier case in which to imply an additional gift so as to make up a total sum of £1,000, but LORD ROMILLY said that it was a mere matter of miscalculation, and that as the testator had only given £300 by his codicil she could only take £800 in all. I prefer the reasoning in *Jordan v. Fortescue* (1) to that in *Morgan v. Middlemiss* (2). This also is the view taken in JARMAN ON WILLS (6th Edn.) vol. I, p. 625, though not in THEOBALD ON WILLS (7th Edn.) p. 743. I hold that the testator has shown a clear indication here that the legatee is to receive a total sum of £11,000 and she is, therefore, entitled to that total amount.

Solicitors: *Burton, Yeates & Hart* for *Johnson & Co.*, Birmingham; *Solicitor to the Treasury*.

[Reported by L. MORGAN MAY, ESQ., Barrister-at-Law.]

Re HAY DRUMMOND. HALSEY v. PECHELL

[CHANCERY DIVISION (Sargant, J.), December 20, 1922]

[Reported 128 L.T. 621; 39 T.L.R. 144; 67 Sol. Jo. 247]

Will—Construction—“All money shares and securities at my bankers”—Stock receipts—Inscription receipts.

A bequest of “all money shares and securities at my bankers” held not to pass stocks of which only stock receipts and inscription receipts were at the bank, such receipts being no evidence of title, and valueless except for purposes of identification.

Notes. As to the construction of “money,” “securities” and “shares” in a will see 34 HALSBURY’S LAWS (2nd Edn.) 253-260; and for cases see 44 DIGEST 703 et seq.

Originating Summons taken out by the testatrix’s executors asking what property passed under a bequest in a codicil dated Nov. 17, 1908, to the will dated July 27, 1899, of the Hon. Katherine Hay Drummond who died in 1922.

The words of the bequest were: I give “all money shares and securities at my bankers,” naming them, to trustees upon trust to sell and invest, as therein mentioned, for the benefit of her nephew and his children, as therein mentioned. The bankers had in their possession at the date of the testatrix’s death cash, and two certificates for railway preference stock, and State receipts for New South Wales Stock, Corporation of London Stock, and Local Loans, and inscription receipts for War Stock. From the evidence of stock brokers it appeared that none of the stock receipts were of any value or negotiable or capable of being used for the purpose of borrowing or otherwise. They were simply evidence that the stocks therein referred to were duly transferred to the testatrix on the dates stated in the receipts. The practice was that they were prepared by the brokers acting for the vendor of the stock, signed by the person acting as attorney for the vendor, and witnessed by the proper officer of the Bank of England, or other bank at which the books relating to the stock were kept. They were then tendered to the purchaser’s broker as evidence that the stocks in question had been transferred, and on their production to him the purchaser’s broker paid the purchase money. The inscription receipts were in the form used in respect of stock registered in the Bank of England, and in the case of certain Natal Government Stock as registered with the Crown agents of the Colonies. The stocks to which both these classes of receipts referred to could be freely dealt with without their production.

Bryan Farrer, for the executors.

Mulligan for the first defendant.

Greene, K.C. and *Charles Harman* (*Farwell* with them) for the nephew and his children.

Grant, K.C. and *Dighton Pollock*, for the persons entitled to residue.

SARGANT, J.—after stating the facts: The documents at the testatrix’s bank relating to the stocks in question are not evidence of any title to the stocks. They are only evidence such as is ordinarily given to the purchaser’s stock broker by the vendor’s stock broker to show that the stock has been transferred to the purchaser in the books of the bank at which the stock was inscribed, and to enable the vendor to obtain the price of the stock. A document of this kind is no evidence of title and is in an entirely different category from certificates. The bank also issued what were called “inscription receipts,” which showed apparently who had been the original subscriber. These are useful for the purpose of identification, but are not evidence of title. It is necessary to give some extended meaning to the words “shares and securities,” and that can be done by saying that they refer to stocks, shares, and securities, the evidence of title to which is in the possession

A of the testatrix's bank. The court can go further, and cannot apply the words to shares and securities of which there are no documents of title at the bank. The result is that the cash and the preference stock of which the certificates were at the bank passes under the bequest, but the stocks identified by the stock receipts and inscription receipts fall into residue.

B Solicitors: *Arnold and Henry White; James Hall; Oliver Richards & Parker; Charles Russell & Co.*

[*Reported by L. MORGAN MAY, Esq., Barrister-at-Law.*]

Re JOWITT. JOWITT v. KEELING

D [CHANCERY DIVISION (P. O. Laurence, J.), May 12, 16, 24, 1922]

[*Reported* [1922] 2 Ch. 442; 91 L.J.Ch. 449; 127 L.T. 466;
38 T.L.R. 688; 66 Sol. Jo. 577.]

Settlement—Apportionment—Death of tenant for life—Payment by company of interim dividend—Apportionment of dividend if declared in respect of definite period—Apportionment Act, 1870 (33 & 34 Vict., c. 35), s. 2.

E An interim dividend paid by a company after the death of a tenant for life under a will is not apportionable under s. 2 of the Apportionment Act, 1870, between the successors of the tenant for life and residuary legatees unless it is declared or expressed to be made for or in respect of some definite period.

F Where a company which had already, in the same financial year, declared an interim dividend in respect of a specified period, resolved that a sum "be distributed by way of further interim dividend,"

G **Held:** the word "further" in the resolution was intended to denote merely that the dividend in question was an interim dividend additional to the one previously declared and could not mean that the later dividend was to be added to the earlier so as to make the later dividend a dividend declared in respect of a definite period; the word "interim" was intended to refer to the time at and the manner in which the dividend was declared and could not be read as prescribing the period between the beginning and end of the company's financial year as the definite period in respect of which the later dividend was paid; and, therefore, the later dividend was not paid in respect of any definite period.

H *Re Griffith* (1) (1879), 12 Ch.D. 655, distinguished.

Notes. Distinguished: *Re Hyde, Hyde v. Bryce* (1930), 74 Sol. Jo. 467. Referred to: *Re Winder's Will Trusts, Westminster Bank, Ltd. v. Fansset*, [1951] 2 All E.R. 362.

I As to apportionment between tenant for life and remainderman see 29 HALSBURY'S LAWS (2nd Edn.) 653-655, and for cases see 9 DIGEST (Repl.) 634, 635, and 40 DIGEST (Repl.) 737-741. For Apportionment Act, 1870, see 13 HALSBURY'S STATUTES (2nd Edn.) 867.

Case referred to:

(1) *Re Griffith, Carr v. Griffith* (1879), 12 Ch.D. 655; 41 L.T. 540; 28 W.R. 28; 9 Digest (Repl.) 634, 4226.

Also referred to in argument:

Lubbock v. British Bank of South America, [1892] 2 Ch. 198; 61 L.J.Ch. 498; 67 L.T. 74; 41 W.R. 103; 8 T.L.R. 472; 9 Digest (Repl.) 625, 4180.

Re Oppenheimer, Oppenheimer v. Boatman, [1907] 1 Ch. 399; 76 L.J.Ch. 287; A 96 L.T. 631; 14 Mans. 139; 9 Digest (Repl.) 635, 4230.

Originating Summons.

By his will, dated Sept. 11, 1908, the testator, Robert Benson Jowitt, after appointing his three sons executors and trustees and giving certain bequests and legacies, directed the trustees to pay to his wife, Caroline Jowitt, during her life an annual sum of £1,500 out of the income from his residuary estate payable half-yearly, on May 10, and Nov. 10, in each year, and subject thereto bequeathed his residuary estate to his three sons absolutely. The testator died in the year 1914, possessed of 11,800 ordinary shares in Robert Jowitt & Sons, Ltd., which were retained by the trustees as part of his residuary estate. Article 3 of the articles of association of that company provided that all moneys received by the company in respect of certain policies of assurance therein referred to should as and when received belong exclusively to the holders for the time being of the first 200,000 ordinary shares issued on the formation of the company, and that such policy moneys should, within seven days after the receipt thereof by the company, or as soon thereafter as the profits of the company should permit, be distributed among the holders of the 200,000 ordinary shares in proportion to the number of such shares held by them respectively. The annual sum of £1,500 was paid to the testator's widow down to Nov. 10, 1920. She died on Mar. 15, 1921. The financial year of the company ended on Nov. 20, in each year. For the financial year ending Nov. 20, 1921, the following dividends were declared by the company. On June 15, 1921, an interim dividend was declared of 5 per cent. free of tax for the six calendar months ended on May 20, 1921. On Oct. 5, 1921, the company received a sum of £25,000 in respect of two of the policies referred to in art. 3, and on Nov. 4, 1921, the directors passed a resolution that this sum of £25,000

"be distributed by way of further interim dividend free of income tax and that, in accordance with art. 3, such dividend be paid pro rata to the shareholders for the time being of the first 200,000 ordinary shares in the company."

On that day, one of the three sons of the testator having died, the company paid the sum of £1,475 to the two surviving sons, such sum being the proportion of the £25,000 attributable to the 11,800 ordinary shares held by them as trustees of the will and forming part of the first 200,000 ordinary shares issued by the company. By a resolution passed at the ordinary general meeting of the company held on Feb. 10, 1922, it was resolved

"that a final dividend of 5 per cent. free of income tax be declared in respect of the year ending Nov. 20, 1921, making, with the interim dividend of 5 per cent. free of income tax already paid, 10 per cent. free of tax for the year, and that such final dividend be forthwith paid."

The trustees issued this summons to determine whether the sum of £1,475 belonged entirely to the estate of the testator or whether that sum was apportionable under the Apportionment Act, 1870, and, consequently, the estate of the annuitant, Caroline Jowitt, was entitled to be paid the arrears of the annuity out of such proportion of that sum as, under the Act, ought to be considered as having accrued prior to the date of her death.

Lionel Cohen for the trustees.

Topham, K.C. for the defendants, residuary legatees under the testator's will.

F. D. Morton, for the defendants entitled to the estate of the annuitant.

Cur. adv. vult.

May 24. **P. O. LAWRENCE, J.**, read the following judgment.—The question to be determined on this application is whether any part of a sum of £1,475 now in the hands of the plaintiffs as trustees of the testator's will belongs to the estate of the annuitant under the testator's will, or whether the whole of such sum belongs

A to the testator's residuary legatees. The solution of this question depends upon whether the sum of £1,475 is apportionable under the Apportionment Act, 1870. If it is then the estate of the annuitant is entitled to be paid the arrears of her annuity out of such proportions of that sum as, under the Act, ought to be considered as having accrued prior to the date of her death. If it is not, the whole sum belongs in equal third shares to the testator's sons, Robert and Edward, and the estate of the testator's deceased son, Frederick.

B The £1,475 was paid to the plaintiffs on Nov. 14, 1921, by Robert Jowitt and Sons, Ltd., in respect of 11,800 ordinary shares in that company belonging to the testator at the time of his death, and since retained by his trustees as part of his estate. By art. 3 of the company's articles of association it is provided that all moneys received by the company in respect of certain policies of assurance therein mentioned should as and when received belong exclusively to the holders for the time being of the first 200,000 ordinary shares issued on the formation of the company, and that such policy moneys should, within seven days after the receipt thereof by the company, or as soon thereafter as the profits of the company should permit, be distributed among such holders of the 200,000 shares in proportion to the number of such shares held by them respectively. On Oct. 5, 1921, the company received a sum of £25,000 in respect of two of the policies referred to in art. 3, and on Nov. 4, 1921, the directors of the company passed a resolution that this sum of £25,000

C "be distributed by way of further interim dividend free of income tax, and that, in accordance with art. 3, such dividend be paid pro rata to the shareholders for the time being of the first 200,000 ordinary shares in the company."

D On the same date, Nov. 4, 1921, the company paid the sum of £1,475 to the plaintiffs, such sum being the proportion of the 25,000 attributable to the 11,800 ordinary shares held by them, which shares formed part of the first 200,000 ordinary shares issued by the company. The expression "by way of further interim dividend" in the resolution of Nov. 4, 1921, is accounted for by the fact that the directors of the company had, on June 15, 1921, resolved to pay an interim dividend of 5 per cent. free of tax for the six months ended on May 20, 1921. Under the articles of association the declaration of dividends formed part of the business of the ordinary general meeting of the company, which had to be held once in each calendar year: see arts. 57, 61, and 62, but by art. 106 the directors were empowered from time to time to pay to the members such interim dividends as appeared to the directors to be justified by the profits of the company. By art. 105 it was provided that no dividend should be paid otherwise than out of the profits arising from the business of the company.

E Although by virtue of s. 5 of the Apportionment Act, 1870, as interpreted by JESSEL, M.R., in *Re Griffith, Carr v. Griffith* (1), it is unnecessary that a payment made by a company out of the revenue to its shareholders, in order to come within the purview of the Act, should be periodical in the sense that it must be a payment which is usually made at recurring intervals, yet, in my opinion, it is essential that a payment in order to be apportionable under the Act must be a payment which is declared or expressed to be made for or in respect of some definite period. If it were otherwise, I find it difficult to see how it could be considered as accruing from day to day. Counsel for the defendants who are entitled to the estate of the annuitant contended that the expression "by way of further interim dividend" in the resolution of Nov. 4, 1921, operated as a declaration or expression that the payment of the £25,000 was made for or in respect of the then current financial year. His grounds for this contention were that the word "further" operated to link up the interim dividend declared on Nov. 4 with the interim dividend declared on June 15, and that, as the last-mentioned dividend was expressed to be paid in respect of a definite period (namely, for the six months ending May 20, 1921), therefore the "further" dividend declared on Nov. 4 was also a

dividend declared in respect of a definite period, which period was defined by the word "interim" to be the period between the commencement and end of the company's then current financial year. Although the contention thus put forward raises a question which, in my opinion, is not altogether free from doubt, I have come to the conclusion that the argument put forward on behalf of the residuary legatees furnished the true answer to it. In my opinion, the word "further" in the resolution was intended to denote merely that the dividend in question was another interim dividend besides the one declared on June 15. It clearly cannot mean that the dividend declared on Nov. 4 was to be added to the interim dividend already declared on June 15 so as to make it a dividend declared in respect of the period of six months ending May 20. Moreover, it would, in my opinion, be unduly straining the meaning of the word "further" to hold that it meant that the dividend was one expressed or declared to be made in respect of some definite period merely because the dividend of June 15 was declared or expressed to be made for a defined period. The word "interim" in the resolution was, in my opinion, not intended to define the period in respect of which the payment of the £25,000 was made, but was intended merely to refer to the time at and the manner in which the dividend was declared. In my opinion, the word "interim" in the resolution means that the dividend is one which is paid by the directors on some date between the ordinary general meetings of the company. That this is the meaning attributed by the directors to the word "interim" is borne out by the wording of the resolution of June 15 in which, besides using the word "interim," there is added the period in respect of which the dividend then resolved upon was to be paid.

Much reliance was properly placed by counsel for the successors of the annuitant upon the decision of JESSEL, M.R., in *Re Griffith, Carr v. Griffith* (1). The distinction, however, between that case and the present is that there the sum divided (which consisted of surplus profits) was expressed to be in respect of a definite period of five years, whereas here the payment of the £25,000 was not expressed to be made in respect of any period. That the company did not intend the £25,000 to be part of the dividend for the then current financial year is further shown by the resolution passed at the ordinary general meeting of the company held on Feb. 10, 1922, at which it was resolved

"that a final dividend of 5 per cent. free of income tax be declared in respect of the year ending Nov. 20, 1921, making, with the interim dividend of 5 per cent. free of income tax already paid, 10 per cent. free of tax for the year, and that such final dividend be forthwith paid."

Having regard not only to the absence of any mention in the resolution of Nov. 4 of any period in respect of which the payment of the £25,000 was made, but also to the nature and origin of the sum then distributed, and to the special rights in respect thereof conferred by art. 3 upon the original holders of the first 200,000 ordinary shares, I am of opinion that the payment of the sum of £25,000 cannot properly be said to have been made for or in respect of any particular period so as to bring it within the scope of the Apportionment Act, 1870. Accordingly, I hold that the sum of £1,475 is outside the purview of the Act, and is divisible among the residuary legatees to the exclusion of the estate of the annuitant. The costs of all parties (to be taxed as between solicitor and client) will be retained and paid by the plaintiffs out of the testator's estate.

Solicitors: *Trower, Still, Parkin & Keeling.*

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

A

R. v. NAT BELL LIQUORS, LTD.

[PRIVY COUNCIL (Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Wrenbury and Lord Carson), November 22, 24, 28, 29, 1921, April 7, 1922]

[Reported [1922] 2 A.C. 128; 91 L.J.P.C. 146; 127 L.T. 437; 38 T.L.R. 541; 27 Cox, C.C. 253; [1922] 2 W.W.R. 30; 65 D.L.R. 1; 37 Can. Crim. Cas. 129]

B

Certiorari—Quashing of conviction—Powers of superior court—Regard to be paid only to what appears on face of conviction—Inadmissibility of extraneous evidence of error—No right to look at evidence before inferior court and to quash conviction if evidence thought insufficient—Error as to law of evidence.

C

Canada—Certiorari—Law the same as in England, subject to any excepting Canadian legislation.

The law with regard to certiorari is the same in England and in Canada except in so far as it may be affected by competent Canadian legislation.

D

On an application for certiorari a superior court has no right to look at the evidence adduced before the inferior court to ascertain whether or not it is sufficient to sustain the conviction sought to be quashed, and, if it considers the evidence not to be sufficient, to quash the conviction. Want of sufficient evidence does not make the conviction one pronounced without jurisdiction. The superior court can only have regard to what appears on the face of the record of the conviction, and extraneous evidence to prove error, such as the depositions, is not admissible. A magistrate who convicts without evidence does something which he ought not to do, but he does it as a judge, and, if his jurisdiction to entertain the charge is not open to impeachment, his error, however grave, is a wrong exercise of a jurisdiction which he has and not usurpation of a jurisdiction which he has not. Error as to the law of evidence, like any other error of law, may, if it is apparent on the record, be ground for quashing the order made below, but failure to give sufficient weight to certain evidence is not error.

E

Statute—Construction—"Penalty"—Inclusion of forfeiture of property on conviction of offence.

By s. 92 of the British North America Act, 1867, a provincial legislature of Canada is empowered to impose punishment "by fine, penalty, or imprisonment for enforcing any law in the province."

G

Held: on the construction of the section, "penalty" included an order for the forfeiture of goods in respect of which an offence against the law of the province had been committed.

Canada—Supreme Court of Dominion—Appeal—Competency—Appeal from Supreme Court of Alberta quashing conviction by magistrate of offence under provincial Liquor Act.

H

An appeal to the Supreme Court of Canada from a decision of the Supreme Court of Alberta quashing a conviction by a magistrate of an offence under the Liquor Act, 1916, of Alberta, **held** to be incompetent as being an appeal in proceedings "for or upon a writ of certiorari arising out of a criminal charge," and, therefore, excepted by s. 36 of the Dominion Supreme Court Act (Rev. Stats. Can. 1906, c. 139).

I

Canada—Alberta—"Direct legislation"—Validity Act passed by provincial legislature after approval by people of province.

In 1915 a petition under the Direct Legislation Act was presented to the Legislative Assembly of the province of Alberta praying that a Bill relating to the sale, &c., of intoxicating liquor should be enacted. Accordingly, a Bill was presented to the people of Alberta to be voted on, and, having been approved by a considerable majority, it was passed by the provincial legislature without substantial alteration under the title of the Liquor Act, 1916.

Held: the fact that under the Direct Legislation Act the provincial legislature did not deal with the Act exclusively, but were bound to pass the Act of 1916 when it had been passed by the people of Alberta did not prevent it being intra vires the legislature, as provided by s. 92 of the British North America Act, 1867, and valid.

Notes. Considered: *R. v. Wandsworth Justices, Ex parte Read*, [1942] 1 All E.R. 56. Applied: *R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1951] 1 All E.R. 268; [1952] 1 All E.R. 122. Considered: *Re Gilmore's Application*, [1957] 1 All E.R. 796. Applied: *Davies v. Price*, [1958] 1 All E.R. 167, 671. Referred to: *R. v. Lincolnshire Justices, Ex parte Brett*, [1926] 2 K.B. 192; *Baldwin and Francis, Ltd.'s Application*, [1957] R.P.C. 465; *D.P.P. v. Head*, [1958] 1 All E.R. 679; *R. v. Agricultural Land Tribunal, Ex parte Bracey*, [1960] 2 All E.R. 518.

As to certiorari see 11 HALSBURY'S LAWS (3rd Edn.) 52-70, 124 et seq.; and for cases see 16 DIGEST 398 et seq.

Cases referred to:

- (1) *R. v. Covert* (1917), 34 D.L.R. 662; 28 Can. Crim. Cas. 25; 10 Alta. L.R. 349; 8 Digest (Repl.) 743, *532.
- (2) *R. v. Smith* (1800), 8 Term Rep. 588; 101 E.R. 1561; 16 Digest 419, 2790.
- (3) *R. v. Bolton* (1841), 1 Q.B. 66; Arn. & H. 261; 4 Per. & Dav. 679; 10 L.J.M.C. 49; 5 J.P. 370; 5 Jur. 1154; 113 E.R. 1054; 16 Digest 418, 2775.
- (4) *Colonial Bank of Australasia v. Willan* (1874), L.R. 5 C.P. 417; 43 L.J.P.C. 39; 30 L.T. 237; 22 W.R. 516, P.C.; 16 Digest 440, 3060.
- (5) *R. v. Wallace* (1883), 4 O.R. 127; 30 Digest (Repl.) 121, *761.
- (6) *R. v. Coulson (No. 1)* (1893), 24 O.R. 246; 1 Can. Crim. Cas. 114.
- (7) *R. v. Coulson (No. 2)* (1896), 27 O.R. 59.
- (8) *R. v. Borin* (1913), 5 O.W.N. 472; 29 O.L.R. 584; 15 D.L.R. 737; 22 Can. Crim. Cas. 248; 30 Digest (Repl.) 119, *650.
- (9) *R. v. Reinhardt Salvador Brewery Co., R. v. McFarlane* (1917), 11 O.W.N.
- (10) *R. v. Cantin, R. v. Weber* (1917), 39 O.L.R. 20; 11 O.W.N. 435; 28 Can. Crim. Cas. 271; 30 Digest (Repl.) 121, *767.
- (11) *R. v. Thompson* (1917), 39 O.L.R. 108; 12 O.W.N. 25; 28 Can. Crim. Cas. 271; 30 Digest (Repl.) 131, *1221.
- (12) *Hawes v. Hart* (1885), 18 N.S.R. 42; 6 R. & G. 45; 16 Digest 440, 3050iii.
- (13) *R. v. Walsh* (1897) 29 N.S.R. 521; 29 O.R. 36; 30 Digest (Repl.) 107, *456.
- (14) *R. v. Pudwell* (1916), 34 W.L.R. 130; 10 W.W.R. 205; 26 Can. Crim. Cas. 47; 14 Digest (Repl.) 283, *1575.
- (15) *R. v. Carter* (1916), 10 W.W.R. 602; 34 W.L.R. 448; 9 Alta. L.R. 481; 26 Can. Crim. Cas. 51; 28 D.L.R. 606.
- (16) *R. v. Emery*, (1917), 1 W.L.R. 337; 33 D.L.R. 556; 27 Can. Crim. Cas. 116; 10 Alta. L.R. 139; 16 Digest 440, 3050xv.
- (17) *R. v. Hoffman* (1917), 2 W.W.R. 839; 28 Man. L.R. 7; 38 D.L.R. 289; 28 Can. Crim. Cas. 355; 30 Digest (Repl.) 127, 1000.
- (18) *Lacasse v. Fortier (Que.)* (1918), 30 Can. Crim. Cas. 87; 33 Digest 335, 465iii.
- (19) *R. v. Grannis, R. v. Nevins, R. v. Lyons, R. v. Ferguson, R. v. Adams and Jackson* (1888), 5 Man. L.R. 153.
- (20) *R. v. Davidson* (1892), 8 Man. L.R. 325, 25 Digest 450, b.
- (21) *R. v. Herrell* (1899), 12 Man. L.R. 198.
- (22) *R. v. Crisp* (1806), 7 East, 389.
- (23) *R. v. Chandler* (1811), 14 East, 267; 104 E.R. 603; 33 Digest 330, 428.
- (24) *Ex parte Vaughan* (1866), L.R. 2 Q.B. 114; 36 L.J.M.C. 17; sub nom. *R. v. Llanfillo, Brecknockshire Justices*, 15 L.T. 277; 31 J.P. 7; 16 Digest 427, 2861.

- A** (25) *Lovesy v. Stallard* (1874), 30 L.T. 792; 38 J.P. 391; 25 Digest 368, 163.
 (26) *R. v. Warnford* (1825), 5 Dow. & Ry. K.B. 489.
 (27) *R. v. Galway Justices*, [1906] 2 I.R. 446.
 (28) *R. v. Cheshire Justices* (1838), 8 Ad. & El. 398; 1 Per. & Dav. 88; 1 Will. Woll. & H. 635; 8 L.J.M.C. 1; 2 J.P. 741; 2 Jur. 964; 112 E.R. 889; 16 Digest 417, 2764.
- B** (29) *R. (Martin) v. Mahony*, [1910] 2 I.R. 695; 25 Digest 451, g.
 (30) *Ex parte Hopwood* (1850), 15 Q.B. 121; 4 New Sess. Cas. 174; 19 L.J.M.C. 197; 14 Jur. 812; 117 E.R. 404; sub nom. *Re Hopwood*, 15 L.T.O.S. 134; 14 J.P. 590; 16 Digest 442, 3074.
 (31) *Re Shropshire Justices, Ex parte Blewitt* (1866), 14 L.T. 598; 16 Digest 419, 2794.
- C** (32) *Brittain v. Kinnaird* (1819), 1 Brod. & Bing. 432; 4 Moore, C.P. 50; 129 E.R. 789; 21 Digest 195, 412.
 (33) *Walsall Overseers v. London and North Western Rail. Co.* (1878), 4 App. Cas. 30; 48 L.J.M.C. 65; 39 L.T. 453; 43 J.P. 108; 27 W.R. 189, H.L.; 16 Digest 186, 920.
 (34) *R. v. Income Tax Special Purposes Comrs.* (1888), 21 Q.B.D. 313; 53 J.P. 84; 36 W.R. 776; sub nom. *R. v. Income Tax Special Comrs., Ex parte Cape Copper Mining Co., Ltd.*, 57 L.J.Q.B. 513; 59 L.T. 455; 4 T.L.R. 636; 2 Tax Cas. 332, C.A.; 28 Digest (Repl.) 403, 1792.
- D** (35) *Anon.* (1830), 1 B. & Ad. 382; 109 E.R. 829; 16 Digest 440, 3054.
 (36) *Bunbury v. Fuller* (1853), 9 Exch. 111; 1 C.L.R. 893; 23 L.J.Ex. 29; 23 L.T.O.S. 131; 17 J.P. 790; 156 E.R. 47, Ex.Ch.; 22 Digest (Repl.) 271, 2741.
- E** (37) *Re McNutt* (1912), 47 S.C.R. 259; 16 Digest 270, o.
 (38) *Mitchell v. Tracey* (1918), 58 S.C.R. 640; 46 D.L.R. 520.
 (39) *Osborne v. Milman* (1887), 18 Q.B.D. 471; 56 L.J.Q.B. 263; 56 L.T. 808; 51 J.P. 437; 35 W.R. 397; 3 T.L.R. 452, C.A.; 14 Digest (Repl.) 30, 22.
- F**

Also referred to in argument:

- A.-G. for Ontario v. A.-G. for the Dominion*, [1896] A.C. 348; 65 L.J.P.C. 26; 74 L.T. 533; 12 T.L.R. 388, P.C.; 8 Digest (Repl.) 707, 134.
Canadian Pacific Wine Co., Ltd. v. Tuley, [1921] 2 A.C. 417; 90 L.J.P.C. 233; 126 L.T. 78; 37 T.L.R. 944, P.C.; 8 Digest (Repl.) 727, 232.
- G** *Gold Seal, Ltd. v. Dominion Express Co.* (1920), 2 W.W.R. 761; 15 Alta. L.R. 377; 33 Can. Crim. Cas. 234; 53 D.L.R. 547; affirmed Oct. 21, 1921; 8 Digest (Repl.) 740, *445.
Re Initiative and Referendum Act, [1919] A.C. 935; 88 L.J.P.C. 143; sub nom. *Re Manitoba Initiative and Referendum Act*, 121 L.T. 651; 35 T.L.R. 630, P.C.; 8 Digest (Repl.) 733, 271.
- H** *Ex parte Ransley* (1823), 3 Dow. & Ry. K.B. 572; 2 Dow. & Ry. M.C. 151; 15 Digest (Repl.) 1150, 11,572.
R. v. Gaunt (1867), L.R. 2 Q.B. 466; 8 B. & S. 365; 16 L.T. 379; 31 J.P. 612; 15 W.R. 1172; sub nom. *R. v. Grant*, 36 L.J.M.C. 89; 3 Digest 399, 335.
- I** *Toronto Rail. Co. v. Toronto City*, [1920] A.C. 446; 89 L.J.P.C. 90; 122 L.T. 641, P.C.; 8 Digest (Repl.) 729, 242.

Appeal by special leave from a judgment of the Supreme Court of Alberta, Appellate Division ([1921] 1 W.W.R. 563) (HARVEY, C.J., dissenting), affirming the judgment of HYNDMAN, J. ([1921] 1 W.W.R. 136), quashing on certiorari the conviction by a police magistrate of the respondents for keeping for sale certain liquors, contrary to the Alberta Liquor Act, 1916, and the order made by the magistrate for forfeiture of the said liquors. On Oct. 2, 1920, upon

the sworn information of a sergeant of the city police that he suspected that liquor was being kept for sale by the respondents contrary to the liquor law, a warrant was issued to seize, and under the warrant all liquors on the premises were seized. On Oct. 7, 1920, the respondents were charged with unlawfully keeping for sale a quantity of liquor contrary to s. 23 of the Alberta Liquor Act, and with unlawfully selling a quantity of such liquor. They were convicted and fined \$200, and the whole of the liquor and the vessels in which it was contained were declared to be forfeited to the Crown. The respondents moved, by way of certiorari, to quash both the conviction and the order for forfeiture. In accordance with r. 4 of the Crown Practice Rules of the Supreme Court of Alberta, the magistrate forwarded to the court the conviction and the order of forfeiture, and with them the information and the evidence taken at the hearing in writing as required by statute. **HYNDMAN, J.**, quashed the convictions, and, on appeal, his judgment was affirmed by the Supreme Court of Alberta (**HARVEY, C.J.**, dissenting). Against that decision the appellant appealed to the Privy Council.

The Attorney-General for Alberta (S. B. Woods, K.C.) and Geoffrey Lawrence for the Crown.

C. C. McCaul, K.C. (of the Canadian Bar) and D. N. Pritt for the respondents.

April 7. **LORD SUMNER**.—On Oct. 7, 1920, an information was laid at Edmonton, Alberta, against the respondents, Nat Bell Liquors, Ltd., before a magistrate of that province, charging them with unlawfully keeping for sale a quantity of liquor contrary to the Alberta Liquor Act, 1916, that is to say, for sale within the province. The offence, which is created by the Act of 1916, s. 23, is triable by a court of summary jurisdiction. The respondents were convicted, and were fined \$200. The conviction, which is in the form provided by the Criminal Code (R.S.C. 1906, amended to 1920) ran, that Nat Bell Liquors, Ltd., "is convicted . . . for that they, the said Nat Bell Liquors, Ltd., on Oct. 1 and 2, 1920, at Edmonton, did unlawfully keep for sale a quantity of liquor." The quantity of liquor was the whole of the respondents' stock of whisky in the warehouse in question, although only one case of twelve bottles was actually sold. By a subsequent order, dated Nov. 4, 1920, the magistrate declared the whole of it, and the vessels in which it was contained, to be forfeited to the Crown. Nothing turns on the form of this order. Thereupon the respondents moved, by way of certiorari, to quash both orders. In accordance with r. 4 of the Crown Practice Rules of the Supreme Court of Alberta, the magistrate returned the conviction and the order of forfeiture and with them the information and the evidence taken at the hearing in writing as required by statute. **HYNDMAN, J.**, quashed the convictions, and on appeal his judgment was affirmed by the Supreme Court of Alberta, **HARVEY, C.J.**, dissenting. The appellant, the Attorney-General for Alberta on behalf of the Crown, then appealed to the Supreme Court of Canada, which dismissed the appeal formally, affirming without reasons given the registrar's decision that any appeal was incompetent, the proceedings having been "on a criminal charge" within the meaning of the Supreme Court Act: (Rev. Stat. Can. 1906, c. 139). Against this decision an appeal has been taken to their Lordships' Board, but it has become of minor importance, seeing that, by special leave subsequently granted by His Majesty in Council, an appeal has been lodged against the decision of the Supreme Court of Alberta, quashing the conviction and the order for forfeiture, and this is the principal matter now to be decided. Both before **HYNDMAN, J.**, and before the Supreme Court of Alberta the evidence was elaborately examined and weighed. The judgments both set out its general effect and frequently quote it in extenso, and it will be convenient, in order to explain what follows, to summarise them.

Nat Bell Liquors, Ltd., were incorporated by Dominion charter in 1917, and did a very large business in Edmonton as exporters of liquor. They held a licence from the Attorney-General of Alberta under the Liquor Export Act (8 Geo. 5, c. 8) and its amendments and complied with the requirements of that Act. The

A officers of the company in control of the business were Nathan Bell and W. Sugarman. They had a warehouse, fully stocked, from which liquor was despatched for export in accordance with orders received, and their warehouseman, one Angel, was strictly commanded by his superiors to have nothing to do with any local sale or delivery, but to observe carefully all the provisions of the Liquor Act. The police determined to test the business actually done by
B the respondents. They employed for this purpose, as a temporary detective-constable and agent provocateur, a man named Bolsing, who posed as a working carpenter and was provided by the police with a sum of marked money. He was a man who had been convicted some time before of stealing beer, and when cross-examined about it he unsuccessfully denied the conviction. He went to the respondent's warehouse, asked for and saw Angel, and after interviews on three
C successive days, succeeded in inducing him to sell him for \$45 twelve bottles of whisky, which were given to him and taken away. Either Bell or Sugarman saw him on the premises before the final day, but they were not proved then to have known what he was about. When Bolsing paid the money to Angel, Bell and Sugarman were in another part of the room, although not within earshot, nor did they see the bottles given to him, but he swore that Angel then and there gave the money to them, saying: "Here's \$45 more." This they denied, as did a girl typist, who was also present. It was common ground that Angel did sell his employers' whisky and took the money, but the defendants' evidence was that he gave the money to a man named Morris Rosenberg to keep for him. Bolsing also swore that he was allowed to select the case out of the entire stock, and to buy whichever whisky he liked. HYNDMAN, J., records the fact that it was not clear whether or
D not Angel was still in the respondents' employment at the time of the hearing. He was, at any rate, doing work for them at the warehouse after his misconduct had become known, and was not shown to have been ever definitely discharged.

Of the numerous contentions raised by the respondents, those which logically come first, though not the most fully argued, relate to the validity of the provision as to forfeiture, and indeed of the whole Act, as it stood at the time of the conviction. It appears that the Liquor Act was passed in 1916 in the following circumstances. In the previous year, pursuant to s. 6 of the Direct Legislation Act (4 Geo. 5 (First Session), c. 3), an initiative petition was duly presented to the Legislative Assembly of Alberta, praying that a Bill, which was identical in all material respects with the Liquor Act, should be enacted. Thereupon, as the Act requires, the Bill was presented to the people of Alberta to be voted on, and, having been passed by a considerable majority, was passed by the legislature without substantial alteration. The respondents contend that the Liquor Act is ultra vires, because, even if it related to matters named in s. 92 of the British North America Act, 1867, regarding which a provincial legislature is "exclusively" empowered to make laws, still it was not "exclusively" made by the legislature, but partly also by the people of Alberta. Indeed, the part played in the matter by the
F legislature was practically only formal. It was further argued that the Direct Legislation Act was itself ultra vires upon the ground that it altered the scheme of legislation laid down for Canada by the British North America Act, a scheme which vests the provincial legislative power in a legislature, consisting of His Majesty, as represented by the Lieutenant-Governor, and of two Houses, or in some provinces of one house, and introduced into it a further and dominant legislative power in the
G shape of a direct popular vote taken upon a Bill, which the statutory legislature must pass, whether it really assents to it or not. On the first point it is clear that the word "exclusively" in s. 92 of the British North America Act means exclusively of any other legislature, and not exclusively of any other volition than that of the provincial legislature itself. A law is made by the provincial legislature when it has been passed in accordance with the regular procedure of the House or both Houses and has received the Royal Assent duly signified by the lieutenant-governor on behalf of His Majesty. Such was the case with the Act in question. It is
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impossible to say that it was not an Act of the legislature, and it is none the less a statute because it was the statutory duty of the legislature to pass it. If the deference to the will of the people, which is involved in adopting without material alteration a measure of which the people has approved, were held to prevent it from being a competent Act, it would seem to follow that the legislature would only be truly competent to legislate either in defiance of the popular will or on subjects upon which the people is either wholly ignorant or wholly indifferent. If the distinction lies in the fact that the will of the people has been ascertained under an Act which enables a single project of law to be voted on in the form of a Bill, instead of under an Act which, by regulating general elections, enable numerous measures to be recommended simultaneously to the electors, it would appear that the legislature is competent to vote as its members may be pledged to vote individually and in accordance with what is called an electoral "mandate," but is incompetent to vote in accordance with the people's wishes expressed in any other form. Unless the Direct Legislation Act can be shown, as it has not been shown on this occasion, to interfere in some way formally with the discharge of the functions of the legislature and of its component parts, the Liquor Act, 1916, being in truth an Act duly passed by the legislature of Alberta and no other, is one which must be enforced, unless its scope and provisions can themselves be shown to be *ultra vires*. As for the Direct Legislation Act, its competency is not directly raised in the present appeal. What was done in this case was done under the Liquor Act, and if that Act is sustained there is no utility in going behind it to decide the validity of another Act, which merely conditioned the occasion on which the Liquor Act was duly passed.

The Liquor Act, as passed in 1916, contained sections obviously designed to save it from offending against the provisions of the British North America Act. These sections were numbered 27 and 72, and they provided as follows:

"27. Nothing herein contained shall prevent any person from having liquor for export sale in his liquor warehouse provided such liquor warehouse and the business carried on therein complies with requirements in sub-sect. (1) hereof mentioned, or from selling from such liquor warehouse to persons in other provinces or in foreign countries, or to a vendor under this Act.

"72. While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the province of Alberta, except as specially provided by this Act, and restrict the consumption of liquor within the limits of the province of Alberta, it shall not affect and is not intended to affect *bonâ fide* transactions in liquor between a person in the province of Alberta and a person in another province or in a foreign country and the provisions of this Act shall be construed accordingly."

Since then the Liquor Act has been repeatedly amended. In 1917, among other amendments, s. 27 was repealed and s. 72 in 1918. Accordingly the Act now reads:

"No person shall, within the province of Alberta, . . . keep for sale . . . any liquor except as authorised by this Act" (s. 23),

and there is nothing in the Act itself, which authorises the carrying on of a liquor exporting business or the keeping of liquor for export to persons in other provinces or in foreign countries. The question now raised is whether the Act is now within the competence of the provincial legislature, containing as it does no disclaimer of any operation affecting such a business, but, on the contrary, expressly forbidding the keeping of liquor for sale in terms of such generality as would make the prohibition apply to such a business.

In their Lordships' opinion the real question is whether the legislature has actually interfered with inter-provincial or with foreign trade. The presence or absence of an express disclaimer of any such interference may greatly assist where the language of the provincial legislature does not in itself determine the question and define its effect. If, however, it is otherwise clear that there is such an

A interference, or that there is none, and the language actually used sufficiently decides that question, there is no such sovereign efficacy in such a clause as s. 72 as to make its presence or absence in an enactment crucial. As to the other section repealed in 1918, it is of capital importance to note that on Apr. 13, 1918, the day on which the amending statute, which affected this repeal, received the Royal Assent, that assent was also given to another statute of the legislature of Alberta, B the Liquor Export Act, which, under conditions not at the moment material, legalised the export of liquor, and authorised the keeping of liquor in the province of Alberta for the purpose of such a trade. In their Lordships' opinion the Liquor Act as amended in 1918 must be taken to authorise by implication that which the legislature, simultaneously and almost *uno flatu*, authorises in express terms by another statute directed to that very matter. It is an inconvenient mode of drafting, C provocative of doubts and not without considerable peril to the Act in question, to use terms in the Liquor Act, which either import a recognition of another Act without any mention of it, or expressly annul while professing to ignore it. The dilemma is this. When the legislature passed these two Acts, which became law on the same day, did it intend by a simple repeal expressed in the one to stultify all its work expressed in the other, which is what the literal reading of its language D leads to, or did it intend to imply the words "or by the Liquor Export Act" after the words "this Act" in s. 23 of the Liquor Act, and so effect a saving exception, which a literal construction of its language clearly negatives? On the principle *ut res magis valeat quam pereat*, their Lordships think that in this Act and in these circumstances the latter alternative is one to be adopted, but they would be loth to apply this precedent in any other than an exactly similar case.

E There are some other sections in the Liquor Act, certainly of a stringent character, which the respondents contended to be generally *ultra vires*. Some of these may be dismissed from consideration now as not imperilling the validity of the Act at large and not affecting the particular offence charged and the particular proceedings taken in this case. Such are s. 78, which makes it an offence to publish any letter F referring to any intoxicating liquor or giving the name of any person manufacturing intoxicating liquor; s. 79, which authorises a magistrate to arrest the occupant of any premises on which, under his search warrant, there has been found any liquor unlawfully kept; and s. 80 under which the owner of any liquor may be summoned before a magistrate, whereupon, if it be found to be his liquor, he is to suffer forfeiture of it, unless he shows that he did not intend it to be sold or kept for sale in violation of the Act. Their Lordships do not think that, if the G Act is otherwise within the competence of the legislature, the inclusion of any of these provisions, remarkable as they are, makes it *ultra vires* as a whole. It is not an interference with s. 121 of the British North America Act, for the word "free," applied to admission into a province, does not further mean that when admitted the article in question can be used in any way its owner chooses, and although this H Act, like many other Liquor Acts, has been made increasingly restrictive of individual freedom and enforced by legal measures of progressive severity, its competence depends on its general character and objects and not on the weight with which the legislature lays its hand on those who violate its statutes. These sections appear to be susceptible of being read and should be read as merely dealing with matters of a local nature in the province and particularly with the steps, by which I competent legislation is to be enforced there.

One of these provisions, however, is separately challenged. It is that which affects the order forfeiting the respondents' stock of whisky. It is contended that the forfeiture provided in s. 79 is *ultra vires* because the powers of the provincial legislature are only those given in head 15 of s. 92 of the British North America Act, viz :

"The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the province."

It is true that this head does not name a forfeiture, but their Lordships think that it is covered by the word "penalty." The word is not defined in the Act. No doubt, the commonest form of penalty is a money penalty, but as that is already dealt with in its most obvious form by the antecedent word "fine" their Lordships are not prepared to put so limited an interpretation on the word "penalty" as would rob the provincial legislature of the power, for example, of depriving an illegal vendor of poisons of his stock in trade and would leave it to him ready for further operations on his release from goal.

The respondents then contended that, if they were within the Liquor Export Act by reason of the business which they carried on, and if they had complied with the provisions and formalities of that Act, they must ipso facto be outside the Liquor Act altogether, so that the presumption arising under that Act from the possession of liquor would not affect them and the lawfulness of their possession and of their purpose under the Liquor Export Act would, of itself, defeat any charge under the Liquor Act. The contention seems to their Lordships to be unfounded and not even easy to understand. Neither Act contains any provision excluding everything, which comes within the purview of the Liquor Export Act, from the operation of the Liquor Act. Presumably full effect must be given to the provisions of both. No doubt what the Liquor Export Act expressly legalises cannot be made an offence under the Liquor Act, for it cannot be supposed that, by similar and simultaneous enactments, the legislature meant to contradict itself, but beyond this the matter cannot go. It is not necessary to examine the effect, which compliance with the Liquor Export Act would have on the presumption raised by the Liquor Act, or to ask whether it would conclusively rebut the presumption or only have the effect of shifting the burden of proof, for these are matters relating to the weighing of evidence and do not arise on certiorari.

Coming to the proceedings taken in this case, it is necessary at the outset to appreciate the general character and scheme of the Liquor Act and its relation to the Canadian Criminal Code. The expression "liquor," as used in the Liquor Act, includes

"all fermented, spirituous and malt liquors and all combinations of liquors and all drinks and drinkable liquids which are intoxicating, and any liquor which contains more than $2\frac{1}{2}$ per cent. of proof spirits shall be conclusively deemed to be intoxicating" (s. 2 (c));

and it is important to realise that everyone who is in possession of "liquor" is presumably a criminal, and is liable to be sent to gaol: (s. 54). Certain persons, such as chemists and clergymen in respect of liquor kept for dispensing and eucharistic purposes, and certain small quantities of liquor kept in a private house, are exempted from this criminality, and a distinction is made between possession for sale and possession in a private dwelling-house, but generally the provisions are as follows:

"Section 23. No person shall, within the province of Alberta, by himself, his clerk, servant or agent, expose or keep for sale or directly or indirectly or upon any pretence or upon any device sell or barter or offer to sell or barter to any other person any liquor except as authorized by this Act. Section 24. No person within the province of Alberta by himself, his clerk, servant or agent, shall have, keep or give liquor in any place wheresoever, other than in the private dwelling-house in which he resides except as authorised by this Act. Section 24 (a). No person within the province of Alberta shall have or keep in his private dwelling-house a quantity of liquor exceeding one quart of spirituous liquor, and two gallons of malt liquor. Section 54. If, in the prosecution of any person charged with committing an offence against any of the provisions of this Act in the selling or keeping for sale or giving or having or purchasing or receiving of liquor, *prima facie* proof is given that such person had in his possession or charge or control any liquor in respect of, or

A concerning which, he is being prosecuted, such person shall be obliged to prove that he did not commit the offence with which he is so charged."

At the hearing of the summons the Attorney-General does not appear to have taken full advantage of the statutory presumption, contained in s. 54, for, instead of simply proving that Nat Bell Liquors, Ltd., had in their possession the liquors to which the charge referred, and leaving it to them to rebut the presumption of guilt thereon arising, he went into the case from the outset, as if the ordinary burden of proof rested on the prosecution. Probably this was the more convenient course in the circumstances of the case, but the result may be that, if the question whether there was evidence to convict can be raised at all, the time at which it arose was the conclusion of the case for the Crown, and that the statutory presumption should not be regarded as making good defects, if otherwise established in a prosecution, in which the Crown had voluntarily undertaken the affirmative. At any rate, the effect of s. 54 is made less of by the learned judges than might perhaps have been expected, and, after the course which the case has taken, it would be unsatisfactory to dispose of the matter by simply saying that the court did not accept the defendants' evidence on an issue upon which the burden of proof lay upon them. It will be convenient to state at the outset that none of the ordinary grounds for certiorari, such as informality disclosed on the face of the proceedings, or want of qualification in the justices who acted, are to be found in the present case. The charge was one which was triable in the court which dealt with it, and the magistrate who heard it was qualified to do so. There is no suggestion that he was biased or interested, or that any fraud was practised upon him. His conduct during the proceedings is unimpeached, and nothing occurred to oust his initial jurisdiction after the commencement of the inquiry. No conditions precedent to the exercise of his jurisdiction were unfulfilled, and the conviction as it stood was on its face correct, sufficient, and complete.

In the superior courts the proceedings in the court below were kept throughout in the forefront of the case, sometimes in the form of asking what evidence the court was entitled to consider, sometimes in the form of considering its sufficiency and effect. The real question, though it might present itself as one of evidence, was one of the jurisdiction of the superior court on certiorari. HYNDMAN, J., cited from *R. v. Covert* (1) a series of rules which, rightly or wrongly, purport to lay down the conditions under which alone a judge of fact can refuse to accept, that is to say, to believe evidence given before him, and, after elaborately examining the evidence, concludes by saying:

G "Looking at the whole case I am of opinion that the evidence of the defence meets, as squarely and satisfactorily as can reasonably be expected, the presumption raised against the defendants by the evidence for the Crown, and that it fulfils the requirements set forth in the judgment in *R. v. Covert* (1) and that consequently the magistrate should have accepted such denials and explanations."

H On appeal STUART, J., while declining to discuss *R. v. Covert* (1), says:

I "After reading the reasons the justice gave for convicting [which were neither part of the formal conviction nor part of the depositions], I cannot discover that he kept in mind, as he should have kept in mind, his duty to receive a spy's evidence with caution, or that he even remembered the untruths in the spy's evidence to which I have referred. . . . It was so easy for Bosling to add the one circumstance to his story—his statement about '\$45 more'—which was necessary to make his work as a detective successful, that this quite evident failure on the part of the magistrate would be almost, if not quite, sufficient of itself in my opinion to justify the quashing of the conviction. . . . If the use of the little word 'more' by Bosling is adverted to I must reply that that is too slight a cord upon which to hang anything, and in addition to the interest of the witness using the expression, and the obvious advantage of

adding it, even the word itself is open to other interpretations. If I had been engaged with a jury on the trial of this case, I should undoubtedly have withdrawn it from their consideration on this latter ground at least."

Thereafter BECK, J., after laying down as a principle,

"that the court has the right and the duty, in the exercise of its inherent plenary jurisdiction in supervising the proceedings of inferior tribunals to examine the entire proceedings certified to it, and to deal finally with the case according to right and justice,"

proceeds to examine the statements of the witnesses, dwells on the fact that Bolsing was an accessory and was uncorroborated, and says :

"Had the charge been one not of keeping for sale but even of the lessor offence of selling, it seems clear to me that, had the case been before a judge and a jury, the judge ought to have withdrawn the case from the jury, or at the very least to have pointed out to the jury the danger of convicting upon such evidence, in view of the presumption of innocence, and the necessity for excluding all reasonable doubt, and in the event of a verdict of guilty to have given leave to appeal on the weight of evidence . . . in which event the verdict would have been undoubtedly set aside."

It appears to their Lordships that, whether consciously or not, these learned judges were in fact re-hearing the whole case by way of appeal on the evidence contained in the depositions, a thing which neither under the Liquor Act nor under the general law of certiorari was it competent to them to do. As, however, the majority in the Supreme Court proceeded on a view of certiorari, which purported to justify this mode of dealing with the evidence, their Lordships will consider the case in that light without disposing of it as a case of entertaining an appeal, where no appeal lay.

The reasons, expressed or implied, which in the view of the learned judges warranted the court in quashing this conviction appear to have been the following : (i) Without Bolsing there was no evidence of the commission of the offence by the accused company, and his evidence was no evidence, since he was an accessory before the fact and was uncorroborated. (ii) It was not evidence on which a jury could safely convict, and ought, therefore, to be treated as no evidence at all. (iii) Want of evidence or of sufficient evidence makes the conviction one pronounced without jurisdiction. (iv) Such want of jurisdiction can be established by evidence dehors what is set out on, or forms part of, the record of the conviction. (v) In any case, by the statute law of Alberta the depositions are part of the record, or can be examined on certiorari as if they were part of the record. And finally, (vi) in Alberta, at any rate in connection with cases arising under the Liquor Act, the superior court can do more than could be done on certiorari by the High Court of Justice in England, and can, as matter of law, review the whole proceedings to see that justice has been done.

Their Lordships think that of these contentions the first and second may be shortly disposed of. They have not been referred to any decisive authority, which applies to certiorari the same considerations as apply to testing a jury's verdict, when challenged on a motion for a new trial or on appeal; nor, apart from a few expressions here and there not very carefully considered, can any judicial dicta be found to support it. Whether the verdict was one which twelve reasonable men could have found, whether the evidence was such that twelve reasonable men could find on it otherwise than in one way, whether the evidence was such that a jury could safely convict upon it, and whether it was such that a Court of Criminal Appeal should refuse to interfere with the conviction, are questions which, though fully argued, have no relation to the functions of a superior court on certiorari. They all imply that there was evidence, but not much; they all ask whether that little evidence was enough; they are all applied to a body of men, who are not the

A absolute judges of fact but only judges, whose decision may, though rarely, be disturbed. On certiorari, so far as the presence or absence of evidence becomes material, the question can at most be whether any evidence at all was given on the essential point referred to. Its weight is entirely for the inferior court. In *R. v. Smith* (2) LORD KENYON said :

B "If indeed there had been any evidence whatever (however slight) to establish this point, and the magistrate who convicted the defendant had drawn his conclusion from that evidence, we would not have examined the propriety of his conclusion; for the magistrate is the sole judge of the weight of the evidence; and for this reason, I think, there is no foundation for the first objection. . . . There was some evidence from which he might draw the conclusion."

C The majority in the Supreme Court of Alberta appear to have accepted this principle, but to have thought that it might be met by inquiring, whether the magistrate had misdirected himself as to the law of evidence, under which term they sought to include a failure to give sufficient or any weight to features in the evidence, which appeared to them to be of preponderating importance. It may well be that error as to the law of evidence, like any other error of law, if it is apparent on the record, is ground for quashing the order made below, but none of the objections taken here show that the magistrate acted under any misapprehension of the law. Their Lordships, beyond pointing out the fact, will not stay to consider that the charge was a charge of keeping the liquor for an unlawful purpose, to which Bolsing was not an accessory, and not one of selling it, to which he was.

D Assuming that Bolsing was an accessory, still he was a competent witness. If he impressed the justice as a witness of truth, no error in law was committed in believing him even without corroboration, but only an error of judgment. Corroboration, however, there was in fact on the point about the money so much adverted to, for, as HYNDMAN, J., points out, though he fails to see the significance of it, Angel, who on the case for the defence had disobeyed his orders in the most serious way and had disposed of his masters' whisky for his own profit, was still at the time of the hearing acting as their employee, a circumstance tending to show that what he had done was not really a piece of flagrant disobedience and roguery but a thing within the scope of his duties, although unfortunately unsuccessful. The weight of this was for the magistrate, and was, if he chose so to regard it, some corroboration of Bolsing's tale.

E Passing from considerations of the weight of the evidence, we come to the questions whether there was any evidence and what materials are to be looked at in order to answer that question, and further what effect a decision, that on some essential point evidence was completely lacking, would have on the jurisdiction respectively of the magistrates and the superior court. In the different provinces of Canada there has, from time to time, been much diversity of view as to the powers and duties of the superior court on certiorari. Though the principles laid down in *R. v. Bolton* (3) and *Colonial Bank of Australia v. Willan* (4) have been accepted in Ontario, the attempt to distinguish them, as STUART, J., and BECK, J., distinguished them in the present case, was made at any rate as long ago as 1883 : *R. v. Wallace* (5), 4 O.R. at p. 141, per CAMERON, J., dissentientem. The courts of Ontario have considered themselves free and even bound, under the legislation applicable, to examine the evidence returned by the inferior court and to inquire whether the justices had before them any evidence of an offence, such as was within their jurisdiction, though they have uniformly purported to recognise that the weight and credibility of it, when given, were entirely for the justices. There has been considerable diversity in the language used. Sometimes the question has been whether there was "any sufficient evidence of the offence": *R. v. Wallace* (5); sometimes whether there was "any evidence of an offence" *R. v. Coulson* (No. 1) (6), and *R. v. Coulson* (No. 2) (7); sometimes whether there was "reasonable" evidence

to support the conviction: *R. v. Borin* (8); but the general view has been that, if A
there is some evidence, there is jurisdiction to hear and determine, and thereafter
the superior court will not interfere: *R. v. Reinhardt Salvador Brewery Co.* (9);
R. v. Cantin (10); *R. v. Thompson* (11). The courts of New Brunswick and Nova
Scotia have decided that want of evidence is not a ground for quashing a conviction,
and in *Hawes v. Hart* (12) and *R. v. Walsh* (13) the authorities are collected.

In Manitoba, Saskatchewan and Alberta, a different view has asserted itself, B
although not without much difference of opinion. In *R. v. Pudwell* (14),
HYNDMAN, J., adopted the regular view of *Willan's Case* (4), and refused to quash
a conviction, where the charge was within the jurisdiction and the proceedings
were regular on the face of them. Later on, in 1916, in *R. v. Carter* (15),
HARVEY, C.J., laid it down, after a full and careful examination of the authorities,
that, if a conviction is valid on its face, absence of evidence to support a conviction C
is not a ground for quashing it, but, in the main, two decisions, *R. v. Emery* (16)
in Alberta, and *R. v. Hoffman* (17) in Manitoba, have caused the view to prevail
in those provinces and in Saskatchewan which was applied in the present appeal
and has also been followed in Quebec: *Lacasse v. Fortier* (18). The practical effect
of those decisions is that, not only is the superior court not precluded from exam- D
ining the evidence given in the court below nor confined to ascertaining, as a
point going to the jurisdiction of the magistrate, whether he had before him some
evidence supporting the conviction, but it is free to range over the whole evidence
and to subject it to criticism. This conclusion is arrived at by holding that legisla-
tion, which requires that depositions shall be taken in writing, and a rule, which
requires them to be transmitted with the conviction on making a return to an
order for certiorari, in effect make them part of the record for all purposes. This, E
of course, is a question of particular statutory practice and not of the general law.
The decisions, however, go on to hold that, although in general the credibility and
weight of the evidence is for the magistrate, the superior court can, as a matter of
law, consider whether he guided himself by a right view of the credibility of
particular evidence, and it is plain that the practice of reviewing the whole of the
depositions, however the purpose of it is expressed, leads very easily to the con- F
clusion that a conviction may be quashed, not so much because no witness has
sworn to the particular facts required to make out a case for the prosecution, as
because, on balancing it against the evidence given for the defendant, the great
preponderance is thought to be on his side. This practice of examining the
evidence, although of many years' standing before the present case, has been stated
in the Manitoba and Alberta decisions as having objects which vary considerably. G
The court would not quash, it has been said, if there was evidence to go to a
jury: *R. v. Grannis* (19). There must be evidence which the court can see may
reasonably support the conviction. Whatever the Court of Queen's Bench, upon
an inspection of the proceedings, would deem sufficient to be left to a jury on a
trial is, when set out on the face of a conviction, adequate to sustain it: *R. v.*
Davidson (20). The court can only quash if there is a complete absence of any H
evidence whatever of the commission of the offence: *R. v. Herrell* (21). The court
examines the evidence to ascertain, not whether the tribunal reached the proper
conclusion on the evidence, but whether there was any evidence upon which the
tribunal could properly find as it did: *R. v. Emery* (16). In the present case
STUART, J., says of the position occupied by the magistrate:

I
"He was not merely standing in the place of a jury. He was also a judge,
with the duty of applying in his own mind sound legal principles in the con-
sideration and the weighing of evidence . . . It is not acting at all on
appeal on the facts to say that the magistrate misdirected himself in his duty
as a judicial officer in failing to take into account the true character of the
evidence of the prosecution on a crucial point. Particularly is this so when
the magistrate knew that his decision against the accused was without appeal

A and would have tremendous consequences with respect to property, while a decision the other way would be subject to review at the instance of the prosecution by two appeals. . . . What I have said has no relation whatever to the questions discussed in *R. v. Covert* (1)."

BECK, J., states the matter with equal breadth, though in a somewhat different way:

B "This Appellate Division held in *R. v. Emery* (16) that the court is entitled upon certiorari—at least in cases where certiorari is not taken away—to look at the evidence given before the convicting magistrate, to ascertain whether or not it is sufficient to sustain the conviction, and if it is not, to quash the conviction. . . . This view seems now to be that adopted in all C the provinces of Canada. . . . I take occasion to endeavour to make clearer why the latter-day English decisions are of no authority upon this question, which, as I have said, seems at the present day to have become settled throughout Canada beyond reversal. . . . The right and duty, therefore, of this D court to consider the evidence upon which a conviction is made, and if it is found to be insufficient, to quash the conviction, is then at least equal to the right and duty of the court to set aside a verdict in a criminal case upon a case reserved, if it appears that the evidence is insufficient to support the conviction. The cases, therefore, in which upon a reserved case the court has set aside a conviction for insufficiency of evidence, are therefore authorities E applicable to cases arising on certiorari . . . but, as I shall endeavour to show, the power of the court to set aside a conviction on certiorari is much greater than its power upon a reserved case."

R. v. Emery (16) was a case to which both STUART, J., and BECK, J., had been parties, and, in a measure, the present case may be said to be an appeal against it. In argument, however, it has been pointed out that *R. v. Emery* (16) was a case of summary trial of an indictable offence, whereas the present is a case of the determination by a court of summary jurisdiction of an offence cognisable F only by such a court. In what their Lordships have to say of *R. v. Emery* (16) they wish to keep open this distinction, if it be one, for consideration, if a case of an indictable offence should hereafter come before them, but in so far as both cases are on all fours, *Emery's Case* (16) must be examined.

The proposition adopted may be stated thus: in exercising its inherent jurisdiction to supervise the proceedings of an inferior court, the superior court must G inquire whether there was any evidence on which the tribunal below could have decided as it did decide, and this involves examining the evidence given to see if it was sufficient in this sense to sustain the conviction. If, on some part of the case, which was material to the charge and had to be legitimately established before the accused person could be convicted, no evidence was forthcoming at all, this would be error of law, which being duly brought to the notice of the H superior court would oblige it to quash the conviction. For this reliance was placed on the cases of *R. v. Smith* (2), *R. v. Crisp* (22), and *R. v. Chandler* (23), *Ex parte Vaughan* (24), and *Lovesy v. Stallard* (25). It is evident that this exact point must be one of rare occurrence. It assumes complete jurisdiction, complete absence of any testimony on a definite and essential point, and complete I presentation to the superior court of this omission in the court below. Only if the whole evidence given can be got before the superior court can this difficulty be raised. Only when it appears that no witness whatever has said a thing which must be said by someone will it fall to be discussed. It will have two aspects: the first whether the omission from the record of any statement that the necessary piece of evidence was given raises the presumption that it must nevertheless have been given or the justices would not have convicted, or the presumption that, as it was not stated, it cannot have been given at all, or whether, at any rate, it shows that the record is in need of further and fuller

statement; and the second, whether pronouncing a conviction, notwithstanding such an absence of necessary proof, is an error of law or a mistake in fact. More generally speaking, it becomes necessary to ask, what is the "record" and when can the superior court go outside it, and, if want of evidence can be established, does that establish want of jurisdiction in the magistrate? A

When justices were required to set out the evidence on the record of the conviction, as nearly as might be in the terms in which it was given, detection of a hiatus on the record would justify a mandamus to them, to complete the record by setting out the evidence on the point. In taking this course in *R. v. Warnford* (26), ABBOTT, C.J., says : B

"The conviction must set out the language used by the witness, in order that it may be seen whether a right conclusion is drawn from it. The court will not assume that the justice has done his duty, unless he tells us so by his own acts." C

On the other hand, if legislation has provided for a shorthand note of the whole of the evidence and for its attachment to the conviction as a part of it, when returned on certiorari, the record itself shows, when it reaches the superior court, whether or not the evidence in question was given. It seems to have been by no means settled on authority that, even when the evidence eventually reaches the court in a complete form, the court should criticise the absence of the material evidence as error in law, and as ground for quashing the conviction. In *Ex parte Vaughan* (24), SHEE, J., alone of the judges who expressed opinions, dealt with the case of there being no evidence at all on which justices could adjudicate, but all he says is that then "they would be acting improperly." LORD COLERIDGE in *Lovesy v. Stallard* (25) says generally (30 L.T. at p. 794) that "the existence of evidence is for the court." On the other hand, in *R. v. Galway Justices* (27) PALLES, C.B., points out that a conviction which sets out no evidence cannot be questioned as to the evidence given before the justices on material dehors the conviction. In *R. v. Cheshire Justices* (28) it actually appeared on the affidavits filed on the question of the justices' jurisdiction that, in making their order, they had acted on a view of the facts not testified to at all, but merely stated to them by one of their own body as being within his knowledge. The Court of Queen's Bench nevertheless, having decided that there was jurisdiction, declined to interfere. Though one member of the court said that the justices had decided "absurdly," they refused to criticise the decision further. "This," said LORD DENMAN, "we cannot look into." D E F G

It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence, on which to convict, is the same as want of jurisdiction to take evidence at all. This clearly is erroneous. A justice who convicts without evidence is doing something which he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction, which he has not. How a magistrate, who has acted within his jurisdiction up to the point at which the missing evidence should have been, but was not, given, can thereafter be said by a kind of relation back to have had no jurisdiction over the charge at all, it is hard to see. It cannot be said that the conviction is void, and may be disregarded as a nullity, or that the whole proceeding was coram non iudice. To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the H I

A real conclusion is that there never was any jurisdiction at all. This appears from the very full and able discussion of all the authorities in *R. (Martin) v. Mahony* (29). On this point *Ex parte Hopwood* (30) may also be referred to. In that case certiorari having been taken away by statute, the court could only interfere, if the justices had convicted without having any jurisdiction at all. It was alleged on affidavit that, on the particular summons in question, they had had no evidence before them, even of the service of the summons. The court held that, even so, the fact did not take away jurisdiction. PATESON, J., said:

"As to the want of evidence on matter of fact, that cannot possibly take away jurisdiction: no case can be cited where that has ever been said."

C To the same effect is *Re Shropshire Justices, Ex parte Blewitt* (31). Furthermore, a conviction, regular on its face, is conclusive of all the facts stated in it, not excepting those necessary to give the justices jurisdiction, and it is from the facts stated in the conviction that the facts of the case are to be collected. Thus in the well-known case of *Brittain v. Kinnaird* (32), the plaintiff had been convicted under the Bumboat Act (2 Geo. 3, c. 28), and the conviction stated his offence in terms of the Act simply, "for that the plaintiff unlawfully had in his possession in a certain boat in the river Thames certain stores," very much as the conviction runs in this case. He said that his vessel was of 13 tons burthen and was not a boat, and sued the justice; but it was held that the conviction was conclusive evidence that a boat it was, and no distinction is drawn, which would limit the conclusive character of the conviction as an answer to civil proceedings in trespass taken against the magistrate. In *R. v. Bolton* (3) (1 Q.B. at pp. 72-74) LORD DENMAN, in a well-known passage, says:

"The case to be supposed is one like the present in which the legislature has trusted the original, it may be (as here) the final, jurisdiction on the merits to the magistrates below; in which this court has no jurisdiction as to the merits either originally or on appeal. All that we can then do . . . is to see that the case was one within their jurisdiction and that their proceedings on the face of them are regular and according to law. . . . Where the charge laid before the magistrate, as stated in the information, does not amount in law to the offence over which the statute gives him jurisdiction. . . . Or if, the charge being really insufficient, he had misstated it in drawing up the proceedings, so that they would appear to be regular, it would be clearly competent to the defendant to show to us by affidavits what the real charge was, and, that appearing to have been insufficient, we should quash the conviction. . . . But, as . . . we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. It will be observed, however, that here we receive them, not to show that the magistrate has come to a wrong conclusion, but that he never ought to have begun the inquiry. But, where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry: in so doing he undoubtedly acts within his jurisdiction; but in the course of the inquiry, evidence being offered for and against the charge, the proper, or it may be the irresistible, conclusion to be drawn may be that the offence has not been committed, and so that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of showing this is clearly in effect to show that the magistrate's decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction. . . . The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion, of the inquiry; and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry."

The law laid down in *R. v. Bolton* (3) has never since been seriously disputed in England. In *Colonial Bank of Australia v. Willan* (4) the Judicial Committee settled that the same rules are applicable to the Dominions, except in so far as they may be affected by competent legislation. The respondents must, therefore, distinguish these authorities since, where they apply, it is not now possible to argue that they were not rightly decided, or else they must show special legislation applicable in Alberta. *Willan's Case* (4) is said to be distinguishable on two grounds, first, that it was not, nor was *Bolton's Case* (3) a criminal case; and, secondly, because SIR JAMES COLVILLE's language shows the decision to have turned on the committee's being satisfied from the evidence before it, that the material allegations had been proved by evidence given in the court below. If so, both cases were merely decisions on the admissibility upon certiorari of fresh affidavit evidence to impugn or to confirm the regularity of the proceedings below, as returned to the superior court. There is no reason to suppose that, if there were any difference in the rules as to the examination of the evidence below on certiorari before a superior court, it would be a difference in favour of examining it in criminal matters, when it would not be examined in civil matters, but, truly speaking, the whole theory of certiorari shows that no such difference exists. The object is to examine the proceedings in the inferior court to see whether its order has been made within its jurisdiction. If that is the whole object, there can be no difference for this purpose between civil orders and criminal convictions, except in so far as differences in the form of the record of the inferior court's determination or in the statute law relating to the matter may give an opportunity for detecting error on the record in one case, which in another would not have been apparent to the superior court, and, therefore, would not have been available as a reason for quashing the proceedings.

In this connection reliance was placed on a passage in the opinion of LORD CAIRNS in *Walsall Overseers v. London and North Western Rail. Co.* (33). The question for decision there was simply whether or not the Court of Appeal had jurisdiction to entertain an appeal from an order of the Court of Queen's Bench, discharging a rule nisi for a certiorari to quash an order of quarter sessions in a rating matter. LORD CAIRNS, speaking of certiorari generally, says (4 App. Cas. at p. 39):

"If there was upon the face of the order of quarter sessions anything which showed that that order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it, and to look at the order, and view it upon the face of it, and, if the court found error upon the face of it, to put an end to its existence by quashing it."

Turning to the kind of order under discussion, and after stating how much in that matter, both of fact and of law, the sessions were bound to set out on the face of their order, he proceeds (*ibid.* at p. 40):

"All that was necessary was that the court of quarter sessions, in making its order should not make it an unspeaking or unintelligible order, but should in some way state upon the face of the order, the elements which had led to the decision of the court of quarter sessions. If the court of quarter sessions stated upon the face of the order, by way of recital, that the facts were so and so, and the grounds of its decision were such as were so stated, then the order became, upon the face of it, a speaking order; and if that, which was stated upon the face of the order, in the opinion of any party, was not such as to warrant the order, then that party might go to the Court of Queen's Bench and point to the order as one which told its own story, and ask the Court of Queen's Bench to remove it by certiorari, and when so removed to pass judgment upon it, whether it should or should not be quashed."

It is to be observed on this passage, that the key of the question is the amount of material stated or to be stated on the record returned and brought into the

A superior court. If justices state more than they are bound to state, it may, so to speak, be used against them, and out of their own mouths they may be condemned, but there is no suggestion that, apart from questions of jurisdiction, a party may state further matters to the court, either by new affidavits or by producing anything that is not on or part of the record. So strictly has this been acted on that documents returned by the inferior court along with its record, for example, the information, have been excluded by the superior courts from its consideration. That the superior court should be bound by the record is inherent in the nature of the case. Its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.

The view taken in the Supreme Court of Alberta of the real grounds for the decision in *Colonial Bank of Australia v. Willan* (4) proceeds on a complete misapprehension. SIR JAMES COLVILLE says of the order, which had been wrongly quashed (L.R. 5 P.C. at p. 446):

"The order, then, was one made by a competent judge, showing, on the face of it, that every requirement of the statute under which it was made had been complied with . . . and containing an express adjudication upon a fact which, though essential to the order, the judge was both competent and bound to decide, viz., that the sum claimed to be due to the petitioning creditors was then due to them from the mining company. Nor can it be said that there was no evidence to support this finding, since the affidavit filed in support of the petition distinctly swears to the debt. This being so, it seems to follow that the Supreme Court could only arrive at the opposite conclusion upon a re-trial of the question of the petitioning creditors' debt, and that upon evidence which was not before the inferior court."

Commenting on this passage, BECK, J., in *R. v. Emery* (16), expresses the opinion that what the Judicial Committee condemned and all that it condemned was a re-trial of the existence of the debt by the superior court on fresh evidence, which had not been adduced below; and in *R. v. Hoffman* (17), which adopted the reasoning and conclusion of *R. v. Emery* (16) in the following year, it is said that all that was decided in *Willan's Case* (4) was the question of the admissibility of fresh evidence by affidavit in the superior court, which had not been before the justices in the court below. All this seems to have hung on SIR JAMES COLVILLE's commencement of a new paragraph and a new step in the reasoning with the words "this being so." This was taken, not as comprehending all that had preceded, but as relating solely to the sentence beginning: "Nor can it be said that there was no evidence . . ." The report shows that no such point was taken by Mr. Benjamin for the respondents. His argument was that the proceedings were heard *ex parte*, for the company did not appear on the winding-up petition; but that the winding-up judge had assumed the preliminary question, viz., whether or not there was a creditor before the court, to have been conceded in consequence of the absence of controversy; that in the result he had established his jurisdiction by proceeding upon an assumed fact; and that the reality of that assumption having been inquired into in the superior court on affidavit as to the fact, since questions going to the jurisdiction of the court below must in case of need be inquired into, and it having been found that in fact no petitioning creditor existed, the order was rightly quashed (*ibid.* at pp. 443 and 444). The passage above relied on is the answer to this argument, which is briefly dismissed at the end of the main conclusion by recalling that the judge had uncontradicted affidavit evidence of the existence of the debt before

him, and found and recited the existence of the debt, and in doing so was examining into the reality of an alleged fact, which it was within his competence to decide, although, had the alleged fact been found to be untrue, he would have been bound to dismiss the petition to wind-up the company. A

This misapprehension of the meaning of the Judicial Committee's opinion is probably due to the not infrequent confusion between facts essential to the existence of jurisdiction in the inferior court, which it is within the competence of that court to inquire into and to determine, and facts essential thereto, which are only within the competence of the superior court. As LORD ESHER, M.R., points out in *R. v. Income Tax Special Purposes Comrs.* (34) (21 Q.B.D. p. 319), if a statute says that a tribunal shall have jurisdiction if certain facts exist, the tribunal has jurisdiction to inquire into the existence of these facts as well as into the questions to be heard, but while its decision is final, if jurisdiction is established, the decision that its jurisdiction is established is open to examination on certiorari by a superior court. On the other hand, the fact on which the presence or absence of jurisdiction turns may itself be one which can only be determined as part of the general inquiry into the charge which is being heard. The following is a real instance of this. In *Anon.* (35), justices who had jurisdiction to hear a charge of common assault were precluded by statute from exercising it if the evidence disclosed that the assault was accompanied by an attempt at felony. Although such an attempt was deposed to in the course of the evidence supporting the charge of assault, a rule to quash a conviction for a common assault was discharged upon the ground that it was for the justices to decide whether they believed the part of the evidence which disclosed the attempt, and, if they did not, their jurisdiction to convict was not ousted by the statute. In the language of COLERIDGE, J., delivering the judgment of the court in *Bunbury v. Fuller* (36), the rule is thus stated (9 Exch. at p. 140): B C D E

"Now it is a general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and, however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the superior court." F

In addition, however, to this mistaken attempt to place the decisions in *R. v. Bolton* (3) and *Colonial Bank of Australia v. Willan* (4) on a too limited ground the majority of the Supreme Court of Alberta acted on a view of the English legislation of 1848, which without foundation is deemed to differentiate the law of certiorari in England and in Canada. The learned judges appear to have thought that the application of these cases depended on the effect in England of the Summary Jurisdiction Act, 1848, that the law applicable in Canada is the law as it was in England before 1848, and not the law as it stood ever since, and that under the earlier law the superior court on certiorari was entitled to examine generally into the evidence on which the conviction was pronounced on the pretext of inquiring whether the conviction was within the jurisdiction of the justices. Their Lordships think that there has been a mistake on both points. *R. v. Bolton* (3) undoubtedly is a landmark in the history of certiorari, for it summarises in an impeccable form the principles of its application under the regime created by what are called Jervis's Acts, but it did not change, nor did those Acts change, the general law. When the Summary Jurisdiction Act, 1848, provided, as the sufficient record of all summary convictions, a common form which did not include any statement of the evidence for the conviction, it did not stint the jurisdiction of the Queen's Bench or alter the actual law of certiorari. What it did was to disarm its exercise. The effect was not to make error no G H I

A longer that which had been error, but to remove nearly all opportunity for its detection. The face of the record "spoke" no longer: it was the inscrutable face of a Sphinx. Long before Jervis's Acts statutes had been passed, which created an inferior court, and declared its decisions to be "final" and "without appeal," and again and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the court to bring the proceedings before itself by certiorari. There is no need to regard this as a conflict between court and Parliament; on the contrary, the latter, by continuing to use the same language in subsequent enactments, accepted this interpretation, which is now clearly established and is applicable to Canadian legislation, both Dominion and provincial, when regulating the rights of certiorari and of appeal in similar terms. The Summary Jurisdiction Act, 1848, was intended to produce and did produce its result by a simple change in procedure without unduly ousting the supervisory jurisdiction of the superior court. The matter has often been discussed as if the true point was one relating to the admissibility of evidence, and the question has seemed to be whether or not affidavits and new testimony were admissible in the superior court. This is really an accidental aspect of the subject. Where it is contended that there are grounds for holding that a decision has been given without jurisdiction, this can only be made apparent on new evidence brought ad hoc before the superior court. How is it ever to appear within the four corners of the record that the members of the inferior court were unqualified, or were biased, or were interested in the subject-matter? On the other hand, to show error in the conclusion of the court below by adducing fresh evidence in the superior court is not even to review the decision; it is to re-try the case. If the superior court confines itself to what appears on the face of the record, evidently the more there is set out on the record the more chance there is that error, if there was error, will appear and be detected. The Summary Jurisdiction Act, 1848, cut down the contents of the record, and so did away with a host of discussions as to error apparent on its face. The superior court acquired no new and more extensive right to admit fresh evidence by affidavit to contradict the record of the conviction by matters de hors its contents. When it would previously have been confined to matter appearing on the face of the record, it continued to be so confined, but the grounds for quashing on certiorari came in practice to be ground relating to competence and disqualification.

It follows that there is not one law of certiorari before 1848 and another after it, nor one law of certiorari for England and another for Canada. The real questions are: (i) Has any statute, having force in Alberta, prescribed a form of conviction which omits all evidence from the record and leaves nothing but the statement that the accused was duly convicted to take its place; and (ii) has any other such statute modified the practical effect of that provision, which, of course, must otherwise be the same for Canada as for England? The legislatures of Canada have not failed to profit by the experience of England in framing new or amending statutes directed to the removal of difficulties in the administration of the law, which arose out of common law rules and forms no longer adapted to the purposes of the day. Even before the British North America Act, 1867, was passed, legislation had been enacted in Canada prescribing a general form of conviction for offences within the competence of a summary jurisdiction. That form was in substance the form prescribed in the English Act of 1848, the form now in force under the Criminal Code of Canada, and the form in which the conviction in the present case was expressed. Special Canadian legislation has long dealt with the subject of temperance and restricted or prohibited the sale of intoxicants, and Alberta, too, has for many years enacted strict measures of her own, the present Liquor Act being the last result of much amendment and re-amendment of the earlier steps taken in that direction. All this has been done with the history of certiorari and of the effect of prescribing a general form for conviction present to the mind of the legislature concerned, and the

enactments so passed must be read in the light of these general provisions. If so, no marked difference can be found between the systems under which in England and in Canada summary jurisdiction is applied to offences against liquor laws, and it follows *prima facie* that Canadian legislation, affecting summary convictions and the powers of superior courts to quash them upon *certiorari* is to be construed, in accordance with the older English decisions, as limiting the jurisdiction by way of *certiorari* only where explicit language is used for that purpose, and, on the other hand, as contenting itself with an indirect limitation on the exercise of that jurisdiction, by substituting for the detailed record of a century and more ago the "unspeaking" form of a general conviction such as was prescribed in 1848. Of course, it is competent for the legislature to go further than this, and, where the language used shows such an intention, the presumption above stated is negated. This may be done notably in two ways. The one is to take away *certiorari* explicitly and unmistakably, or to limit it in a manner not within the older decisions upon such words as "final" or "without appeal"; the other is, on the other hand, to restore it to its pristine rigour by restoring to the record a full statement of the evidence.

In the present case it is argued that both methods have been employed in Alberta. The record, it is said, is made to contain the whole of the evidence and on *certiorari* the superior court is directed to examine it. Three enactments are relied upon as differentiating the present case from the "latter-day" English cases. They are (i) ss. 682, 683, 721, 793, 1017, and 1124 of the Canadian Criminal Code. The first two require that the evidence given before justices shall be taken down in the form of written depositions; s. 793 binds the magistrate to transmit the depositions with other papers to the clerk of the peace to be placed among the records of the general sessions of the peace; s. 1017 only refers to appeals and applications for new trials; s. 1124 is to the like effect; it uses practically the same terms as s. 62 of the Liquor Act, hereinafter quoted, and is re-enacted from 55 & 56 Vict. c. 29, s. 889; (ii) the provision in the Crown rules, which requires depositions to be returned with the conviction on *certiorari*; and (iii) ss. 62 and 63 of the Liquor Act, which are relied on as specific legislation, directing what is to be done with those depositions in the superior court on *certiorari* to bring up a conviction under the Liquor Act. Their Lordships think it reasonably plain that no great reliance can be placed on any but the last of these provisions. To say that there would be no use in written depositions, if they were not to be available for use in a superior court on *certiorari*, is to beg the question. Until the hearing is concluded, and the decision is pronounced, it cannot be known whether or not an appeal may be taken in appealable cases, but if it is to be taken to good purpose, the depositions must have been put into permanent form while the evidence is being given. Even where there is no appeal, the process of taking down what the witnesses say, as they say it, tends to care both on the part of the witnesses and of the court, and makes it all the more possible to ensure that no conviction will be pronounced unless evidence has been given of each essential feature of the charge. Either of these considerations provides and abundant satisfaction for the sections, which require the evidence to be taken down, and it is unnecessary to speculate further as to their possible admissibility in the particular case of *certiorari*. Again, r. 4 of the Crown Practice Rules only requires that the evidence shall be returned with the conviction, and it refers to the depositions as separate papers or documents. Since the statute expressly provides that the record of the conviction may be sufficiently recorded in the statutory form, a mere general rule of practice is not to be read as altering that provision or as requiring that the record of it shall include a separate document sent along with it, that is to say, virtually, as declaring that the general form of conviction shall not be in itself a sufficient record, the statute notwithstanding. Sections 62 and 63 of the Liquor Act, 1916, as amended by

- A the Statute Law Amendment Act, 1918, are headed "Convictions and Subsequent Proceedings," and are as follows :

Section 62. "No conviction order or warrant for enforcing the same or any other process shall upon any application by way of certiorari or for a habeas corpus or upon any appeal be held insufficient or invalid for any irregularity, informality or insufficiency therein, or by reason of any defect of form or substance therein, if the court or judge hearing the application or appeal is satisfied by a perusal of the depositions that there is evidence on which the justice might reasonably conclude that an offence against a provision of this Act has been committed."

Section 63. "The court or judge hearing any such application of appeal may upon being satisfied as aforesaid confirm, reverse or modify the decision which is the subject of the application or appeal or may amend the conviction or other process or may make such other conviction or order in the matter as he thinks just."

Here, no doubt, there is an express definition of the relation of depositions to certiorari, which excludes any implied relation such as has been referred to above.

- D The depositions are not made part of the record. They are used as independent materials, upon which the judge must uphold a conviction, which upon its face he might otherwise be bound to quash for irregularity, informality or insufficiency, provided that he is satisfied within the terms of the section. It seems to have been thought in the court below that, if the depositions could be looked at for one purpose on certiorari, they could be looked at for another, and that, as it is expressly provided that they are materials available for affirming an otherwise dubious conviction, they must also, by necessary implication, be materials available for quashing a conviction, which on its face appears to be beyond doubt. This is not so. Plainly, the object of the section is to stop every chance of the accused's escaping after conviction, so far as it is possible to do so; but it contains no word in his favour. The only wonder is that it does not provide for certiorari to bring up and quash an order dismissing the information.

Section 63 does, it is true, contain the word "reverse," but on examination it is clear that this is not a reversal which is to benefit the accused. The court, upon being satisfied as aforesaid, that is, in the words of s. 62, being

- G "satisfied by a perusal of the depositions that there is evidence on which the justice might reasonably conclude that an offence against a provision of this Act has been committed . . . may confirm, reverse or modify the decision . . . or may amend the conviction or other process or may make such other conviction or order in the matter as he thinks just."

- H The condition of power to reverse, in the sense of a power to let the guilty person off, cannot be a conclusion from evidence that the Act has been violated, and it is to be noted that the word is "reverse" and not "quash." What evidently is meant is that, on drawing the above conclusion from the evidence, the court may, if it thinks fit to exercise the power of making some other conviction, reverse for that purpose the conviction actually made below, which otherwise would stand in the way, and direct the conviction, which in its opinion the justices should have pronounced. Their Lordships are of opinion that the provisions of the Canadian Criminal Code and of the Alberta Liquor Act have not the effect of undoing the consequences of the enactment of a general form of conviction; that the evidence, thus forming no part of the record, is not available material on which the superior court can enter on an examination of the proceedings below for the purpose of quashing the conviction, the jurisdiction of the magistrate having been once established; and that it is not competent to the superior court, under the guise of examining whether such jurisdiction was established, to consider whether or not some evidence was forthcoming before the magistrate of every

fact which had to be sworn to in order to render a conviction a right exercise of his jurisdiction. A

The magistrate's order for the forfeiture of the entire stock of whisky in cases stands or falls by the same considerations as the conviction for keeping it unlawfully, although in itself it constituted by far the severest penalty. The learned judges below were not unnaturally impressed by the fact that one reason for selecting as the offence to be charged an unlawful keeping instead of an unlawful selling, was to get the opportunity, after establishing the offence, of applying for the forfeiture of the stock of whisky. This, however, makes no difference to the legal aspect of the matter. There was also some irregularity in the issue of the search warrant, which preceded the application for forfeiture and in the information on which it was applied for, but this does not afford a ground for quashing the order, if otherwise it is not impeachable. It is urged that there was no evidence which would justify the forfeiture, since proof of the unlawful sale of one case is no evidence of an unlawful keeping of the entire stock of cases, thousands in number. This, of course, is only another way of contending that there was no evidence of the commission of the principal offence. Even if the superior court was entitled to investigate the nature and extent of the evidence, as to which the considerations already advanced need not be repeated, their lordships are of opinion that this matter was one for the magistrate. If he believed the evidence as to the circumstances in which the whisky sold was inquired for, selected, sold and taken away, it cannot be said that his conclusion, that the whole stock and not the single case only was unlawfully kept, exceeded the provisions of the Liquor Act. B C D

As leave was given for the appeal from the judgment of the Supreme Court of Alberta, upon which all the questions which arise can be completely disposed of, it became unnecessary, for the purpose of this case, to proceed with the appeal from the refusal of the Supreme Court of Canada to entertain the matter and their Lordships might well have declined to entertain it. They have, however, been asked to give a decision on this point also, in order that a question of law, which it is suggested is at least doubtful, may be set at rest. On this ground, and not as opening the door in future to any general admission of argument upon points which do not necessarily arise, their Lordships are content to deal with it. The question is whether an appeal from the Supreme Court of Alberta in this case to the Supreme Court of Canada would have been a criminal cause or matter within the words of the Dominion statute 10 & 11 Geo. 5, c. 32. This Act, which received the Royal Assent shortly before the commencement of the proceedings now in question, excepted by s. 36 from the appellate jurisdiction of the Supreme Court of Canada, "proceedings for or upon a writ of certiorari arising out of a criminal charge." In substance and for present purposes this was the law as laid down in the Supreme Court Act, ss. 35, 36, and 39, and the alterations made in 1920 are not now material. The question whether a prosecution under a typical temperance Act is or is not a criminal charge has twice been before the Supreme Court in recent years, viz., *Re McNutt* (37), which was a case of habeas corpus, and *Mitchell v. Tracey* (38), which was a case of prohibition. In the first, six judges took part in the hearing. Three of them held that the application for the writ arose "out of a criminal charge"; one held that it did not, and one seriously doubted whether it did; the remaining judge expressed no opinion on the point. The case was, however, capable of being disposed of on other grounds. DUFF, J., delivered an elaborate and striking judgment, to the effect that the application for the writ did not arise out of a criminal charge, and the principal judgment contra was that of ANGLIN, J. In the second case, out of five judges who took part, three followed the conclusion of ANGLIN, J., in the earlier case, ANGLIN, J., himself being one, and two expressed no opinion on the point at all. In these circumstances it becomes desirable to examine the question more fully than would otherwise be required, in view of the E F G H I

A fact that the present case has been substantially disposed of on the appeal from the Supreme Court of Alberta.

The issue is really this. Ought the word "criminal" in the section in question to be limited to the sense in which "criminal" legislation is exclusively reserved to the Dominion legislature by the British North America Act, 1867, s. 91, or does it include that power of enforcing other legislation by the imposition of penalties, including imprisonment, which it has been held that s. 92 authorises provincial legislatures to exercise? It may also be asked (though this question is not precisely identical) under which category does this conviction fall of the two referred to by BOWEN, L.J., in *Osborne v. Milman* (39), when he contrasts the cases "where an act is prohibited in the sense that it is rendered criminal," and "where the statute merely affixes certain consequences more or less unpleasant to the doing of the act." Their Lordships are of opinion that the word "criminal" in the section and in the context in question is used in contradistinction to "civil," and "connotes a proceeding which is not civil in its character." Certiorari and prohibition are matters of procedure, and all the procedural incidents of this charge are the same whether or not it was one falling exclusively within the legislative competence of the Dominion legislature, under s. 91, head 27. When the Supreme Court was established by statute in 1875, and this exception out of its powers as to habeas corpus was enacted by ss. 23 and 51, there was then in existence a substantial body of undoubtedly criminal matters, which did not rest on any statute, and this must have been within the purview of these sections, the British North America Act notwithstanding. After all, the Supreme Court Act is concerned, not with the authority which is the source of the "criminal" law under which the proceedings are taken, but with the proceedings themselves, and all the arguments in favour of limiting appeals in such cases apply with equal force, whether the provincial legislature is or not the competent legislative authority. Their Lordships will therefore humbly advise His Majesty that on the appeal from the judgment of the Supreme Court of Alberta the appeal should be allowed; that the judgments of the Supreme Court and of HYNDMAN, J., should be set aside, and that the conviction and order for forfeiture should be restored, and the appeal from the Supreme Court of Canada should be dismissed. Their Lordships were given to understand that an arrangement has been made between the parties, which makes any direction as to costs unnecessary on the present occasion.

Solicitors : *Blake & Redden; Lawrence, Jones & Co.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

MARCHBANK v. CAMPBELL AND ANOTHER

[KING'S BENCH DIVISION (Darling and Salter, JJ.), November 22, 30, 1922]

[Reported [1923] 1 K.B. 245; 92 L.J.K.B. 137; 128 L.T. 283;
39 T.L.R. 120; 67 Sol. Jo. 184; 21 L.G.R. 90]

Rent Restriction—Apportionment—Necessity—Question for court—Question of fact—Apportionment unnecessary where new and separate dwelling-house created by substantial structural alteration—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12 (3) (9).

Where part of a dwelling-house has been separately let the question whether, to ascertain the rent or rateable value of that part, it is necessary to apportion the rent or rateable value of the whole of the house, or whether the rent at which the part is first separately let or rated is the standard rent or rateable value, is a question of fact and depends on the nature and extent of the structural alteration of the premises. It is not to be inferred from s. 12 (9) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, that apportionment must always be made unless the structural alteration amounts to a complete reconstruction within that sub-section. It is a question of the physical identity of the part of the premises which has been separately let. To justify a judge in finding that the part was first let when it was first let separately there must be, in his opinion, not merely a new and separate dwelling-house in law by virtue of a new and separate letting, but a new and separate dwelling-house in fact by virtue of substantial structural alteration.

The respondents were landlords of premises, consisting of a basement, a ground floor, and three floors above, which came within the Rent Restrictions Acts. In 1914 the premises in question were let as a whole. In 1920 the landlords bought the lease of the house for £550, with seven and a half years unexpired, with the intention of living and practising their profession as masseuses in the lower part and letting off the two upper floors as a separate flat. They spent about £90 on the two upper floors, partly in decoration and partly in structural alteration. A partition with locked door and fanlight was built on the second floor landing, shutting off the two upper floors from the rest of the house. One of the rooms on the second floor, formerly a bedroom, was converted into a kitchen by building a dresser, fixing a gas cooker and two sinks, and laying on gas and water. A loft in the roof was floored for use as a boxroom and the access to it was enlarged. Separate gas and electric meters were fixed and some minor work was done, such as fixing picture rails and electric light plugs. A bell was fixed at the front door to ring in the flat. In common with the landlords the tenant had the use of the staircase to the second floor, the entrance hall of the premises, a water closet and bathroom on the ground floor, and a coal cellar. In December, 1920, the tenant became the first tenant of this upper part of the house on a three years' tenancy at a rent of £150 a year. The rateable value of the whole house in 1922 was £81, but there was no evidence that the tenants' tenement had been separately rated. On an application by the tenant for apportionment of the standard rent of the house under s. 12 (3) of the Act of 1920,

Held: there was evidence on which the county court judge could find, as he did, that the landlords had created a new dwelling-house in fact substantially different from the original upper part of the house and he was right in law in deciding that the tenant's tenement was a dwelling-house which was let for the first time since Aug. 3, 1914, and that no apportionment was necessary to determine its standard rent of it.

Notes. Section 12 (3) of the Increase of Rent, &c. (Restrictions) Act, 1920 (for which see 13 HALSBURY'S STATUTES (2nd Edn.) 981), was amended as to

- A England and Wales, but not Scotland, by the repeal of the references therein to standard rent, the section now being limited to apportionment of rateable value.

Considered: *Sulton v. Begley*, [1923] All E.R. Rep. 388; *Stockham v. Easton*, [1923] All E.R. Rep. 618. Referred to: *Barrett v. Hardy Bros. (Alnwick), Ltd.*, [1925] All E.R. Rep. 139; *Phillips v. Potter* (1925), 94 L.J.K.B. 819; *Capital and*

- B *Provincial Property Trust, Ltd. v. Rice*, *Rice v. Capital and Provincial Property Trust, Ltd.*, [1950] 2 All E.R. 174.

As to apportionment of rateable value see 23 HALSBURY'S LAWS (3rd Edn.) 724-726 and for cases see 31 DIGEST (Repl.) 685-688.

Case referred to:

- C (1) *Sinclair v. Powell*, [1922] 1 K.B. 393; 91 L.J.K.B. 220; 126 L.T. 210; 38 T.L.R. 239; 66 Sol. Jo. 235; 20 L.G.R. 73, C.A.; 31 Digest (Repl.) 673, 7691.

Appeal by the tenant from Marylebone County Court on an application by the tenant for apportionment under s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and an action under s. 14 of that Act to recover alleged overpayments of rent. The county court judge dismissed the application on the ground that it was not necessary to have recourse to apportionment in order to determine the standard rent of the applicant's dwelling-house.

The facts appear in the judgment of **SALTER, J.**

J. D. Casswell for the tenant.

- E *H. J. Casey* for the landlords.

Cur. adv. vult.

Nov. 30. **DARLING, J.**—My brother **SALTER** has prepared a written judgment in this case, and I only desire to say that I entirely concur in the judgment which he is about to read.

- F **SALTER, J.**, read the following judgment. This was an application by the appellant, the tenant, for apportionment under s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and an action under s. 14 of that Act to recover alleged overpayments of rent. It was contended for the respondents, the landlords, that the case fell within s. 12 (9). This contention was rejected and no appeal is made on this point. The county court judge dismissed the application on the ground that it was not necessary to have recourse to apportionment in order to determine the standard rent of the applicant's dwelling-house. The question is whether, upon the facts, he was right in law in so deciding.

- G No. 25, Upper Gloucester Place (the premises in question) consists of a basement, a ground floor, and three floors above. It was let as a whole in 1914 at a rack rent of £70 a year. In 1920 the rack rent was £90 a year. In September, 1920, the respondents bought for £550 the lease of this house with seven and a half years unexpired at a ground-rent of £40 a year. The respondents are in partnership as masseuses and bought the house with the intention of living and practising their profession in the lower part, letting off the two upper floors as a separate flat. They spent about £200 in decoration and repair. About £90 of this was spent on the two upper floors, partly in decoration and partly in structural alteration. I A partition, with locked door and fanlight, was built on the second-floor landing, shutting off the two upper floors from the rest of the house. One of the rooms on the second floor, formerly a bedroom, was converted into a kitchen by building a dresser, fixing a gas cooker and two sinks, and laying on gas and water. A loft in the roof was floored for use as a boxroom and the access to it was enlarged. Separate gas and electric meters were fixed and some minor work was done, such as picture rails and electric-light plugs. A bell was fixed at the front door to ring in the flat. In December, 1920, the appellant became the first tenant of this upper

part. The tenancy is for three years at a rent of £150 a year. She has the right to the use, in common with the respondents, of the staircase to the second floor, the hall, the water-closet and bathroom (which are on the ground floor), and one of the coal cellars. One of the cellars was appropriated to her sole use, but it is not clear that she has any exclusive right to it. No evidence was given that the appellant's tenement had been separately rated. It was stated that the rateable value in 1922 was £81. This I understand to mean the rateable value of the whole house. The appellant's tenement was, therefore, created by the separate letting for residence of part of a house which, at the time of the separate letting, was subject to the Act of 1920. It is clear that this tenement is a "dwelling-house" within the meaning of the Act.

The question is whether apportionment is necessary for the purpose of determining the standard rent of that dwelling-house. Section 12 (1) (a) [repealed by Rent Act, 1957, of which see for present rent limit s. 1] lays down the rule, and the only rule, for determining the standard rent of every dwelling-house. The words "except where the context otherwise requires" may qualify the other definitions in sub-s. 1 or some of them, but do not seem to me to apply to para. (a). The three classes into which dwelling-houses are divided comprise every possible case. The standard rent of every dwelling-house is the actual rent of that dwelling-house at a fixed date. The question in the case of every dwelling-house is at what date is the actual rent of this dwelling-house to be taken for the purpose of determining its standard rent. When the dwelling-house in question is a dwelling-house in the ordinary sense, a house let as a whole, there is no difficulty in placing it in one or other of the three classes. But where the applicant's tenement is only a "dwelling-house" by virtue of the Act, created by letting separately a room, or a storey, or some other portion of a house, then it may be a matter of some difficulty to determine in which of the three classes such dwelling-house is to be placed. In this case the whole house was let as a whole on Aug. 3, 1914, and the part was first separately let in December, 1920. The question is whether the part is a dwelling-house which was let on Aug. 3, 1914, or a "dwelling-house which was first let after the said Aug. 3, 1914." If the latter, the standard rent of the part is the actual rent of the part in December, 1920, and no apportionment is necessary to determine the standard rent. If the former, the standard rent of the part is the actual rent of the part on Aug. 3, 1914. This can only be ascertained by an apportionment of the actual rent of the whole at that date. In such a case someone must make a binding apportionment, and sub-s. (3) empowers the county court to make it. The county court judge must ascertain the date at which the actual rent of the applicant's tenement is to be taken. If at that date the tenement had a separate rent of its own no apportionment is necessary and the application fails. If at that date the tenement had no separate rent, but was let as part of a whole, then he must make an apportionment. The question in this case is: What are the considerations which should guide a judge in deciding (to take the present case) whether this flat was first let in December, 1920, or was let on Aug. 3, 1914. In my opinion, this is a question of fact and depends on the nature and extent of the structural alteration. It is not, I think, to be inferred from the terms of s. 12 (9), that apportionment must always be made unless the structural alteration amounts to complete reconstruction within that sub-section. Sub-sections (2) and (3) read together, seem to me to imply that, to ascertain the actual rent of a dwelling-house such as this flat, it will be sometimes necessary and sometimes unnecessary to resort to apportionment. It is a question of the physical identity of the applicant's dwelling-house. To justify a judge in finding that the part was first let when it was first let separately, there must be, in his opinion, not merely a new and separate dwelling-house in law by virtue of a new and separate letting, but a new and separate dwelling-house in fact, by virtue of substantial structural alteration.

This view is, I think, in accordance with the observation of ATKIN, L.J., in *Sinclair v. Powell* (1) ([1922] 1 K.B. at p. 407):

A "If the part of a house was not let as a separate dwelling in August, 1914, you may show that substantially in the form in which it now is it existed and was let as part of a whole house or a larger tenement in August, 1914, and can get the rent apportioned. But if the part has been substantially altered so that you cannot fairly predicate of it that in its present form it was, as part of a whole, let in 1914. I do not think that apportionment is possible.

B The apportioned values may be entirely misleading, as where by structural alterations the upper bedrooms of a house, ordinarily, I suppose, the least valuable, have become, when fitted as a separate tenement, of greater value than the lower floors."

C One of the objects of the Act, so far as it deals with tenancy, is to promote the provision of dwellings. When a landlord, by enterprise and expenditure in altering and adapting a large house, has provided two or three decent and separate homes where only one existed before, it seems reasonable that he should be allowed to get what rent he can for the new dwelling-houses thus created. But if, with little or no preparation, by mere separate letting, he houses two or three families in a building

D designed to accommodate one, it is clear that the Act would be defeated if he could claim to base the standard rents on the actual rents thus obtained. In this case, in view of the facts set out, I think there was evidence on which the county court judge could find, as he did, that the respondents had created a new dwelling-house in fact, substantially different from the four upper bedrooms of the original house—something of which it could not be fairly said "that, in its present form, it was, as part of a whole, let in 1914." If so, I think he was right in law in deciding that the

E applicant's tenement was a dwelling-house which was first let after Aug. 3, 1914, and that no apportionment was necessary to determine the standard rent of it. The appeal, therefore, fails.

Appeal dismissed.

Solicitors: *Simon, Haynes, Barlas & Ireland; Downer & Johnson.*

[*Reported by T. W. MORGAN, Esq., Barrister-at-Law.*]

NORTH BRITISH RAILWAY CO. v. SCOTT

[HOUSE OF LORDS (Lord Dunedin, Lord Atkinson, Lord Sumner, Lord Wrenbury and Lord Carson), July 27, November 3, 1922]

[Reported [1923] A.C. 37; 92 L.J.P.C. 16; 128 L.T. 394; 39 T.L.R. 66; 67 Sol. Jo. 122; 8 Tax Cas. 332]

Income Tax—Income—Emolument from employment—Payment by employer of employee's income tax—Income Tax Act, 1860 (23 & 24 Vict. c. 14), s. 6—Income Tax Acts, Sched. E.

A railway company paid to its employees their salaries without deduction of income tax, thus discharging on behalf of each employee his liability to tax.

Held: the amount of the tax so paid was an additional emolument accruing to the employee by reason of his employment in respect of the amount of which he was liable to tax.

Notes. Considered: *Shrewsbury and Talbot (Countess) v. I. R. Comrs.*, [1936] 2 All E.R. 101. Referred to: *Hartland v. Diggines*, [1926] All E.R. Rep. 573; *Nicoll v. Austin* (1935), 19 Tax Cas. 531; *I. R. Comrs. v. Pearson, I. R. Comrs. v. Pratt*, [1936] 2 All E.R. 731; *I. R. Comrs. v. Cook*, [1945] 2 All E.R. 377; *Jaworski v. Institute of Polish Engineers in Great Britain, Ltd.*, [1950] 2 All E.R. 1191.

As to emoluments chargeable to income tax see 20 HALSBURY'S LAWS (3rd Edn.) 311 et seq., and for cases see 28 DIGEST (Repl.) 225 et seq.

Cases referred to:

- (1) *Beaumont v. Bowers*, [1900] 2 Q.B. 204; 69 L.J.Q.B. 600; 83 L.T. 126; 64 J.P. 552; 48 W.R. 557; 16 T.L.R. 376; 44 Sol. Jo. 467; 4 Tax Cas. 189, D.C.; 28 Digest (Repl.) 246, 1087.
- (2) *Hudson v. Gribble, Bell v. Gribble*, [1903] 1 K.B. 517; 72 L.J.K.B. 242; 88 L.T. 186; 67 J.P. 85; 51 W.R. 457; 19 T.L.R. 260; 1 L.G.R. 292; 4 Tax Cas. 522, C.A.; 28 Digest (Repl.) 246, 1088.
- (3) *L.C.C. v. A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 49 W.R. 686; 17 T.L.R. 131; 4 Tax Cas. 265, H.L.; 28 Digest (Repl.) 191, 790.

Also referred to in argument:

- Tennant v. Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 8 T.L.R. 434; 3 Tax Cas. 158, H.L.; 28 Digest (Repl.) 216, 916.
- Great Western Ry. Co. v. Bater*, [1922] 2 A.C. 1; 91 L.J.K.B. 472; 127 L.T. 170; 38 T.L.R. 448; 66 Sol. Jo. 365; 8 Tax Cas. 231, H.L.; 28 Digest (Repl.) 222, 957.

Appeal by the North British Railway Co. from an interlocutor of the First Division of the Court of Session as the Court of Exchequer in Scotland on an appeal by the company under the Taxes Management Act, 1880, from a determination of the Commissioners for the Special Purposes of the Income Tax Acts relative to an assessment to income tax, Sched. E, for the year ending Apr. 5, 1919, made upon the appellants under the provisions of the Income Tax Acts.

At a meeting of the Special Commissioners the company (hereinafter called the appellants) appealed against the assessment in question. The assessment under appeal was in respect of offices and employments of profit held in or under the appellants, and was made upon the appellants pursuant to s. 6 of the Income Tax Act, 1860, which enacted:

"In like manner as aforesaid, the Commissioners for Special Purposes shall assess the duties payable under Sched. E, in respect of all offices and employments of profit held in or under any railway company, and shall notify to the secretary or other officer of such company the particulars thereof; and the said

A assessment shall be deemed to be and shall be an assessment upon the company, and paid, collected and levied accordingly; and it shall be lawful for the company or such secretary or other officer to deduct and retain out of the fees, emoluments, or salary of each such officer or person the duty so charged in respect of his profits and gains."

B In a letter from the appellants' solicitor addressed, on May 24, 1920, to the inspector of taxes, it was stated:

"The railway company are under contractual obligation to the officer that they will not exercise their statutory discretionary right to deduct tax from his salary."

C The appellants, accordingly, paid to each of their officers the agreed amount of salary in full, without any deduction on account of income tax. In arriving at the amount of the assessment an addition was made, in the case of each officer, to the amount actually paid to him by the appellants in respect of income tax paid thereon by the appellants. It was admitted by the appellants that, if any such addition had to be made, the amounts so added were to be taken to have been correct. Prior to the making of the assessment, the appellants had never been assessed to income tax Sched. E in sums greater than the amounts actually paid by them to their officers, though they had not at any time deducted income tax upon payment to their officers of the said amounts. The Special Commissioners were of opinion that the contentions advanced on behalf of the inspector of taxes were correct in law, and, they confirmed the assessment. The question of law for the opinion of the Court of Session was whether the sum paid by the appellants as income tax in respect of the salaries of their officers, and not deducted from the salaries paid to such officers, was part of the officers' income for income tax purposes. The First Division answered the question in the affirmative, and the railway company appealed to the House of Lords.

D *T. Graham Robertson* (of the Scottish Bar) and *Geoffrey Lawrence* for the appellants.

F *The Attorney-General* (*Sir Ernest Pollock, K.C.*), *The Lord Advocate* (*C. D. Murray, K.C.*), *R. P. Hills*, and *A. N. Skelton* (the latter of the Scottish Bar) for the respondent, the inspector of taxes.

The House took time for consideration.

Nov. 3. The following opinions were read.

G **LORD DUNEDIN.**—This appeal has to do with income tax assessment for the year ending April 5, 1919.

By the Income Tax Act, 1860 [repealed, Income Tax Act, 1918] it is provided in s. 5 that assessments for income tax on a railway company shall be made by the Special Commissioners in lieu of the General Commissioners who are debarred from making any such assessment. Section 6 of the Act is in these terms:

H "In like manner as aforesaid the Commissioners for Special Purposes shall assess the duties payable under Sched. E in respect of all offices and employments of profit held in or under any railway company, and shall notify to the secretary or other officer of such company particulars thereof and the said assessment shall be deemed to be and shall be an assessment upon the company, and paid, collected, and levied, accordingly; and it shall be lawful for the company or such secretary or other officer to deduct and retain out of the fees, emoluments, or salary of such officer or person the duty so charged in respect of his profits and gains."

I There are certain officials of the appellant company whose salary is fixed at a specified sum in cash, the company at the same time coming under contractual obligation to make no deduction in respect of the income tax paid by them in terms of the said section. A test case was taken. The Special Commissioners assessed the income tax on such a sum as would, when the income tax thereon was deducted,

leave a sum equal to the sum in cash which the company paid to the official. A Case was stated for the opinion of the First Division of the Court of Session, in which Case the above-mentioned facts were set forth, and the question for the court stated thus :

“The question of law for the opinion of the court is : Whether the sum paid by the appellants as income tax in respect of the salaries of their officers, and not deducted from the salaries paid to such officers, is part of the offices’ income for income tax purposes ?”

The First Division of the Court of Session affirmed the determination of the commissioners. Appeal has now been taken to your Lordships’ House.

Turning back to s. 6 of the Act, we find that the first duty of the commissioners is to assess the duties payable under Sched. E in respect of offices and employments held in or under the railway company. That necessarily sends us to Sched. E. Sched. E, which is to be found in the Act of 1853 [see now Income Tax Act, 1952, s. 156 : 31 HALSBURY’S STATUTES (2nd Edn.) 149], imposes the duties “For and in respect of every . . . employment of profit,” and by r. 1, which is contained in s. 146 of the Income Tax Act, and is applicable to Sched. E of the Act of 1853 :

“The said duties shall be annually charged on the persons having, using, or exercising the offices or employments of profits mentioned in the said Sched. E . . . for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, . . .” [see now s. 156 of Act of 1952].

Now each office must be dealt with separately. It is obvious that if the official here in question were asked : “What profit whatsoever do you get from your office ?” his answer would have to be : “I get x pounds in cash, and I get the income tax due in respect of my salary paid by the company.” It would, therefore, be on the aggregate of these two sources of profit that the duty would have to be calculated. It is true that, when that is done, the duty so assessed is, by the second part of the clause in s. 6, made to be an assessment on the company [see s. 157 of Act of 1952]. It has to be laid on and paid by the company; the official himself has no concern with it. Most of the appellants’ argument was rested on the fact that this was a company debt, and not the official’s debt; and it was contended that the company could not be asked to pay an assessment on an assessment. The fallacy of this argument consists in ignoring the fact that, although this is a company debt, the measure of that debt is not any liability of the company, but is what would be the liability of the official under Sched. E, if that liability were not transferred to the company by the section; and the concluding words of the section are strictly accurate when, dealing with the power given to the company to deduct from the salary of the official the sum they have had to pay, they characterise the duty as so paid in respect of his—that is, the official’s—profits and gains.

The appellants further attempted to urge that the decision appealed against practically took away from the company the option by the section of deducting or refraining from deducting. It does no such thing. The power of deducting was necessary in order to deprive the official of the contention that, the debt being made a company debt, there could be no right to make him pay by way of deduction what was not his debt; and if the company chooses to deduct—in cases where they have not, as here, bound themselves by contract not to do so—it follows that the official’s total emolument is the conditional salary of x pounds from which the income tax was deducted. Then if, as here, they elect not to deduct, then they are by their action making it that the total emolument of the official is not only the cash salary, but also the sum necessary to maintain that cash salary at its undiminished figure. For these reasons I am of opinion that the judgment appealed from is right, and that the appeal should be dismissed with costs.

A **LORD ATKINSON.**—The facts have been already stated. Section 146 of the Income Tax Act, 1842, provides that the duties thereby granted contained in Sched. E shall be assessed under the rules thereto following, which rules are to be deemed and construed as part of the Act. Under the first of these rules these duties are to be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in Sched. E, or to whom the annuities or stipends mentioned in the schedule shall be payable for all salaries, fees, wages, B perquisites, or profits whatever accruing by reason of such offices, employments, or pensions, after deducting the amount of the sum or sums payable or chargeable on the same by virtue of any Act of Parliament, where the same shall have been really and bonâ fide paid and borne by the party to be charged.

C *Beaumont v. Bowers* (1) illustrates what is the nature of the sums to which these last words of this rule apply. Beaumont was the clerk of the guardians of a poor law union. Under the provisions of s. 12 of the Poor Law Officers' Superannuation Act, 1896 [repealed with reservations, Local Government Act, 1929], he contributed annually, for the purposes of the Act, a sum of £15 10s., which was deducted from his salary. He claimed, and was held to be entitled to deduct this contribution from the sum on which he was assessed for income tax under this rule. The officer was, D apparently, under this section compelled to make this contribution if he was to derive any benefit from the superannuation fund. In *Hudson v. Gribble*, *Bell v. Gribble* (2), the decision in *Beaumont v. Bowers* (1) was criticised and its soundness doubted; and it was held that deductions made in respect of a contribution to a superannuation fund agreed to as part of the terms of the employment of an officer of a corporation did not come within these words of the section, even though E the corporation framed the superannuation scheme constituted by it in exercise of statutory powers. These deductions were held to be voluntary payments by the officer, and should not be deducted from the sum at which he was assessed for income tax. *L.C.C. v. A.-G.* (3), referred to in argument in the last-mentioned case, was wholly irrelevant, and LORD MACNAGHTEN's well-known judgment in that case has no application to this case; but *Hudson v. Gribble* (2) does, I think, F establish that, if the railway company had, before the Act of 1860 was passed, arranged with the officers of their staff employed for profit, as part of the terms of their hiring, that, to spare those officers the inconvenience of being each visited by a revenue officer to collect the amount of the income tax of which they were respectively liable, the company would pay in one sum all the income tax for which G the staff collectively were liable, and would set off against the salary of each officer the sum paid on his behalf to the revenue, the entire salary of the officer would have been assessed for income tax. No deduction would have been allowed for the tax so paid by his employer on his behalf. I think that the same result would have followed even if the company, either from benevolence or from any other motive, declined to set off the amount which they had paid for or on behalf of an officer in discharge of that officer's statutory liability, because, in truth, the sum paid by H the company is not a sum outside of the officer's salary or independent of it, but is a part of his salary; and if the employer did not set off this sum against the employee's salary the latter would simply pocket his full salary, his debt to the revenue having been paid by another, not by himself. That is all.

I It appears to me that the Act of 1860 does little more than embody in a statutory form such an arrangement as I have mentioned. The duties payable under Sched. E in respect of all offices and employments of profit held under the company are to be assessed; but the only duties assessed and charged under Sched. E are, first, the duties annually charged on persons having, using, or exercising the offices or employments of profit mentioned in the schedule, and that charge is measured in this way—it is to be payable "for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices," &c., each assessment in respect of such office or employment to be in force for one year. The amount with which officers are charged, and for which they are assessed, must be ascertained for the

purposes of the Act of 1860, else the retention from or the deduction from their salaries never could be properly made. It would be a mistake, in my view, to hold that the officer is not assessed. He must be assessed, for it is the duty charged in respect of his profits and gains which is to be retained or deducted. Then, for the purpose of the collection of the sums due by those officers of the company, their separate assessments are deemed to be an assessment of the company, one assessment, and are to be paid and collected accordingly. By this last provision the company is thus made responsible for the debts, thus lumped together, of their individual officers, and obliged to pay them; and then they can, by retaining out of or deducting from what they owe to each officer, recoup themselves for their outlay in this respect. Whether the company avails itself or not of the means provided by statute to enable it to recoup itself for its outlay in paying the debts of its officers is its own concern. Its action in that respect cannot, in my view, affect prejudicially the rights of the revenue. The sums paid by the company to satisfy the debts which those officers respectively owed to the revenue remain part of the profits and gains which those officers derive from the offices which they respectively hold, and they are liable to be assessed to income tax just as the amount of the income tax deducted by a railway company from the dividends which it pays its shareholders is part of the income of those shareholders. In truth, the whole scheme of the statute is to apply the common and convenient method of deducting income tax at the source.

I, accordingly, think that the question submitted in the Case as stated for the opinion of the court was rightly answered by the First Division of the Court of Session. The appeal, I think, fails and should be dismissed with costs.

LORD SUMNER.—I concur.

LORD WRENBURY.—This case was argued upon the sections of the Income Tax Acts, 1842, 1853, and 1860, and not upon the corresponding sections of the Income Tax Consolidation Act, 1918. Under the first rule of Sched. E of 1842, the assessment is to be made upon the person having the office or employment "for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions."

Under the Income Tax Act, 1860, s. 6, the persons to make the assessment are the Special Commissioners; and they are to assess the duties payable under Sched. E in respect of offices and employments of profit held under a railway company—this being the assessment to be made under Sched. E of 1842—and are to notify the secretary of the company,

"and the said assessment shall be deemed to be and shall be an assessment upon the company and paid, collected, and levied accordingly,"

and it is to be lawful for the company to deduct out of the salary of the officer the duty charged "in respect of his profits and gains." These last words are material. The assessment, therefore, remains, as regards its amount the same as it was under the Act of 1842, and is to be deemed something which it is not—namely, an assessment on the company—and, being so deemed, is to "be an assessment upon the company" and be paid accordingly. The result is that the company becomes debtor for that which would otherwise have been, and seemingly under the Act of 1842 still is, the debt of the officer, and is measured by the profits and gains of the officer. In the case before us

"the railway company are under contractual obligation to the officer that they will not exercise their statutory discretionary right to deduct tax from his salary."

In other words having paid the tax on his income, they will not charge him with it. The question is: What are the "profits and gains" for income tax purposes of an officer employed upon those terms? If the salary which the officer is to

- A receive net is £100, the "salaries, fees, wages, perquisites, or profits whatsoever" which form the reward of his service are the £100, and the contractual benefit that when the company has paid the tax due for his income tax—the payment of which is imposed upon the company by the statute—they will not deduct it against him, as they might. This is a further valuable consideration or profit accruing to the officer by reason of his office, and is a factor in arriving at his assessable income for income tax purposes. His total "profits and gains" are the aggregate of these sums. The appellants say that by such an assessment the revenue take tax on tax; certainly—so it does. But everyone who pays 5s. in the pound income tax pay tax not only on the 15s. which he retains, but also on the tax of 5s. which he has to pay. The question for the opinion of the court is, therefore, to be answered by saying that the sums paid by the appellants as income tax on the officer's profits and gains form part of the officer's income for income tax purposes. It follows that this appeal must be dismissed with costs.

LORD CARSON.—I concur.

Appeal dismissed.

- D Solicitors: *Lewin, Gregory, & Anderson*, for *James Watson*, Edinburgh; *Solicitor of Inland Revenue*, for *Stair A. Gillon*, Solicitor of Inland Revenue for Scotland.

[*Reported by W. C. SANDFORD Esq., Barrister-at-Law.*]

E

RUTTER v. PALMER

- F [COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), March 30, 31, 1922]
[*Reported* [1922] 2 K.B. 87; 91 L.J.K.B. 657; 127 L.T. 419;
38 T.L.R. 555; 66 Sol. Jo. 576]

Bailee—Negligence of servant—Exemption from liability—Custody of car for sale—"Cars driven at owners' sole risk."

- G The plaintiff, who was the owner of a motor car, placed his car with the defendant, a motor car dealer, for sale on commission upon the terms of a deposit note which provided, inter alia, that "customers' cars are driven by your staff at customers' sole risk." During the period of bailment, when the car was being taken out by one of the defendant's drivers to be shown to a prospective purchaser, owing to the negligence of the driver the car collided with a lamp-post and was damaged.

- H **Held:** the contract between the parties was to be distinguished from a contract of carriage by a railway company or a common carrier; there was no ambiguity in the clause set out which must be read as directed to the risk of negligence when the plaintiff's car was being driven by the defendant's driver; and, therefore the clause was effective to exempt the defendant from liability for the driver's negligence.

- I **Notes.** Applied: *Forbes, Abbott and Lennard v. Great Western Rail. Co.* (1927), 138 T.L.R. 286. Considered: *Calico Printers' Association Ltd. v. Barclay's Bank* (1931), 145 L.T. 51. Applied: *Alderslade v. Hendon Laundry, Ltd.*, [1945] 1 All E.R. 244. Referred to: *James Durnford & Sons, Ltd. v. Great Western Rail. Co.* (1927), 43 T.L.R. 527; *Aslan v. Imperial Airways, Ltd.* (1933), 149 L.T. 276; *Bontex Knitting Works, Ltd. v. St. Johns Garage*, [1943] 2 All E.R. 690; *Olley v. Marlborough Court, Ltd.*, [1949] 1 All E.R. 127; *White v. John Warwick & Co.*, [1953] 2 All E.R. 1021; *Halbauer v. Brighton Corpn.*, [1954] 2 All E.R. 707.

As to the duty to take care of a bailee for reward see 2 HALSBURY'S LAWS (3rd Edn.) 114 et seq., and for cases see 3 DIGEST 72 et seq. A

Cases referred to :

- (1) *Joseph Travers & Sons, Ltd. v. Cooper*, [1915] 1 K.B. 73; 83 L.J.K.B. 1787; 111 L.T. 1088; 30 T.L.R. 703; 12 Asp. M.L.C. 561; 20 Com. Cas. 44, C.A.; 3 Digest 74, 140.
- (2) *Reynolds v. Boston Deep Sea Fishing and Ice Co., Ltd.* (1922), 38 T.L.R. 429, C.A.; Digest Supp. B
- (3) *Price & Co. v. Union Lighterage Co.*, [1904] 1 K.B. 412; 73 L.J.K.B. 222; 89 L.T. 731; 52 W.R. 325; 20 T.L.R. 177; 48 Sol. Jo. 207; 9 Com. Cas. 120, C.A.; 8 Digest (Repl.) 46, 277.
- (4) *Rosin and Turpentine Import Co. v. B. Jacob & Sons* (1910), 102 L.T. 81; 26 T.L.R. 259; 54 Sol. Jo. 268; 11 Asp. M.L.C. 363; 15 Com. Cas. 111, H.L.; 8 Digest (Repl.) 46, 279. C
- (5) *McCawley v. Furness Rail. Co.* (1872), L.R. 8 Q.B. 57; 42 L.J.Q.B. 4; 27 L.T. 485; 37 J.P. 358; 21 W.R. 140; 8 Digest (Repl.) 111, 718.

Also referred to in argument :

- Gibaud v. Great Eastern Rail. Co.*, [1921] 2 K.B. 426; 90 L.J.K.B. 535; 125 L.T. 76; 37 T.L.R. 422; 65 Sol. Jo. 454, C.A.; 8 Digest (Repl.) 141, 906. D
- Lewis v. Great Western Rail. Co.* (1877), 3 Q.B.D. 195; 47 L.J.Q.B. 131; 37 L.T. 774; 26 W.R. 255, C.A.; 8 Digest (Repl.) 66, 439.
- Stewart v. London and North Western Rail. Co.* (1864), 3 H. & C. 135; 4 New Rep. 64; 33 L.J.Ex. 199; 10 L.T. 302; 10 Jur. N.S. 805; 12 W.R. 689; 159 E.R. 478; 8 Digest (Repl.) 138, 896.
- Cordey v. Cardiff Pure Ice Co.* (1903), 88 L.T. 192; 19 T.L.R. 256, C.A.; 3 Digest 74, 139. E

Appeal from an order of LORD TREVETHIN, C.J., in an action tried by him without a jury.

The plaintiff claimed to recover damages for damage to his motor car while in the custody of the defendant, a motor car dealer. The plaintiff had placed his motor car with the defendant at his garage to be sold on commission either by private treaty or public auction, upon terms and conditions contained in a deposit note dated Feb. 7, 1920, the relevant clauses of which were these : F

"Unless you [the defendant] give a receipt for the goods stating the same to have been delivered to you in perfect condition in every respect, you will not be responsible for any damage whatever to the goods whilst in your possession. Customers' cars are driven by your staff at customers' sole risk." G

On Feb. 10, 1920, a driver in the employ of the defendant was taking the motor car to show it to a likely buyer, and, the road being greasy, the car skidded, collided with an electric standard and sustained damage. The Lord Chief Justice found that the motor car came into collision with the electric standard and was damaged by reason of the want of reasonable care and skill on the part of the defendant's driver, that the defendant, being a bailee for reward of the car, was bound to take reasonable care and use reasonable skill in dealing with it, and that the two conditions in the deposit note did not relieve him from responsibility for damage caused by the negligence of his servant. He gave judgment for the plaintiff for £160, and the defendant appealed. H

Croom Johnson for the defendant. I

Shakespeare and Montagu Berryman for the plaintiff.

BANKES, L.J.—The question raised in this case is as to the true construction of an owner's risk clause in a garage proprietor's deposit note. At first sight it seemed to me that there was much to be said in favour of the Lord Chief Justice's decision, based as it was upon a dictum by Kennedy, L.J., in *Joseph Travers & Sons, Ltd. v. Cooper* (1). Upon further consideration, however, I am

A satisfied that a contract, such as the one in question in this case, which has reference to the driving of a motor car and the risk and liabilities attendant thereon, is a special form of contract, referring to a particular purpose, and is to be distinguished from a contract of carriage by a railway company or a common carrier. The latter is liable for the acts of his servants whether they are negligent or not, whereas an ordinary bailee for work and labour is not liable
B for the acts of his servants unless they are negligent. A common carrier who wishes to protect himself from all responsibility for damage for all acts on the part of his servants must make use of words which will include acts of negligence because words which would be sufficient to protect him from liability in respect of acts properly done by his servants in the course of their employment might not suffice to free him from liability where the acts arose from negligence on the part of his servants. If, however, an ordinary bailee uses words applicable to the acts of his servants, these words will, as a rule, cover acts of negligence, as he is liable only for acts of negligence. Otherwise these words would be superfluous and have no effect. Moreover, it is well known to be a common practice among owners of motor cars to insure themselves against all risk whatsoever in connection with their car, that is to say, not only against damage done
D to the car, but also damage done by it, and damage caused not only by negligent acts but by innocent acts as well. These, I think, are the considerations which have to be borne in mind in construing the printed conditions on the deposit note.

Turning, now, to the contract in question, in the present case, it is a garage proprietor's contract and contains a number of printed conditions upon which he agrees to receive the motor car. One of the clauses is designed to protect
E the garage proprietor against injury to the car while it is on his premises. The clause is in the following terms:

"Unless you give a receipt for the goods stating the same to have been delivered to you in perfect condition in every respect, you will not be responsible for any damage whatever to the goods whilst in your possession."

F That clause does not apply to the facts of the present case, but a subsequent clause is very much in point, which says: "Customers' cars are driven by your staff at customers' sole risk." The facts here were these. The car was taken out by a driver employed by the defendant in order to be shown to a potential purchaser. While it was thus being driven it came into collision with a lamp-post, and as the result the car and the lamp-post suffered serious damage. The first
G question to be considered is whether the driver was negligent. The Lord Chief Justice found that the accident was caused by the negligence of the defendant's driver, and from that finding there is no appeal. In the course of his judgment he said that the above clause construed literally was wide enough to cover negligent driving by a member of the defendant's clerical staff, and that, therefore, some limitation ought to be placed upon its meaning. The expression "your staff" must, of course, be construed to mean "your regular driving staff," and the clause would, therefore, be read as it ran: "Customers' cars are driven by your drivers at customers' sole risk." No question, however, arises on that point in this case, because the man who drove the motor car on the day of the accident was a regular driver in the defendant's employment. It seems
I to me that if that change of words is not introduced with a view to protecting the garage proprietor from the negligent acts of his driver, it is hard to see what effect it has beyond being a mere statement of the general law. On behalf of the plaintiff we have been invited to read into this clause an exception of damage caused by the driver's negligence. Even if it were desirable to do so, I can see no reason for doing so. The clause may very well have been inserted in the contract in order to bring it home to the customer that if he wishes to insure against all accidents in which the car may be concerned, he must specifically take out an insurance on his own account to this effect. In my opinion, the

principle which is applicable to the cases of owners' risk clauses in the consignment notes of common carriers does not apply to bailees of this class—still less does it apply to a bailee of a motor car who, for special reasons, is less willing to undertake the risk of damage. In my opinion, the clause referred to must be read as relieving the defendant in this case from liability for the damage caused by the negligent act of his servant. For these reasons, I think, the appeal must be allowed, the judgment appealed from set aside, and judgment entered for the defendant with costs.

SCRUTTON, L.J.—I am of the same opinion. This is one of those difficult cases where in a contract of bailment a clause exempting the bailee from liability is said to include an exemption from liability for the negligence of the bailee's servants, although negligence is not in terms referred to in the clause. As a matter of history there are two sets of cases which it is by no means easy to reconcile. In the first place, there are the cases of contracts by railway companies to carry at owner's risk, and also to carry at the company's risk, which introduce the provisions of the Railway and Canal Traffic Act, 1854. The former class of contracts, if they are just and reasonable, has been held to protect the companies against negligence, although not specifically mentioned. Then there is another set of contracts, namely, for carriage by ship or barge. *Primâ facie*, the owner of the ship or barge is liable for the unseaworthiness of his vessel and for negligence whether by himself or on the part of his servants, and when the question has been raised to what extent a clause exempting him from liability, without mentioning either seaworthiness or negligence, will exempt him from liability for the one or the other, the courts have always insisted more strictly on the liability of the shipowners. In *Joseph Travers & Sons, Ltd. v. Cooper* (1), an attempt was made by **PHILLIMORE, L.J.**, to reconcile these two lines of authority by distinguishing cases in which immunity depends on the cause or origin of the loss from cases in which it depends on the kind of loss, but the suggested distinction, the subtlety of which the lord justice regretted, is a fine one. For the purposes of the present case a rougher test will, I think suffice. In construing an exemption clause certain general rules may be applied, the first of which is that the defendant ought not to be relieved from liability for the negligence of his servants unless clear and unambiguous words to that effect are used. In the second place the liability of the defendant has to be ascertained quite apart from the exempting words in the contract. Then, again, the particular clause in the contract has to be construed and considered, and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to discharge him: see *Reynolds v. Boston Deep Sea Fishing and Ice Co., Ltd.* (2).

The contract here is a contract by a garage proprietor to sell a car on commission. In order to bring about a purchase, a trial of the car may be necessary, and this involves the driving of the car by one of the servants of the garage proprietor. What is the liability of the latter in these circumstances? He is only liable for his own negligence, and for that of his servants. If an accident happens without any negligence on his part or on the part of his servants, he would not be liable; but if there has been negligence on his or his servants' part, which has caused the accident, he would be liable. That being so, this clause has been introduced into the contract, which he makes with his customer: "Customers' cars are driven by your staff at customers' sole risk." It seems to me that two obvious limitations must be put upon the meaning of these words. In the first place, "staff" must mean "staff of qualified drivers"—it does not include a typist or a charwoman—and, secondly, "driven" does not include joy-riding, but must mean driven for the purpose of the bailment, that is to say, for the purpose of selling the car. The clause cannot mean that the garage proprietor is to be exempt from liability if an accident happens while it

A is being taken out by a member of his clerical staff for pleasure. Thus limited, the clause, which is regularly inserted in all contracts by garage proprietors to sell customers' cars on commission and for that purpose to take them out for a trial run, can only have one meaning, and that is that the owner of the car must effect his own insurance against accidents due to the negligence of the garage proprietor's servants—that is to say, accidents for which without the clause the garage proprietor would be liable.

B It was contended on behalf of the plaintiff that the clause was ambiguous and must, therefore, be construed strictly against the part relying upon it. In support of this contention, the judgment of WALTON, J., in *Price & Co. v. Union Lighterage Co., Ltd.* (3), and the judgment of BUCKLEY, L.J., in *Joseph Travers & Sons, Ltd. v. Cooper* (1) were cited, and it was said that, if those learned judges held that C similar words were insufficient to protect a carrier from liability for negligence, it could not be said that the words in this contract did in clear and unambiguous terms protect from negligence. I addressed the same argument to the House of Lords in *Rosin and Turpentine Import Co. v. B. Jacob & Sons* (4), where the words were "they will not be liable for any loss or damage, including negligence, which can be covered by insurance," but their Lordships held that D the meaning of the clause was clear to them, and protected the respondents from liability. The meaning of the clause was clear to them, and they must act upon their view although others might read the clause in a different way. That decision binds me, and as I can find no ambiguity in this clause, I must hold that the appeal must be allowed.

E **ATKIN, L.J.**—I agree. I accept the principle that if a party to a contract wishes to exempt himself from liability for the negligence of himself or of his servants, he must do so in clear and unambiguous terms. In contracts of carriage by sea or land it has been held that clauses purporting in general terms to exempt a party from "any loss" or to provide that "any loss" shall be borne by the other party, are insufficient to exempt from liability for negligence. The F liability of the carrier is not confined to his own acts of negligence or those of his servants; it extends beyond liability for negligence. Therefore, when a clause in the contract exempts the carrier from any loss it may have a reasonable meaning even although the exemption falls short of conferring immunity for acts of negligence. That is the reasoning which is to be found at the bottom of all the shipping cases, but it does not, as a rule, apply to railway companies, G because, when acting as carriers, they generally come under special legislation. Where, however, in the circumstances, a railway company is exposed to one kind of liability only, and that is a liability for negligence and the parties agree that the risk of loss or damage is to be borne by the passenger or owner of goods, they must, in that case, intend to relieve the company from liability in the only event which is likely to expose it to liability, namely, the negligence H of the company's servants. I think that principle cannot be better stated than it is by COCKBURN, C.J., in *McCawley v. Furness Rail. Co.* (5), where the railway company gave to the plaintiff, a drover, a free pass to enable him to travel with his cattle "at his own risk." A carrier of passengers, unlike a carrier of goods, is liable only for negligence. The plaintiff brought an action for personal injuries sustained by him in a collision on the defendant's railway. The defendants I pleaded that they had received the plaintiff to be carried under a free pass, as the drover accompanying cattle, one of the terms of which was that he should travel at his own risk. The plaintiff replied that it was by reason of the gross and wilful negligence of the defendants that the accident happened. The point was raised neatly on a demurrer to the replication. The demurrer was held to be bad. COCKBURN, C.J., said:

"The terms of the agreement under which the plaintiff became a passenger exclude everything for which the company would have been otherwise liable.

They would have been liable for nothing but negligence, and they would have been liable whether the negligence was gross or of a minor degree, and so far, in ordinary circumstances, the passenger would have been carried at their risk. But it was agreed that the plaintiff should be carried at his own risk, which must be taken to exclude all liability on the part of the company for any negligence for which they would otherwise have been liable."

That principle applies, I think, directly to the facts of the present case. The clause in the contract containing the words "customers' sole risk," is directed particularly to the special risk incurred by the defendant when a customer's car is being driven by his servants. That risk is the risk of liability for negligence, and the intention of the contract was that that liability should be imposed upon the owner of the car. The appeal must, therefore, be allowed.

Solicitors : *Taylor, Willcocks & Co. ; F. J. Berryman.*

[Reported by EDWARD J. M. CHAPLIN, Esq., *Barrister-at-Law.*]

Appeal allowed.

LA FABRIQUE DE PRODUITS CHIMIQUES SOCIÉTÉ ANONYME v. LARGE

[KING'S BENCH DIVISION (Bailhache, J.), November 14, 1922]

[Reported [1923] 1 K.B. 203; 92 L.J.K.B. 370; 128 L.T. 636;
39 T.L.R. 76; 16 Asp. M.L.C. 110; 28 Com. Cas. 248]

Insurance—Marine insurance—Loss of cargo—F.p.a. clause—Goods of different kinds in packages separately valued—Some packages stolen—Warehouse to warehouse clause—Theft—Limitation to theft by violence—Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 76 (1).

By a Lloyd's policy of marine insurance the defendant and other underwriters insured certain perishable goods—namely, two cases of vanillin and one case of caffeine—for the plaintiffs from London to Switzerland. The policy was "free of particular average," and it incorporated several of the Institute Cargo Clauses, including the "warehouse to warehouse" clause, which was as follows: "Including, subject to the terms of the policy, all risks covered by this policy from shipper's or manufacturer's warehouse until on board the vessel, during transhipment, if any, and from the vessel, whilst on quays, wharfs, or in sheds during the ordinary course of transit until safely deposited in consignee's or other warehouse at destination named in policy." The f.p.a. clause provided: "Warranted free from particular average unless the vessel or craft be stranded, sunk, or burnt, but the owners are to pay the insured value of any package or packages which may be totally lost in loading, transhipment or discharge, also any loss of or damage to the interest insured which may reasonably be attributed to . . . warehousing." The three cases were separately valued. While they were in a warehouse pending shipment, thieves broke into the warehouse by violence and stole the two cases of vanillin.

Held: since the goods were of different species and were separately valued, the loss was not a particular loss of the whole of the goods insured, but was a total loss of part of the goods, and, therefore, the defendant was not exempted from liability by the f.p.a. clause.

A **Quære:** whether, in a warehouse to warehouse policy, the word "theft" ought to be limited to theft by violence, in the same way as it is in a purely marine policy.

Notes. As to the total loss of goods insured, see 22 HALSBURY'S LAWS (3rd Edn.) 142 et seq., and for cases see 29 DIGEST 236 et seq. For the Marine Insurance Act, 1906, s. 76, see 13 HALSBURY'S STATUTES (2nd Edn.) 51.

B Cases referred to in argument :

Ralli v. Janson (1856), 6 E. & B. 422; 119 E.R. 922; sub nom. *Janson v. Ralli*, 25 L.J.Q.B. 300; 27 L.T.O.S. 139; 4 W.R. 568; sub nom. *Jamson v. Ralli*, 2 Jur. N.S. 566, Ex.Ch.; 29 Digest 244, 1974.

Duff v. Mackenzie (1857), 3 C.B.N.S. 16; 26 L.J.C.P. 313; 30 L.T.O.S. 103; 3 Jur. N.S. 1025; 140 E.R. 643; 29 Digest 256, 2075.

Wilkinson v. Hyde (1858), 3 C.B.N.S. 30; 27 L.J.C.P. 116; 7 L.T. 442; 4 Jur. N.S. 482; 140 E.R. 649; 29 Digest 256, 2076.

Hills v. London Assurance Corpn. (1839), 5 M. & W. 569; 9 L.J.Ex. 25; 11 L.T. 159; 151 E.R. 241; 29 Digest 255, 2071.

D **Action** in the commercial list.

The plaintiffs, who were a Swiss company, had bought on c.i.f. terms from a London company, A. Johnson & Co. (London), Ltd., three cases of chemicals (two of vanillin and one of caffeine), which were perishable goods. By a Lloyd's policy of marine insurance, dated Nov. 21, 1918, the defendant and other underwriters insured the goods for the plaintiffs, lost or not lost, at and from London to Bordeaux, while there, and thence to Brougg, in Switzerland. The policy was "free of particular average," and to it was annexed several of the Institute Cargo Clauses, including the "warehouse to warehouse" clause which was as follows :

"5. Including, subject to the terms of the policy, all risks covered by this policy from shipper's or manufacturer's warehouse until on board the vessel, during transhipment, if any, and from the vessel, whilst on quays, wharfs, or in sheds during the ordinary course of transit until safely deposited in consignee's or other warehouse at destination named in policy."

The f.p.a. clause was as follows :

"8. Warranted free from particular average unless the vessel or craft be stranded, sunk or burnt, but the owners are to pay the insured value of any package or packages which may be totally lost in loading, transhipment or discharge, also any loss of or damage to the interest insured which may reasonably be attributed to . . . warehousing. . . ."

The three cases were valued for insurance at a total sum of £1,100 but each case was separately valued; one case of vanillin at £462, the second case of vanillin at £363, and the case of caffeine at £275. The goods, pending shipment, were lying in a warehouse in London, which was securely locked and barred, but was unattended at night. On Nov. 29, 1921, thieves forcibly broke into the warehouse and stole the two cases of vanillin, the insured value of which was £825. They effected an entrance by breaking down an outer door, which was securely fastened by a mortice lock and a large padlock, and two inner gates, which were secured with bar and padlock, by the use of crowbars. The plaintiffs claimed under the policy to recover from the defendant the sum of £51 11s. 3d., being his proportion of the sum underwritten, having regard to the value of the goods stolen. The defendant denied liability on the ground, inter alia, that there was no total loss of the whole or any severable part of the goods insured, but that the loss of the two cases of vanillin was a particular average loss for which the defendant was under no liability.

By the Marine Insurance Act, 1906, s. 76 (1) :

"Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part."

MacKinnon, K.C., and *H. U. Willink* for the plaintiffs.
Leck, K.C., and *James Dickinson* for the defendants.

BAILHACHE, J.—This is an action on a policy of marine insurance, dated Nov. 21, 1918, covering risks from warehouse to warehouse on three cases of perishable goods, namely, two cases of vanillin, a chemical, and one case of caffeine. The policy is "free of particular average." On Nov. 29, 1918, the two cases of vanillin were stolen from a transporting warehouse. The defences to the claim by the assured are that the loss was only a particular average loss, and that, as particular average is excluded, the defendants are not liable. Further, that, even assuming that it is not a particular average loss, but a total loss of a part which can be severed from the rest, there was no "theft" within the meaning of that word in a policy of marine insurance.

I will deal with the second point first [His LORDSHIP stated the facts relating to the loss of the goods from the warehouse, and continued:] Counsel for the defendants reminds me that the risk of thieves, in policies of marine insurance, does not cover an ordinary clandestine theft, but only theft accompanied with violence. That certainly is so, when the policy is a policy of marine insurance pure and simple, but he says the same rule must be applied when it is a warehouse to warehouse policy as well as a marine policy, because by cl. 5 of the Institute Cargo Clauses which are annexed to this policy, the risks covered are "all risks covered by this policy." He says that that means that the risk of thieves under a warehouse to warehouse policy must have the same construction as in a marine policy; and there can be no violence in a case like this, where the warehouse from which the goods were stolen was, as this warehouse was, left unattended at night. I am not sure myself that, in a warehouse to warehouse policy, the word "theft" ought to be limited to theft by violence, in the same way as it is in a purely marine policy. But, however that may be, in my opinion this was clearly a theft by violence. There was the smashing in of two sets of doors by crowbars, and it seems to me that clearly there was theft by violence. I do not think that the expression "by violence" means that there must be an assault on some person or another. It seems to me, therefore, that, even if counsel for the defendants is right in saying that the theft must be of the same character from the warehouse as from a ship (that is to say, by violence and not a clandestine theft), the facts of this case answer the description of a theft by violence.

Then it is said that the policy being free of particular average, and only a portion of these goods (which were insured under one policy) having been stolen, there is not a total loss of the whole or any severable part, and, therefore, that there can be no claim under the policy. That seems to me to stand—on authority and on the Marine Insurance Act, 1906—in this way: Where perishable goods are insured for a lump sum and are insured in bulk, and the bulk is all of the same description, then the total loss of part of the bulk gives no claim under a policy which is free of particular average. It is a particular average loss and no claim can arise on it. But there are exceptions to this in three instances. There are very often express words in the policy which make each package a separate insurance, and in such case the loss of one package is a total loss of that particular package, and the underwriters are liable, although the policy is f.p.a., for the loss of that particular package. Then sometimes there is an

- A insurance in one sum of goods of actually distinct and very different kinds. An instance was given of the master of a ship who insured all his effects, which were of such different kinds as a feather bed and chronometer. They were insured within one sum, and it was held that the effects were so distinguishable in kind that the loss of one particular thing, a chronometer or a feather bed, was a total loss of that particular article and not a particular average loss of the whole.
- B Another instance which was given was that of an emigrant to Natal who had all sorts of equipment with him, and, although there was one general insurance of the whole, it was held that the packages were of such distinct character that the loss of one package was a total loss of that package, and not a particular average loss of the whole. It has also been held that, even though the species are the same, yet if they are contained in cases or packages which are themselves separately valued, the loss of one of those packages is a total loss of that package, and not a particular average loss of the whole.
- C

- In the present case, not only are the goods of different species (the two cases lost being vanillin and the one left being caffeine), but each case has a separate value attributed to it, one case being valued at £462, one at £368 and one at £275. It is true that the insurance is for a whole sum of £1,100, but that £1,100 is merely the addition of those three separate items. It seems to me that not only are the goods of different species (which by itself would be sufficient), but that they are separately valued, and that is a double reason for saying that the loss in this case was not a particular average loss of the whole of the goods insured but was a total loss of the particular goods which were stolen, namely, two cases of vanillin.
- D
- E

In these circumstances, in my opinion, judgment must be for the plaintiffs for the amount claimed, namely, £51 11s. 3d. with interest from the date of the writ, and costs.

Judgment for plaintiffs.

Solicitors : *L. Goldberg ; Thomas Cooper & Co.*

[*Reported by T. W. MORGAN, Esq., Barrister-at-Law.*]

R. v. CORFIELD

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Sankey, JJ.), October 13, 1922]

[Reported 128 L.T. 305; 86 J.P. 216]

Licensing—Licence—Renewal—Condition attached by justices—Removal of condition—Need to apply for new licence without the condition—Licensing (Consolidation) Act, 1910 (10 Edw. 7, and 1 Geo. 5, c. 24), ss. 12 (1), 16 (1), 59 (1).

A holder of a justices' licence subject to a condition imposing early closing cannot obtain the removal of that condition on an application for a renewal of his licence, and so can only do so by applying for a new licence without the condition.

R. v. Crewkerne Licensing Justices (1) (1888), 21 Q.B.D. 85, applied.

Notes. The Licensing (Consolidation) Act, 1910, has been repealed and replaced by the Licensing Act, 1953, s. 11 (1), s. 110 (1), and s. 165 (1) of which correspond to s. 16 (1), s. 59 (1) and s. 12 (1) of the 1910 Act.

As to what is a new justices' licence, see 22 HALSBURY'S LAWS (3rd Edn.) 539, as to renewal see *ibid.* 549, as to early closing licences see *ibid.* 669, and for cases see 30 DIGEST (Repl.) 77. For the Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142.

Cases referred to :

- (1) *R. v. Crewkerne Licensing Justices* (1888), 21 Q.B.D. 85; 57 L.J.M.C. 127; 60 L.T. 84; 52 J.P. 372; 36 W.R. 629; 4 T.L.R. 528, C.A.; 30 Digest (Repl.) 77, 594.
- (2) *R. v. Taylor, R. v. Amendt*, [1915] 2 K.B. 593; 84 L.J.K.B. 1489; 113 L.T. 167; sub nom. *R. v. Taylor, Ex parte A.-G. v. Amendt, Ex parte A.-G.*, 79 J.P. 332; 31 T.L.R. 317, D.C.; 30 Digest (Repl.) 37, 281.

Rule Nisi for a writ of certiorari to quash an order made by the licensing justices of Newtown, in the county of Montgomery, granting to William Corfield by way of renewal a licence for the sale of intoxicating liquors free from the condition that he was to close one hour earlier than the ordinary closing hours. The rule was obtained at the instance of the Commissioners of Customs and Excise.

An early closing licence, i.e., a licence with the above condition attached had been granted successively to different persons for the licensed premises in question and William Corfield had for many years had the licence with this condition. William Corfield applied to the licensing justices for a renewal without the condition, and the justices made the order.

By the Licensing (Consolidation) Act, 1910 :

Section 12 (1) : "For the purposes of this Act, a new justices' licence is a justices' licence granted at a general annual licensing meeting otherwise than by way of renewal or transfer as defined by this Act.

Section 16 (1) : "For the purposes of this Act, the renewal of a justices' licence means the grant of a justices' licence at a general annual licensing meeting by way of renewal of a similar licence which is in force in respect of the premises at the date of the application. Provided that, where an application is made for the grant of a licence in respect of premises in respect of which a similar licence is not in force at the date of the application, but was in force at the date of the general annual licensing meeting in the previous year, the application shall be treated as an application for the renewal of a licence, and the grant of a licence in pursuance of the application shall be treated as a renewal of the licence, if the licensing justices are satisfied that the applicant had reasonable cause for not making his application at the previous general annual licensing meeting.

A Section 59 (1): "Where, on the occasion of any application for a new justices' on-licence, or the ordinary removal or renewal of the justices' on-licence, the applicant applies to the licensing justices to insert in his licence a condition that he shall close the premises in respect of which the licence is or is to be granted one hour earlier at night than that at which those premises would otherwise have to be closed, the justices shall insert that condition in the licence."

B *Wootten, K.C. (R. Mitchell Banks with him) for the applicant for the licence. The Solicitor-General (Sir Leslie Scott, K.C.) (W. Bowstead with him), for the Commissioners of Customs and Excise, was not called on to argue.*

C **LORD HEWART, C.J.**, stated the facts and continued: The question is, therefore, whether where an early closing licence has been granted a licence freed from the restriction of early closing can be granted by way of renewal or whether the getting rid of the restriction does not necessitate an application for a new licence. The difference between the two is obvious and the consequences are many. There is no need to enter upon them.

D The matter seems to turn on the definition of "the renewal of a justices' licence" in s. 16 (1) of the Act of 1910:

"For the purposes of this Act the renewal of a justices' licence means the grant of a justices' licence at a general annual licensing meeting by way of renewal of a similar licence which is in force in respect of the premises at the date of the application."

E The argument of counsel for the applicant for the licence has been that here, at any rate, is a licence, which is a licence for the sale of intoxicating liquor, and as it was on the application of the person who became the licensee that the restriction as to early closing was inserted, so also it should be on his application by way of renewal that that restrictive condition should be removed. Mention has been made in the course of the argument of *R. v. Amendt* (2), where for certain purposes the question what is meant by "a similar licence" had to be considered. But it is quite obvious when one looks at the case that the question involved in the present case was not raised and was not indeed relevant. The other case to which reference had been made is *R. v. Crewkerne Licensing Justices* (1). It is quite true that that case has to do not with an early closing licence but with a six-day licence, but, when one looks at the provisions relating to the one and to the other in the statute, it is tolerably obvious that considerations in this respect which apply to the one kind of licence must apply to the other kind of licence, and so far as this court is concerned I do not think that counsel has attempted to suggest that a distinction can be drawn between cases relating to six-day licences and cases relating to early closing licences. In that case **LINDLEY, L.J.**, in giving judgment in the Court of Appeal, said (at p. 87):

H "Now what is the meaning of applying for a renewal of a licence? It can only mean that the licence holder is applying to renew that which is in existence and is on the point of expiring, which in the present case is a six-day, and not a seven-day licence."

I So here it seems to be clear that the licence-holder was applying to renew that which was in existence and was on the point of expiring, that is to say, an early closing licence, and in those proceedings and on that occasion he could not apply for a licence freed from the restriction as to early closing and so by a circuitous route avoid the rather burdensome consequences which flow from the grant of a new licence under that name. For those reasons I think that this rule must be made absolute. Counsel for both parties have agreed, that in order to avoid obvious difficulties the order to quash shall lie in the office until the next licensing sessions when what has been done can be put in order, and in the meantime the licence which has been granted, and which when the order has

issued from the Crown Office would be effectively quashed, shall apply as if it contained the restriction as to early closing. A

AYORY, J.—I am of the same opinion. The question to be decided here appears to have been already decided in the Court of Appeal in *R. v. Crewkerne Licensing Justices* (1). There are only two possible distinctions between the present case and the decision of the Court of Appeal. One is that counsel for the applicant for the licence did not argue the *Crewkerne Case* (1), and that is a difference which can only be remedied by the House of Lords, and the other is that the decision in the *Crewkerne Case* (1) was a decision on what is called a six-day licence and the present case is a case under s. 59 as to an early closing licence. I can see no ground for saying that the decision as to the six-day licence does not equally apply to the early closing licence and therefore I agree with the judgment of my Lord that this order made by the justices must be quashed. B C

SANKEY, J.—I agree.

Rule absolute.

Solicitors: *Godden, Holme & Ward*; Solicitor for the Customs and Excise.

[Reported by J. F. WALKER, ESQ., Barrister-at-Law.] D

SHEARS & SONS, LTD. v. JONES AND ANOTHER

[CHANCERY DIVISION (Russell, J.), July 10, 11, 12, 1922]

[Reported [1922] 2 Ch. 802; 92 L.J.Ch. 28; 128 L.J. 218; 66 Sol. Jo. 682;

[1922] B. & C.R. 211]

Bill of Sale—"Agreement by which right in equity to charge on personal chattels conferred"—*Agreement undertaking in certain event to execute bill of sale*—*Bills of Sale Act, 1878* (41 & 42 Vict. c. 31), s. 4—*Bills of Sale Act* (1878) *Amendment Act, 1882* (45 & 46 Vict. c. 43), ss. 3, 4, 8, 9. G

A written agreement undertaking in a certain event to execute a bill of sale is an "agreement . . . by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred" within the meaning of the Bills of Sale Act, 1878, s. 4, and so is a bill of sale and to be valid must comply with the requirements of the Bills of Sale Acts. H

A debtor and his wife made a written agreement with the husband's creditor that: "In consideration of your forbearance at our request to proceed with the filing of a bankruptcy petition against the undersigned, J. W. J., we hereby jointly and severally undertake and agree that in the event of your not receiving within two calendar months from this date the balance due to you on the judgment . . . to execute two several bills of sale for securing payment to you of the above-mentioned sum on the household furniture and effects belonging to us severally" at an address at B. "(signed) J. W. J. (signed) T. J." I

Held: the document contained an undertaking to give the charge on the contingency mentioned and was made for valuable consideration, and, therefore, it conferred on the plaintiffs a right in equity to a contingent charge on the chattels.

Edwards v. Edwards (1) (1876), 2 Ch.D. 291, applied.

A *Husband and Wife—Gift by wife to husband—Need of separate and independent advice to wife.*

To avoid a bankruptcy petition being filed against a husband he and his wife signed a document, which was held to be a bill of sale, over valuable furniture in the matrimonial home, the bulk of which belonged to the wife, to secure his debt to the plaintiffs.

B **Held:** while there was no principle of universal application that the rules of courts of equity as to confidential relationship necessarily applied to a gift by a wife to her husband, in the circumstances of the present case a duty was cast on the plaintiffs to see that the wife had separate and independent advice before they took this benefit from her, and, therefore, the document could not stand.

C Dictum of LORD ALVERSTONE, C.J., in *Howes v. Bishop* (2), [1909] 2 K.B. 390, 395, applied.

Notes. As to agreements to give a bill of sale see 3 HALSBURY'S LAWS (3rd Edn. 266; and for cases see 7 DIGEST 22, 23. For the Bills of Sale Acts, 1878 and 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 557, 574. As to undue influence see 17 HALSBURY'S LAWS (3rd Edn.) 672 et seq.; and for cases see 12 DIGEST (Repl.) 110 et seq.

D Cases referred to:

(1) *Edwards v. Edwards* (1876), 2 Ch.D. 291; 45 L.J.Ch. 391; 34 L.T. 472; 24 W.R. 713, C.A.; 7 Digest 23, 104.

(2) *Howes v. Bishop*, [1909] 2 K.B. 390; 78 L.J.K.B. 796; 100 L.T. 826; 25 T.L.R. 533, C.A.; 27 Digest (Repl.) 156, 1136.

(3) *Taylor v. Eckersley* (1876), 2 Ch.D. 302; 45 L.J.Ch. 527; 34 L.T. 637; 24 W.R. 450; 2 Char. Pr. Cas. 84, C.A.; 39 Digest 24, 280.

(4) *Chaplin & Co., Ltd. v. Brammall*, [1908] 1 K.B. 233; 77 L.J.K.B. 366; 97 L.T. 860, C.A.; 27 Digest (Repl.) 157, 1144.

(5) *Turnbull & Co. v. Duval*, [1902] A.C. 429; 71 L.J.P.C. 84; 87 L.T. 154; 18 T.L.R. 521, P.C.; 27 Digest (Repl.) 157, 1146.

(6) *Bischoff's Trustee v. Frank* (1903), 89 L.T. 188; on appeal, cited in [1911] 1 K.B. at pp. 863, 864, C.A.; 27 Digest (Repl.) 156, 1135.

(7) *Huguenin v. Baseley* (1807), 14 Ves. 273; 33 E.R. 526; 40 Digest (Repl.) 600, 1025.

Also referred to in argument:

G *Cook v. Taylor* (1887), 3 T.L.R. 800, D.C.; 7 Digest 57, 305.

Furnivall v. Hudson, [1893] 1 Ch. 335; 62 L.J.Ch. 178; 68 L.T. 378; 41 W.R. 358; 3 R. 230; 7 Digest 57, 310.

Hughes v. Little (1886), 18 Q.B.D. 32; 56 L.J.Q.B. 96; 55 L.T. 476; 35 W.R. 36; 3 T.L.R. 14, C.A.; 7 Digest 57, 314.

Re Jackson and Bassford, Ltd., [1906] 2 Ch. 467; 75 L.J.Ch. 697; 95 L.T. 292; 22 T.L.R. 708; 13 Mans. 306; 10 Digest (Repl.) 1031, 7130.

Re Jeavons, Ex parte Mackay, Ex parte Brown (1873), 8 Ch. App. 643; 42 L.J.Bey. 68; 28 L.T. 828; 37 J.P. 644; 21 W.R. 644, L.J.J.; 7 Digest 23, 108.

Sibley v. Higgs (1885), 15 Q.B.D. 619; 54 L.J.Q.B. 525; 33 W.R. 748; 1 T.L.R. 576, D.C.; 7 Digest 57, 313.

I **Witness Action** to enforce specific performance of an agreement dated March 14, 1921.

The plaintiffs were a limited company, Geo. Shears & Sons Ltd., and the defendants were Mr. and Mrs. Jones. So far as Mr. Jones is concerned no relief was asked except subsidiary relief, the fact being that it was unknown to the plaintiffs at the date of the writ that he had become bankrupt. The substantial defence raised by the wife was that the agreement in question was wholly void because it was a bill of sale within the meaning of the Bills of Sale Acts. It was conceded that

if it was a bill of sale it was wholly void on a variety of grounds—among others, that it was never registered. Secondly, Mrs. Jones said that the agreement was a document by means of which she was made to confer a benefit on her husband, that it was obtained from her by the undue influence of her husband, and that she had no separate advice. She counterclaimed for rescission of the agreement and a declaration that it was null and void, and also that it was incapable of specific performance because specific performance could not be obtained in respect of an agreement to give a bill of sale. The position on Mar. 14, 1921, when the document was signed, was that the plaintiffs had obtained judgment for £1,000 and costs against the husband. Payments of about £200 were made about Mar. 8, and there remained owing £811 odd. Following the judgment a bankruptcy notice had been served on such a date as that the time within which one could proceed on the notice expired on the following day. Attempts were made to get further payments, but the defendant husband was wholly unable to pay the principal sum asked for. On Mar. 14 the parties met at the office of a Mr. Trevanion, the solicitor acting for the plaintiffs. There were present besides, C. I. Shears, his brother W. P. Shears, both directors of the plaintiff company, and the husband. At that interview a suggestion was made, but it did not appear by whom, that the matter might be arranged if the wife would concur in an agreement to give a bill of sale over her furniture to secure the husband's debt. The landlords were the plaintiff company, and there was a considerable quantity of valuable furniture, the bulk of which belonged to the wife and not to her husband. The value of that which belonged to her was said to be £1,000. A discussion ensued and Mr. Trevanion dictated the terms of a document which was signed by Mr. Jones. It was in these terms :

"In consideration of your forbearance at our request to proceed with the filing of a bankruptcy petition against the undersigned John William Jones, we hereby jointly and severally undertake and agree that in the event of your not receiving within two calendar months from this date [certain sums specified] to execute two several bills of sale for securing payment to you of the above-mentioned sums on the household furniture and effects belonging to us severally at No. 27, Porchester Road, Bournemouth, and we also jointly and severally undertake that in the event of any other creditor or creditors taking or threatening to take any legal proceedings against the said John William Jones, this undertaking is to be of immediate effect without waiting for the remainder of the period of two months to expire and you are to be at liberty notwithstanding this undertaking to take such steps as you may consider advisable to enforce your judgment."

Mr. Jones took the document home, obtained his wife's signature to it, and returned it to the plaintiffs.

Courthope Wilson, K.C. and Watt Dollar for the plaintiffs.

Barrington-Ward, K.C. and Graham Mould for the defendants.

RUSSELL, J.—stated the facts and continued : The first question is whether the document is a bill of sale in itself. Under the Bills of Sale Act (1878) Amendment Act, 1882, s. 9, it is provided that

"A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

It is quite clear that this document was not so made. By s. 8 it is absolutely void unless there are witnesses, &c. Then again by s. 4 every bill of sale is to be in the form of the annexed schedule therein described. In this document a bill of sale within the meaning of this Act? The definition section is s. 3 of the Act of 1882 and provides that

"The expression 'bill of sale,' and other expressions in this Act, have the same meaning as in the principal Act; . . ."

A That means the Bills of Sale Act, 1878. In that Act the definition clause is s. 4:

"The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, . . ."

That must be read with the qualification which counsel for the plaintiff pointed out in s. 3 of the Act of 1878,

"whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale."

In my opinion, this document is a bill of sale within s. 4 of the Act of 1878. It is a document which confers on the plaintiffs a right in equity to a contingent charge on the chattels. The document confers that right because the compact was to give such a charge and made for valuable consideration: the contingency being the non-payment of the money within the period of two months. This is really covered by the decision of the Court of Appeal in *Edwards v. Edwards* (1), decided under the Bills of Sale Act, 1854. The definition clause (s. 7) there was in very restricted terms:

"The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels and also powers of attorney, authorities, or licences to take possession of personal chattles as security for any debt."

F That is a very much narrower definition clause than in the present Act, and it was held that the particular document there in question was within that Act. The document there was a deed of July 1, 1869, reciting an agreement to purchase leasehold premises in London and the business of a printer carried on there for £500 paid down, and £7,500 to remain on such security as thereafter mentioned, the vendor, Edwards, assigned to the defendant the leasehold premises, machinery, fixtures, and effects, and the goodwill of the business. He covenanted to pay the £7,500 on Dec. 31, 1869. It was further provided that if default was made in payment of the £7,500, then the property in question, and the furniture, fixtures, and effects, then or thereafter to be in or about the premises or used in connection with the business, and the book debts then or thereafter owing or belonging to the business, should, as long as the £7,500 remained unpaid, stand and be charged and chargeable with the payment of that sum or such part as remained unpaid and interest. Pausing there, the charge was given by the instrument on the happening of a contingency. Then the deed continued, that the defendant, his executors, &c., would at his and their own expense, if and when required by Edwards, &c., execute and do all such things as should be necessary for granting and assigning the premises to the said Edwards for further securing the repayment of the £7,500.

I The deed was not registered as a bill of sale. The person who took the security died, the executors took proceedings to enforce the charge and asked for the appointment of a receiver, and on Aug. 4, 1879, after the receiver had been appointed, but before he had given security, an execution creditor seized some of the chattels; the question was whether the right of the execution creditor or the right of the mortgagee prevailed. It was held that, as regards the chattels, the deed was void because it was a bill of sale under the Act of 1854. JAMES, L.J. does not give reasons for his opinion. He says (2 Ch.D., at p. 295):

"The question here is, Who has the better right to certain chattels, a mortgagor whose bill of sale is not registered but who has obtained an order for a receiver, or an execution creditor of the mortgagor?" A

That is the only relevant portion of the judgment. MELLISH, L.J., is much more specific. He says (*ibid.* at p. 297):

"I am of the same opinion. The first point argued was that this is not a bill of sale within the meaning of the Act. I am of opinion that it was, and that on two grounds. In the first place, it is an instrument under seal charging the goods with the debts. If it did not pass the property in the goods, I am inclined to think that even at law it would be held to give a right to take possession of them as a security. In the second place, it contains a covenant to assign the goods when required, which clearly gives an equitable title to them, and we have held that equitable securities on goods are bills of sale within the meaning of the Act. The statute mentions declarations of trust, which shows that equitable titles are within its scope. I think that any equitable security which gives a right to take possession through the agency of the court is within the Act." B C

That case decided that an agreement to assign chattels after a particular contingency was a bill of sale within the meaning of the narrow definition of the Act of 1854. A fortiori this document, an agreement to execute a bill of sale after the happening of a particular contingency, is a bill of sale within the wider definition of the Act of 1878. Apply a test. Assume that during the two months it had come to the knowledge of the plaintiffs that the wife was secretly disposing of the furniture and putting the money in her pocket. Could they not have obtained the appointment of a receiver and an injunction? In my opinion, they could: see *Taylor v. Eckersley* (3), a case of a document that gave a right in equity to a contingent charge on the chattels. If I am right in that view, that is sufficient to dispose of the case. As regards the document then in this case, it must be void. D E

However, as it may be that, on the facts of this case, a higher court may take a different view, it appears to me to be advisable to say something on the other branch of the case. [His LORDSHIP reviewed the evidence as to how the wife came to execute the document in question, and continued:] The question I have to decide is, first, Did Mrs. Jones substantially understand the document? Secondly, Is the fact that there was no separate independent advice fatal to the plaintiffs' claim? Taking the latter first, there are various authorities which have been cited to me—*Howes v. Bishop* (2), *Chaplin & Co., Ltd. v. Brammall* (4), *Turnbull & Co. v. Duval* (5) and *Bischoff's Trustee v. Frank* (6). I cannot extract from them any simple principle, but I understand that the mere relationship of husband and wife does not render necessary separate independent advice in order to validate a gift by the wife to the husband. More shortly, it does not raise an equity, as in *Huguenin v. Baseley* (7), but the circumstances may be such that in the absence of independent advice such a gift cannot stand. I will only read from the judgment of LORD ALVERSTONE, C.J., in *Howes v. Bishop* (2). He says ([1909] 2 K.B. at p. 395): F G H

"I must not be understood to be laying down a rule that in no case where a wife acts on her husband's instructions and under his influence is it necessary to show that she has received independent advice. There may be circumstances where the mere signature of the document by the married woman is not of itself sufficient to render her liable upon it, but, in my opinion, there cannot be a general rule of universal application that the rules of the courts of equity as to confidential relationships necessarily apply to the relation of husband and wife." I

[His LORDSHIP referred to the evidence, and continued:] In my view, the duty was cast on the plaintiffs to see that the wife had separate and independent advice

A before they took from her this benefit, and, accordingly, if I had not already come to an opinion adverse to the plaintiffs on the other part of the case, in view of the absence of independent advice, the document could not stand. It is not necessary to analyse Jones's evidence and that of his wife. The wife did understand the general nature of the document sufficiently to know that she was placing her furniture at risk for the purpose of giving security to the plaintiffs for a debt due from her husband under the judgment. She seems also to have appreciated the extent beyond the judgment of some sums of undefined amount. But I am satisfied that the case falls a long way short of the facts in *Chaplin & Co., Ltd. v. Brammall* (4). If that were not so I should have been able to decide on that point in favour of the plaintiffs. But the absence of independent advice is fatal to the claim.

C Solicitors: *Peacock & Goddard*, for *Trevanion*, *Curtiss & Ridley*, Bournemouth, *Corbould-Ellis, Mitchell & Mawby*.

[Reported by J. L. DENISON, Esq., Barrister-at-Law.]

D

E Re FOSTER'S SETTLED ESTATES

[CHANCERY DIVISION (Eve, J.), January 26, 27, 1922]

[Reported [1922] 1 Ch. 348; 91 L.J.Ch. 365; 126 L.T. 689; 66 Sol. Jo. 299]

F *Settled Land—Tenant for life—Sale under statutory powers—Trustee of proceeds for all parties entitled under settlement—Recoupment of tenant for life respecting sums spent by him on unauthorised improvements enhancing value—Settled Land Act, 1882 (45 & 46 Vict., c. 38), s. 21, s. 53.*

G The C. M. estate, containing a mansion-house, grounds, and lands was settled in 1909 (subject to an annuities' term) to the use of the plaintiff as tenant for life without impeachment of waste with remainders over. The settlement expressly enabled every tenant for life in possession to sell the mansion-house and grounds without the consent of the trustees or an order of the court. The expenditure of a sum not exceeding £600 had by an order of Mar. 1, 1918, been authorised, on the application of the tenant for life, out of capital for additions and alterations to the mansion-house to enable it to be let. The tenant for life had provided out of his private funds for the installation of electric light and baths in the mansion-house. The tenant for life, after an attempted sale by auction, on Apr. 9, 1920, entered into a contract with one S. for the sale of the mansion-house and grounds to him at the price of £10,000. £1,000 deposit was paid to the auctioneers. The purchaser having made default in completing his purchase on the day fixed, the tenant for life treated the contract as at an end and forfeited the deposit. H S. commenced an action against the tenant for life claiming rescission and repayment of the deposit, but that action was dismissed on payment of £5 costs by S. to the life tenant. The outgoings of the estate had exceeded the receipts. I

Held: (i) the tenant for life, having sold under his statutory powers as tenant for life, was in the position of a trustee for all parties entitled under the settlement, and could not retain the forfeited deposit as a windfall, but must hold any money coming to him under the contract as capital, neither was he entitled to be recouped out of the forfeited deposit his expenditure in improvements

to the mansion-house which were not authorised by the Settled Land Acts, notwithstanding that the result of such expenditure should be the realisation of an enhanced price on a future sale; but (ii) the tenant for life was entitled to be indemnified against the costs of the abortive sale and the purchaser's action. A

Notes. The Settled Land Acts, 1882 and 1890, have now been repealed. The provisions there made as to the cost of improvements have been replaced by the corresponding provisions of the Settled Land Act, 1925, s. 83 and Sched. 3, Part I, and those as to capital money by ss. 80-81. B

As to improvements to settled land the cost of which is not liable to be replaced by instalments see 23 HALSBURY'S LAWS (3rd Edn.) 116-120, and for cases see 30 DIGEST (Repl.) 320-328. As to the distinction between casual profits and capital under a settlement, see 29 HALSBURY'S LAWS (2nd Edn.) 644-645; as to whether tenant for life or remainderman must bear the costs of proceedings see *ibid.* 658-659; and for cases see 40 DIGEST (Repl.) 707-737. For the Settled Land Act, 1925, see 23 HALSBURY'S STATUTES (2nd Edn.) 12. C

Cases referred to:

- (1) *Re De Teissier's Settled Estates, Re De Teissier's Trusts, De Teissier v. Teissier*, [1893] 1 Ch. 153; 62 L.J.Ch. 552; 68 L.T. 275; 41 W.R. 184, 186; 9 T.L.R. 62; 37 Sol. Jo. 46, 47; 3 R. 103, 111; 30 Digest (Repl.) 326, 164. D
- (2) *Re Willis, Willis v. Willis*, [1902] 1 Ch. 15; 71 L.J.Ch. 73; 85 L.T. 436; 50 W.R. 70; 46 Sol. Jo. 49, C.A.; 40 Digest (Repl.) 745 2326. E

Also referred to in argument:

- Re Hunloke's Settled Estates, Fitzroy v. Hunloke*, [1902] 1 Ch. 941; 71 L.J.Ch. 530; 86 L.T. 829; 40 Digest (Repl.) 713, 2075.
- Re Rodes, Sanders v. Hobson*, [1909] 1 Ch. 815; 78 L.J.Ch. 434; 100 L.T. 959; 40 Digest (Repl.) 713, 2076.
- Re Lacon's Settlement, Lacon v. Lacon*, [1911] 2 Ch. 17; 80 L.J.Ch. 610; 104 L.T. 840; 27 T.L.R. 485; 55 Sol. Jo. 551, C.A.; 40 Digest (Repl.) 712, 2066. F
- Earl of Shrewsbury v. Countess of Shrewsbury* (1854), 23 L.T.O.S. 86; 18 Jur. 397; 40 Digest (Repl.) 222, 1810.
- Vyse v. Foster* (1872), 8 Ch. App. 309; 42 L.J.Ch. 245; 27 L.T. 774; 21 W.R. 207, L.J.J.; affirmed (1874), L.R. 7 H.L. 318; 44 L.J.Ch. 37; 31 L.T. 177; 23 W.R. 355, H.L.; 24 Digest (Repl.) 739, 7258. G
- Re Ward's Settled Estate* (1919), 63 Sol. Jo. 319; 40 Digest (Repl.) 806, 2851.
- Jesse v. Floyd* (1888), 48 L.T. 656; 30 Digest (Repl.) 314, 35.

Adjourned Summons.

By an indenture of settlement dated July 2, 1909, executed on the marriage of the respondent, Edward Baynton Grove Foster, such indenture being expressed to be made between Edmund Benson Foster, the settlor, of the first part, Edward B. G. Foster, of the second part, Marjory Wentworth Forbes, of the third part, and trustees, represented by the three applicants on the present summons, of the fourth part, the Clewer Manor Estate was settled on the following limitations in succession, viz., to the use of the settlor for life, then to the use of the trustees for a term of 500 years, then to the use of the respondent (hereinafter referred to as "the life tenant"), for life without impeachment of waste, then to the use that if the said wife of the life tenant should survive him she should receive a jointure for life of £200 (reducible to £100 on re-marriage), then to the use of the sons and daughters of the life tenant successively in remainder in tail male or in tail with divers remainders over. Certain heirlooms were included in the settlement upon trust to devolve with the estate subject to a direction that they might be sold with the consent of the trustees and the proceeds applied H

I

- A as if the sale had been made under an order of the court. The term of 500 years was vested to secure annuities for which the settlor was liable under his covenant in his marriage settlement, being chargeable on income and capital of the settled estate. The settlement, by cl. 6, declared that the trustees thereof should be trustees thereof for the purposes of the Settled Land Acts, 1882 to 1890, and in cl. 9 there was contained a declaration that, in addition to other
- B powers conferred, every tenant for life in possession in respect of any property thereby settled might, without the consent of the trustees or an order of the court, sell the mansion-house and pleasure grounds, and park and land occupied therewith either with or without the heirlooms settled to devolve with the settled hereditaments. The estate consisted at the date of the settlement of a mansion-house, park, garden and grounds, comprising $57\frac{1}{2}$ acres; various farms and lands;
- C and a number of cottages, in all 206 acres. Since the sale of part the estate contained 165 acres, of which $52\frac{1}{2}$ acres formed the park, garden and grounds of Clewer Manor. The settlor died on Nov. 1, 1917, and the respondent then became and continued until the hearing the tenant for life in possession of the settled estate. The tenant for life's wife was living and there had been issue of their marriage four daughters, who were infants, and whose names had been
- D ordered to be added as respondents to the present summons. The mansion-house and park were occupied by the settlor down to his death on Nov. 1, 1917, and thence to March, 1918, by his widow, who died pending the hearing of the summons.

- By an order of the court, made on Mar. 1, 1918, on the application of the life tenant, £600 was authorised to be expended out of capital moneys for additions and alterations to the mansion-house in order to enable the same to be let. The
- E tenant for life had provided money out of his private funds for installing electric light and fixing lavatory basins. The evidence was that this expenditure was necessary in order that the mansion-house might be let or sold. The mansion-house, park, garden and grounds were put up by the life tenant for sale, the statement in the conditions being that the tenant for life was selling under
- F his powers as tenant for life under the Settled Land Acts, by public auction on Apr. 2, 1919, under printed particulars and conditions of sale, but no sale was effected. On Apr. 9, 1920, the life tenant entered into a contract with one Snazelle for the sale of such property at the price of £10,000, subject to the payment of a deposit of £1,000 (which sum was paid to the auctioneers, Waring & Gillow, Ltd., as stakeholders), the contract fixing June 24, 1920, as the
- G date for completion, and providing that as from that date the purchaser should bear the outgoings and receive any rents. The purchaser made default in completing the sale and by letter dated July 30, 1920, notice was given that the purchase must be completed by Sept. 1, 1920, and that on failure so to complete the contract would be treated as abandoned and the deposit would be forfeited. The purchaser took no steps and the life tenant treated the contract as at an
- H end, and forfeited the deposit. The purchaser on Aug. 31, 1920, commenced an action for rescission of the contract of Apr. 9, 1920, and for repayment of the deposit against the life tenant. An order was made on Feb. 18, 1921, the purchaser undertaking to pay £5 towards the life tenant's costs of action and, the life tenant being satisfied that the purchaser was impecunious and could not
- I pay costs, that the action be dismissed. After deducting commission and charges in respect of the abortive sale from the amount of the deposit there was left £770 15s. which sum had been paid by the auctioneers to the solicitors for the life tenant pending the decision of the questions on the present summons. There also remained to be paid the life tenant's costs of the auction, the abortive sale and of the action. The tenant for life had arranged to give the purchaser vacant possession. The outgoings as from June 24, 1920, had exceeded the receipts by upwards of £236. There was evidence in January, 1918, that the mansion-house without modern sanitary arrangements, bathrooms, electric lighting, and

a constant supply of water with adequate storage could not be let furnished or unfurnished. A

The present trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890 issued their originating summons raising questions and for relief: (i) For a declaration whether the deposit of £1,000 paid by one Oswald H. Snazelle under the contract dated Apr. 9, 1920, and made between the respondent Edward B. G. Foster and Oswald H. Snazelle (being a contract for sale by the said respondent of part of the above-mentioned estate), and subsequently forfeited by the respondent owing to the purchaser's default, belonged to the respondent absolutely subject only to the payment of the costs and expenses incident to the abortive sale, or whether such deposit, after deduction of such costs and expenses, was applicable as capital moneys of the settlements under the said Acts, and in the latter event whether any of the following items were payable thereout: (a) the respondent's solicitor and client costs of the action *Snazelle v. Foster*. (b) the amount by which the outgoings of the property the subject of the abortive sale exceeded the receipts therefrom as from June 24, 1920 (the date fixed for completion under the contract) for any and what period. (ii) That the taxed costs of that application as between solicitor and client might be paid out of the deposit or out of the property subject to the settlement with necessary directions. B C D

W. M. Hunt for the trustees.

H. C. Bischoff for the tenant for life.

L. W. Byrne for the remainderman.

EVE, J.—Counsel for the tenant for life has said everything which can be said on behalf of the tenant for life in support of his claim to be entitled to the balance of the forfeited deposit remaining after discharging the costs of the abortive sale and the taxed costs of the action to which he was exposed at the suit of the purchaser, but I am constrained to hold that the money is capital money arising under the Act and falls within s. 21 thereof. E

The first question is whether the contract of sale was entered into under the power conferred upon the tenant for life by the Settled Land Acts or under the additional power contained in the settlement. I have had the contract before me and in cl. 12 it is stated that the vendor is selling as tenant for life under the powers of the Settled Land Acts, 1882–1890. In face of this it is impossible to say that he was not selling under his statutory powers. It results from this that in relation to this contract he must be deemed to be in the position and to have the duties and liabilities of a trustee for all parties entitled under the settlement: see s. 53 of the Act of 1882; and when once this is appreciated it seems to me impossible to hold that he can retain for his own exclusive benefit any money coming to him under the contract. On this ground I think the forfeited deposit must be treated as capital moneys, and not as a windfall or casual profit belonging to the life tenant. The same result would, I think, have followed had the sale been made under the special power. F G H

Counsel for the tenant for life argued that, even so, there are circumstances in this case which would justify the application of the money in recouping to the life tenant sums expended by him on improvements to the mansion-house which have increased its saleable value, and that the moneys ought not to be regarded as capital moneys applicable only to the purposes authorised by s. 21 of the Act of 1882. It appears that the tenant for life has at his own expense effected improvements to the mansion-house not authorised by the Act, and it is argued that in dealing with this unexpected addition to the capital of the settled estate it would be a fair and reasonable course to hold it in medio, and if it should ultimately turn out that the expenditure of the life tenant has added to the price obtained for the mansion an opportunity should be afforded the life tenant of claiming recoupment from this fund to the extent of the added value. I

- A I cannot adopt that view—it would be affording the life tenant an opportunity of raising a case for applying capital moneys to unauthorised purposes and would open the door to those possible abuses which were pointed out by CHITTY, J., in *Re De Teissier's Settled Estates* (1) and repeated by VAUGHAN WILLIAMS, L.J., in *Re Willis* (2) ([1902] 1 Ch. at p. 21), I must, therefore, treat the balance of the deposit as capital moneys arising under the Act and applicable as such and not to any other purposes.

It is not disputed that the balance must be arrived at after payment of the costs, charges, and expenses incurred by the tenant for life in and about the abortive sale. He has also been involved in costs occasioned by the unjustifiable action brought by the purchaser. That action the tenant for life was bound to defend because the purchaser was asking for repayment of the whole deposit.

- C The tenant for life is therefore entitled to be indemnified against the taxed costs of that action, so far as they were not paid by the purchaser. The declaration will therefore be that the balance of the £1,000, after indemnifying the tenant for life against all costs, charges, and expenses properly incurred in connection with the abortive sale and the taxed costs of the action so far as the same have not been paid by the purchaser and providing for the costs of all parties to the present application to be taxed as between solicitor and client, ought to be held by the trustees as capital moneys arising under the Settled Land Acts.

Solicitors : *Ford & Leach.*

[Reported by W. P. PAIN, Esq., Barrister-at-Law.]

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F

THE TERVAETE

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), July 12, 1922]

[Reported [1922] P. 259; 91 L.J.P. 213; 128 L.T. 176; 38 T.L.R. 825; 67 Sol. Jo. 98; 16 Asp. M.L.C. 48]

- G *Shipping—Maritime lien—Attachment—Ship belonging to foreign State—Sale to private persons after collision.*

Whether a maritime lien is properly to be regarded as a step in the process of enforcing a claim against the owners of a ship, or as a remedy or partial remedy in itself, or as a means of securing a priority of claim, it cannot, consistently with the rule of immunity laid down by the law of nations, be attached to a vessel belonging to a sovereign Power and being used for public purposes. To allow such a lien to attach would be to create a *jus in re alienâ*, which would be a subtraction from the absolute property of the sovereign State.

- H Consequently, where a vessel belonging to a foreign State was alleged to have caused damage to another vessel in a collision and after the collision was sold to private persons, it was **held** that no lien attached to the ship while she was the property of the foreign State which, while remaining dormant and unenforceable during such ownership, became effective and enforceable when the vessel passed into private ownership.

- I Decision of DUKE, P., [1922] P. 197, reversed.

Notes. Considered: *The Stream Fisher*, [1926] All E.R. Rep. 513. Referred to: *The Colorado*, [1923] All E.R. Rep. 531; *The Meandos*, [1925] P. 61; *The Goulandris*, [1927] All E.R. Rep. 592; *The Zigurds* (No. 1) (1932), 48 T.L.R. 556; *The Tolten*, [1946] 2 All E.R. 372.

As to maritime lien see 30 HALSBURY'S LAWS (2nd Edn.) 947 et seq.; and for A cases see 41 DIGEST 927 et seq.

Cases referred to :

- (1) *The Ripon City*, [1897] P. 226; 66 L.J.P. 110; 77 L.T. 98; 13 T.L.R. 378; 8 Asp. M.L.C. 304; 41 Digest 938, 8298.
- (2) *Imperial Japanese Government v. Peninsular and Oriental Steam Navigation Co.*, [1895] A.C. 644; 64 L.J.P.C. 107; 72 L.T. 881; 11 T.L.R. 498; 8 Asp. M.L.C. 51; 11 R. 493, P.C.; 16 Digest 191, 959. B
- (3) *The Newbattle* (1885) 10 P.D. 33; 54 L.J.P. 16; 52 L.T. 15; 33 W.R. 318; 5 Asp. M.L.C. 356, C.A.; 41 Digest 814, 6755.
- (4) *Musurus Bey v. Gadban*, [1894] 2 Q.B. 352; 63 L.J.Q.B. 621; 71 L.T. 51; 42 W.R. 545; 10 T.L.R. 493; 38 Sol. Jo. 511; 9 R. 519, C.A.; 11 Digest (Repl.) 629, 523. C
- (5) *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Word*, [1897] 2 Ch. 487; 66 L.J.Ch. 747; 77 L.T. 241; 46 W.R. 67, C.A.; 1 Digest 47, 376.
- (6) *Harmer v. Bell, The Bold Buccleuch* (1852), 7 Moo. P.C.C. 267; 19 L.T.O.S. 235; 13 E.R. 884, P.C.; 41 Digest 927, 8168.
- (7) *Currie v. M'Knight*, [1897] A.C. 97; 66 L.J.P.C. 19; 75 L.T. 457; 13 T.L.R. 53; 8 Asp. M.L.C. 193, H.L.; 41 Digest 928, 8182. D
- (8) *Magdalena Steam Navigation Co. v. Martin* (1859), 2 E. & E. 94; 28 L.J.Q.B. 310; 34 L.T.O.S. 30; 5 Jur. N.S. 1260; 7 W.R. 598; 121 E.R. 36; 11 Digest (Repl.) 628, 513.
- (9) *The Parlement Belge* (1880), 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp. M.L.C. 234, C.A.; 11 Digest (Repl.) 628, 516. E
- (10) *Morgan v. Castlegate Steamship Co.; The Castlegate*, [1893] A.C. 38; 62 L.J.P.C. 17; 68 L.T. 99; 41 W.R. 349; 9 T.L.R. 139; 7 Asp. M.L.C. 284; 1 R. 97, H.L.; 41 Digest 937, 8285.
- (11) *Utopia (Owners) v. Primula (Owners and Master), The Utopia*, [1893] A.C. 492; 62 L.J.P.C. 118; 70 L.T. 47; 9 T.L.R. 542; 7 Asp. M.L.C. 408; 1 R. 394, P.C.; 41 Digest 931, 8215. F
- (12) *Gladstone v. Musurus Bey* (1862), 1 Hem. & M. 495; 1 New Rep. 178; 32 L.J.Ch. 155; 7 L.T. 477; 9 Jur. N.S. 71; 11 W.R. 180; 71 E.R. 216; 11 Digest (Repl.) 628, 514.
- (13) *Larivière v. Morgan* (1872), 7 Ch. App. 550; 41 L.J.Ch. 746; 26 L.T. 859; 20 W.R. 731, L.C.; reversed sub nom. *Morgan v. Larivière* (1875), L.R. 7 H.L. 423; 44 L.J.Ch. 457; 32 L.T. 41; 23 W.R. 537, H.L.; 1 Digest 48, 390. G
- (14) *Vavasour v. Krupp* (1878), 9 Ch.D. 351; 39 L.T. 437, C.A.; 1 Digest 49, 392.
- (15) *The Porto Alexandre*, [1920] P. 30; 89 L.J.P. 97; 122 L.T. 661; 36 T.L.R. 66; 15 Asp. M.L.C. 1, C.A.; Digest Supp. H
- (16) *The Dictator* (1878), 38 L.T. 947; 4 Asp. M.L.C. 19; 1 Digest 214, 1368.

Also referred to in argument :

The Tasmania (1888), 13 P.D. 110; 57 L.J.P. 49; 59 L.T. 263; 6 Asp. M.L.C. 305; 41 Digest 931, 8210.

Mighell v. Sultan of Johore, [1894] 1 Q.B. 149; 63 L.J.Q.B. 593; 70 L.T. 64; 58 J.P. 244; 10 T.L.R. 115; 9 R. 447, C.A.; 11 Digest (Repl.) 615, 435. I

Appeal by the owners of the Belgian steamer *Tervaete* from an order of DUKE, P., on a summons by the Belgian vice-consul at Cardiff on behalf of the owners of the *Tervaete* asking that their solicitors might be relieved of an undertaking to appear and put in bail in an action against them by the owners of the steamer *Lyntown* for damage suffered in collision, and that the writ in the action might be set aside.

- A The *Tervaete* was formerly the German steamer *Adelina Hugo Stinnes III*. She was handed over to the Belgian government under the reparation terms of the Treaty of Versailles. On May 18, 1920, the *Adelina Hugo Stinnes III* collided with and damaged the steamer *Lynntown* at Bonanza, on the Guadalquivir River. At that time the *Tervaete* was a public vessel of the State of Belgium, and in its possession and held and worked by the State for the public purposes of the
- B State. At some subsequent date she was sold by the Belgian government to private Belgian owners and re-named *Tervaete*. Payment was made by instalments. At the time of the summons these payments had not yet been completed. On Jan. 10, 1922, when the *Tervaete* was at Cardiff, the plaintiffs, the owners of the *Lynntown*, issued a writ claiming for the damage done at Bonanza, and on Jan. 12, in order to avoid the arrest of the *Tervaete* and to enable her to sail
- C from Cardiff, the defendants' solicitors, acting on the instructions of the Belgian vice-consul at Cardiff, accepted service of the writ and gave the usual undertaking to appear and provide bail. On Jan. 23 they entered an appearance under protest. On Feb. 9 the defendants took out the present summons.

The learned President dismissed the summons and the owners of the *Tervaete*, the defendants, appealed.

- D *Bateson, K.C.*, and *E. A. Digby* for the defendants.
Dunlop, K.C., and *Dumas* for the plaintiffs.

Cur. adv. vult.

July. 12. The following judgments were read.

- E **BANKES, L.J.** (after stating the facts):—The plaintiffs contend that, as a result of the collision, a maritime lien attached to the *Tervaete* which, now that she is a private property and is found within the jurisdiction, they are entitled to enforce by proceedings in rem in the Admiralty Court of this country. The present proceedings were taken by the plaintiffs to test the correctness of that contention. The plaintiffs do not contest the proposition that, as a general principle of maritime
- F law in the case of a claim for damage arising out of collision, a proper maritime lien must have its root in the personal liability of the owner or of the person for this purpose in the position of owner. The subject is very fully discussed by LORD GORELL in *The Ripon City* (1). He gives a definition of a maritime lien in language which is, I think, of assistance in this case. He says ([1897] P. at p. 242):

- G "Such a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another—a *jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing. This right must, therefore, in some way, have been derived from the owner either directly or through the acts of persons deriving
- H their authority from the owner."

- I The plaintiffs, further, do not dispute that, so long as the *Tervaete* remained the property of the Belgian government, no proceedings could be taken either in personam or in rem in respect of the damage done to their vessel by the collision. The contention upon which they relied in the court below, and which was accepted by the President, was that the fact that no such proceedings could be taken was not due to an absence of any liability on the part of the Belgian government for the negligence of their servants which brought about the collision, but to the rule introduced by international comity which prohibited the taking of any proceedings to enforce that liability. As a further contention, founded upon the one just mentioned, it was said that a maritime lien did attach to the *Tervaete* as a consequence of the collision, and, though it remained, as it were, dormant and unenforceable during the ownership of the vessel by the Belgian government, it became enforceable when the vessel passed into private ownership.

These contentions raise the question whether a maritime lien ever did attach to the vessel at a time when she was owned by the Belgian government. This is quite a different case from a case where a maritime lien attached to a vessel at a time when she was privately owned, which vessel afterwards passed into government ownership and then into private ownership again. It may well be that in such a case the maritime lien is dormant during the period of government ownership. The present case is quite distinct from that and involves the question whether a maritime lien ever attached to the *Tervaete* at all. A

I think that it may be conceded for the purposes of the argument that the fact that a sovereign or a sovereign power cannot be proceeded against in the courts of a foreign country does not exclude all idea of liability for a breach of contract or for a tort, in the sense that, in no circumstances, can the sovereign or the sovereign State do wrong. The rule that, where a foreign sovereign sues in the courts of this country, proceedings may be taken against him in mitigation of the relief claimed by him, would be of no value, except upon the assumption that claims for breaches of contract or for torts might be established and set off in mitigation. In *Imperial Japanese Government v. Peninsular and Oriental Steam Navigation Co.* (2), the whole discussion as to the court in which proceedings might be taken would have been avoided had the law been that the Emperor of Japan could not be liable for damages resulting from the collision of his vessel with that of the defendants. The point was, however, never suggested in that case. In *The Newbattle* (3) it was assumed that the King of the Belgians might be held liable in damages in the cross-cause for the negligence of those in charge of his vessel, the *Louise Marie*. The fact that the immunity of an ambassador from process in the courts of this country in respect of debts contracted while he was ambassador lasts during the time during which he is accredited to the sovereign and for a reasonable period after he has presented his letters of recall to enable him to wind-up his official business and to prepare for his return home, which is the law as laid down in *Musurus Bey v. Gadban* (4), points also, in my opinion, to the same conclusion. In the numerous cases, such as the *South African Republic Case* (5), in which the question of enforcing cross-claims in actions by sovereigns or sovereign States arose, it appears to me to be assumed that the cross-claims are in respect of breaches of contract or of tort actually committed for which the sovereign, or the sovereign state, would have been responsible, but for the immunity from process which he or it enjoyed. C D E F

In spite of the fact that, so far, I have accepted the arguments of the plaintiffs in support of the judgment of the President, I am unable to agree with his final conclusion, and that on a point to which his attention does not appear to have been specially directed. The point is founded partly on the effect on the property of the sovereign State, if a maritime lien attached to the *Tervaete* as alleged, and partly on a consideration of the nature of a maritime lien itself. If the judgment of the President is right and the maritime lien attached to the *Tervaete*, the value of the vessel to the Belgian government must necessarily have been affected; how seriously, of course, depends upon the amount of the plaintiffs' claim. A vessel to which a maritime lien extends for any substantial amount must necessarily be worth less in the market than if she was free from any lien. G H

In *The Bold Buccleugh* (6) (7 Moo. P.C.C. at p. 284), SIR JOHN JERVIS, when dealing with the question of a maritime lien, adopts LORD TENTERDEN's definition of it as a claim or privilege to be carried into effect by legal process; and he then goes on to say that a maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment when the lien attaches. In *Currie v. M'Knight* (7) ([1897] A.C. at p. 106), LORD WATSON speaks of a maritime lien as a remedy against the corpus of the offending ship. Whether a maritime lien is properly to be regarded as a step in the process of enforcing a claim against the owners of a ship, or as a remedy or partial remedy in itself, I

A or as a means of securing a priority of claim, it cannot, in my opinion, consistently with the rule of immunity laid down by the law of nations, be attached to a vessel belonging to a sovereign Power, and being used for public purposes. To allow such a lien to attach would be, to use LORD GORELL's language in *The Ripon City* (1), to create a *jus in re alienâ*, a subtraction from the absolute property of the sovereign State.

B I may here refer to *Musurus Bey v. Gadban* (4), in which the immunity from process of an ambassador was considered. It was argued in that case that it was permissible to issue a writ against an ambassador in order to prevent the running of the Statute of Limitations, provided that no further step of serving or attempting to serve it was taken. The court, taking the same view as was taken in *Magdalena Steam Navigation Co. v. Martin* (8), refused to accept the contention.

C DAVEY, L.J., in *Musurus Bey v. Gadban* (4), says this ([1894] 2 Q.B. at p. 352):

“With regard to the first, it is, in my opinion, sufficient to refer to the third section of 7 Anne c. 12 [Diplomatic Privileges Act, 1708], which makes all writs and processes, whereby the person of any ambassador or other public minister may be arrested or imprisoned, or his goods and chattels may be distrained, seized or attached, utterly null and void. It has been decided in *Magdalena Steam Navigation Co. v. Martin* (8) that the section applies not only to writs of execution against the property or person of a privileged person, but also to writs which lead up to and would in ordinary course have the consequence of attaching his goods or person. If so, I am of opinion that a writ of summons in an action is of that character, and that the effect of the statute (which is said to be declaratory only of the common law) is to make such a writ void and of no effect. Mr. Pollard is quite right in saying that the writ had been served in the *Magdalena Case* (8) and that all that it was necessary to decide was that that service was bad. But the grounds upon which the decision was based in LORD CAMPBELL's judgment go beyond that point, and, in my opinion, show a total want of jurisdiction of the court to entertain the action at all. LORD CAMPBELL (2 E. & E. at p. 111) states the principle to be that for all judicial purposes an ambassador is supposed still to be in his own country, and he concluded his judgment in these words: It certainly has not hitherto been expressly decided that a public minister duly accredited to the Queen by a foreign State is privileged from all liability to be sued here in civil actions; but we think that this follows from well-established principles. These passages, in my opinion, correctly state the legal principles on which the exemption is founded, and are in accordance with the course of decision in our courts; see, for example, the late case of *The Parlement Belge* (9), in the Court of Appeal, in which it was said (I am reading from the marginal note, which is fully borne out by the judgment) that, as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each State declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory. I am unable to think that the issue of a writ in an action, which action the court has no jurisdiction to entertain, and which writ, therefore, the court has no jurisdiction to issue, can prevent the statute running.”

It seems to be impossible, consistently with the law as there expressed, to hold that it is permissible to recognise a maritime lien as attaching to the property of a sovereign or a sovereign State. I see no distinction in principle between the act of the individual issuing the writ and the act of the law attaching the

lien. Each equally offends the rule affording immunity. If this is the correct view of the law, then the defendants are entitled to succeed, because, unless a maritime lien attached to the *Tervaete* while she was the property of the Belgian government, it cannot attach at all. In my opinion, the appeal must be allowed with costs here and below, and an order made relieving Messrs. Downing and Hancock from their undertaking, dated Jan. 12, 1922, setting the writ aside, and staying all proceedings thereunder.

SCRUTTON, L.J.—In my view, it is now established that procedure in rem is not based upon wrongdoing of the ship personified as an offender, but is the means of bringing the owner of the ship to meet his personal liability by seizing his property. The so-called maritime lien has nothing to do with possession, but is a priority in claim over the proceeds of sale of the ship in preference to other claimants. It does not appear *eo nomine* in cases of collision in the reports till *The Bold Buccleugh* (6) was heard, where it is defined as a claim in privilege upon a thing to be carried into effect by legal process; and it is stated, erroneously, as is now admitted, that whenever an action in rem lies, there a maritime lien exists. The report proceeds (7 Moo. P.C.C. at p. 284):

“This claim or privilege travels with the thing into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached.”

The cases as to the relation of a maritime lien to the personal liability of the owner are exhaustively examined by LORD GORELL in *The Ripon City* (1). He comes to the conclusion that a maritime lien may exist, though the owner is not personally liable, where there is personal liability in those to whom he had voluntarily entrusted the control of the vessel as charterers, though not if his entrusting is compulsory, as in the case of compulsory pilots. But for a lien to arise, in my view, some person having, by permission of the owner, temporary ownership or possession of the vessel must be liable for the collision. If he is so liable, a privilege or lien at once arises in this sense that, if a vessel comes within English territorial waters, it may be arrested, and the claims or privilege on it will date back to the time of the lien. Any purchaser after the collision takes the ship subject to this possibility of claim.

At the time of the collision, if it happened in English waters, would it have been possible to arrest the *Tervaete* and claim a maritime lien? The well-known decision of *The Parlement Belge* (9) compels the answer in the negative. Neither the Belgian government could have been sued in personam, nor could their ship have been arrested in rem. If this is so, I do not understand how there could then be any maritime lien on the ship. To hold that a lien would come into existence if the government sold the ship to a private purchaser, would be to deprive the Belgian government of part of their property, for such a lien about to arise must reduce the price paid to the government and so affect the property of the government.

The general language of LORD WATSON in *The Castlegate* (10) ([1893] A.C. at p. 52) that “a proper maritime lien must have its root in the personal liability of the owner,” approving the language of LORD ESHER in *The Parlement Belge* (9), and the similar language of SIR FRANCIS JEUNE in *The Utopia* (11) ([1893] A.C. at p. 499), appear to me entirely to support this view, even if that general language is not applicable, as LORD GORELL, in *The Ripon City* (1), thought it was not, to the complicated facts in that case. And, while I agree with the President that the passage in *The Parlement Belge* (9) was not strictly necessary to the decision, yet it was so closely related to it that, coming from such a master of maritime law, I have no hesitation in following it, especially as I agree with it in principle. LORD ESHER says (5 P.D. at p. 218):

- A "The property cannot be sold as against the new owner if it could not have been sold as against the owner at the time when the alleged lien accrued. This doctrine of the Courts of Admiralty goes only to this extent, that the innocent purchaser takes the property subject to the inchoate maritime lien which attached to it against him who was the owner at the time the lien attached."
- B In the present case no lien attaches against the Belgian government, nor could their ship have been arrested in rem. But if they could only sell the ship subject to the lien, their property would be affected by the lien, in that they would receive less than the value of the ship free from encumbrances or lien. The result would be that our law would assert a right over the property of a foreign sovereign not arising from any voluntary action on his part which adversely affected his property.
- C I agree that a sovereign may call upon us to enforce legal rights in his favour. The case of *The Newbattle* (3) shows that, if he does so, we may refuse to enforce those rights unless he allows the legal rights that we recognise to be effectively enforced against him. I agree that cases like *Gladstone v. Musurus Bey* (12) and *Larivière v. Morgan* (13) show that, where English trusts are concerned, this court will proceed, though foreign rights are concerned. While, on the other hand, *Vavas seur v. Krupp* (14) involves the proposition that this country will not enforce English patent rights against property in the jurisdiction which a foreign sovereign claims, I am disposed to agree that the ground of the decisions is that, though there are English rights, we do not enforce them against a foreign sovereign directly or indirectly, because of the comity of nations. But it respectfully appears to me that the error of the President's judgment is that he is enforcing rights against a foreign sovereign indirectly, when he supports the view that over his property there is by English law an inchoate lien which will diminish the value of that property by lowering the price that a private purchaser will give for it. I appreciate that the matter becomes of international importance if States increase their commercial trading by national fleets. I have already, in *The Porto Alexandre* (15), expressed my views of the disadvantages of State immunity in such circumstances, but the remedy is, in my opinion, State agreement by diplomatic action, not infringement of legal principles based on the comity of nations. For these reasons, I think the appeal must be allowed with costs here and below, and the writ against the *Tervaete* set aside.
- F
- G **ATKIN, L.J.**—This case raises a question of considerable importance. I have found it difficult, and I differ from the reasoning of the learned President with hesitation; but, having formed a judgment which is not in agreement with his conclusion, I must express it.

- H I understand the argument made by the plaintiffs and enforced by the President to be this. Collision damage caused by the negligent manipulation of a ship creates a right in the person injured to recover damages from the owner responsible for the navigation. It also creates a right in the person injured to a maritime lien over the ship so causing damage. That lien is not a possessory lien, but consists of the right, by legal proceedings in an appropriate form to have the ship seized by the officers of the court and made available by sale, if not released on bail, to pay the collision damage. If the ship is the property of a foreign sovereign, it is admitted that the legal proceedings cannot be commenced against him either personally or in rem, that is, for the arrest of the ship, because by the comity of nations no process can be brought in the courts against the person or the property of a foreign sovereign. But this is only a personal privilege of the sovereign not to be impleaded. The right of the injured person to damages and to a lien still exists, and, as the right to a lien is not abrogated when the ship is transferred into the possession of a third person, so, when the ship formerly owned by the foreign sovereign becomes the property of a third person not protected by the personal privilege of the sovereign, the right to
- I

a lien becomes effective, and the necessary proceedings in rem may be taken against the ship. The right to a maritime lien, it is said, is equivalent to a charge created by voluntary hypothecation of a chattel by the sovereign—a charge which may not be capable of enforcement while the chattel is in the possession or ownership of the sovereign, but can be enforced as it is transferred into the property of a third person. A

A part of that reasoning is irresistible. It seems to me correct to say that the acts of a foreign sovereign may constitute breaches of contract or of duty not arising from contract, which create rights in the other party. True, such rights may be of little value, as they cannot ordinarily be enforced by action. But the inability is a mere personal inability to sue; they can be made effective in defence as, for instance, by set-off, where the rights give rise to a power of set-off, and, as I should suppose, by a plea of contributory negligence; and should the sovereign submit to the jurisdiction in respect of a claim based upon such rights I apprehend that the court would be bound to give effect to them. But, in my judgment, upon a true analysis of what is meant by a maritime lien, the right to such a lien is not such as can be created at all by the act of a sovereign. It is not a right to take possession or to hold possession of a ship. It is confined to a right to take proceedings in a court of law to have the ship seized, and, if necessary, sold. The action in rem is an action in which the owners of the ship are named as parties to the proceedings, and in which, according to our procedure, if they appear, subject to the statutory right to limit liability, they will be made liable personally for the full damage regardless of the value of the res. The owner, therefore, in such an action is directly impleaded. But whether it be directly or indirectly, the owner who is a foreign sovereign cannot be impleaded at all. The result appears to me to be that the maritime lien against the foreign sovereign cannot exist at all. A right which can only be expressed as a right to take proceedings seems to me to be denied where the right to take proceedings is denied. No independent liability of the sovereign, such as a liability for debt or damages, remains pendent, protected only by an immunity from legal proceedings. The right of maritime lien appears, therefore, to be essentially different from a right of property by hypothec or pledge created by the voluntary act of the sovereign. B C D E F

If this reasoning be correct, inasmuch as there never was a time during the ownership of the Belgian government when the plaintiffs could aver that they possessed a maritime lien over the *Terraete*, there was no obligation which attached to the ship or to the new owners when the ship became their property. On the explanation of the origin of the maritime lien given by SIR FRANCIS JEUNE in *The Dictator* (16), one may perhaps be allowed to wonder how such a right, avowedly dependent on the personal liability of the owner, could be held to be enforceable against a new owner not in any way personally liable for the collision. It is too late to raise a doubt as to this point after the decision in *The Bold Buccleugh* (6). But where there was no right against the old owner, the new owner must escape. I myself should in any case feel bound by the dictum of LORD ESHER in *The Parlement Belge* (9), referred to in the judgment of the President. G H

I have thought it necessary to state my views on this difficult question in my own way, because I am not sure that I feel so much pressed as my brothers with the contention that dormant maritime lien over a foreign sovereign's ship would affect the value of the ship in his hands, and, therefore, must be negatived. The supposition that the liability existed as for a personal claim, but was merely unenforceable, does not seem necessarily to be invalidated by the fact that such liability would impose pecuniary disadvantages upon the sovereign. A voluntary pledge or hypothec would be attended with the same results, but would it not be valid? I do not, however, dissent from their view. I concur in the view taken by my brothers of the cases cited by them and of their bearing on this case. I only desire to add a word or two on the case of *The Neubattle* (3), in the Court of Appeal. There the court held that upon the construction of the Admiralty Court Act, 1861. I

A where a foreign government had brought an action in rem against the owners of the *Newbattle*, and order could be made staying the action until security had been given by the plaintiff to answer the counter claim of the defendants in respect of the same collision. The relevance of the case is that, under the section, a condition precedent of such an order is that the plaintiff's ship cannot be arrested, and the decision of the court proceeds upon the ground that, though the foreign sovereign has invoked the jurisdiction of the court, and though he were under possible liability for damages in an effective cross suit, yet his ship was exempt from arrest. That a maritime lien was not enforceable in such circumstances appears to afford strong support for the view that it did not exist at all. For these reasons I think the appeal must be allowed and the order made as stated by BANKES, L.J.

C *Appeal allowed.*

Solicitors: *Downing, Middleton & Lewis* for *Downing & Handcock*, Cardiff; *Holman, Fenwick & Willan*, for *Lean & Lean*, Cardiff.

[Reported by W. C. SANDFORD, ESQ., Barrister-at-Law.]

D

E NEILSON v. LONDON AND NORTH WESTERN RAIL. CO.

[HOUSE OF LORDS (Lord Buckmaster, Lord Dunedin, Lord Atkinson and Lord Sumner), April 6, 7, May 12, 1922]

[Reported [1922] 2 A.C. 263; 91 L.J.K.B. 680; 38 T.L.R. 653;
66 Sol. Jo. 502]

F *Carriage of Goods—Special contract—Carrier excepted from liability for “misconveyance, misdelivery, delay”—Need for clear and unambiguous language—Deviation from contract route—Termination of protection.*

G The plaintiff contracted with the defendants for the carriage of certain goods from L. to B. upon the condition that the defendants were to be relieved from “all liability for loss, damage, misconveyance, misdelivery, delay, or detention” not due to the wilful misconduct of the defendant's servants. At M., which was on the contract route, instead of being forwarded to B. some of the goods were, owing to a mistake on the part of one of the company's servants, unloaded and sent to destinations not on the agreed route, and others were deposited in the cloak-room at M. station to be kept there until the owners were ascertained. On account of this mistake there was a delay in the delivery of the goods at B., whereby the plaintiff suffered damage.

H **Held:** (i) the exception of liability for delay was an exception of liability only during the transit contracted for, and the protection of the exception ended when the goods were diverted from the route agreed on for that transit and sent to wrong destinations or deposited in the cloakroom; (ii) where a carrier sought to protect himself from liability for the negligence of his servants by exceptions of such a far-reaching character as those in question he must do so in clear and unambiguous language which would convey to persons of ordinary understanding that he was reserving to himself a freedom from liability for what might happen to the goods entrusted to him and not use inventive words of doubtful meaning, and “misconveyance” was an ambiguous word of doubtful meaning which was not available to excuse the railway company when read, as it should be, *contra proferentem*; and, therefore, the plaintiff was entitled to recover in respect of the damage suffered by him.

I

Per LORD BUCKMASTER and LORD ATKINSON: "Misdelivery" refers to the final act of handing the goods conveyed over to the consignee and cannot be applied to a case where the carrier retains the goods in his possession and does not deliver them to any consignee.

Foster v. Great Western Rail. Co. (1), [1904] 2 K.B. 306, overruled.

Decision of the Court of Appeal, [1922] 1 K.B. 192, affirmed.

Notes. Applied: *Buerger v. Cunard Steamship Co.*, [1925] 2 K.B. 646. Distinguished: *Hartstoke Fruiterers, Ltd. v. London Midland and Scottish Rail. Co.*, [1943] 1 All E.R. 470. Referred to: *Turner v. Civil Service Supply Association*, [1926] 1 K.B. 50; *Bontex Knitting Works, Ltd. v. St. Johns Garage*, [1943] 2 All E.R. 690; *The Albion, France, Fenwick and Tyne and Wear Co. v. Swan Hunter, and Wigham Richardson, Ltd.*, [1953] 2 All E.R. 679.

As to the limitations of a carrier's liability see 4 HALSBURY'S LAWS (3rd Edn.) 154 et seq., and *ibid.*, 2nd Edn., vol. 27, pp. 120, 121. For cases see 8 DIGEST (Repl.) 41 et seq.

Cases referred to:

(1) *Foster v. Great Western Rail. Co.*, [1904] 2 K.B. 306; 73 L.J.K.B. 811; 90 L.T. 779; 52 W.R. 685; 20 T.L.R. 472; 48 Sol. Jo. 459, D.C.; 8 Digest (Repl.) 69, 465.

(2) *Mallet v. Great Eastern Rail. Co.*, [1899] 1 Q.B. 309; 68 L.J.Q.B. 256; 80 L.T. 53; 47 W.R. 334; 15 T.L.R. 137, D.C.; 8 Digest (Repl.) 47, 283.

(3) *Gibaud v. Great Eastern Rail. Co.*, [1921] 2 K.B. 426; 90 L.J.K.B. 535; 125 L.T. 76; 37 T.L.R. 422; 65 Sol. Jo. 454, C.A.; 8 Digest (Repl.) 141, 906.

(4) *Lilley v. Doubleday* (1881), 7 Q.B.D. 510; 51 L.J.Q.B. 310; 44 L.T. 814; 46 J.P. 708; 3 Digest 77, 163.

(5) *The Cap Palos*, [1921] P. 458; 91 L.J. P. 11; 126 L.T. 82; 37 T.L.R. 921; 15 Asp. M.L.C. 403, C.A.; 41 Digest 683, 5126.

Appeal by the defendants from an order of the Court of Appeal reported [1922] 1 K.B. 192.

The proprietor of a theatrical company, the plaintiff in the action and respondent to the present appeal, contracted with a railway company for the carriage of the company and their luggage and theatrical properties from Llandudno to Bolton. The goods were placed in a van to the exclusive use of which the respondent was entitled and on which the words "through to Bolton" were marked in chalk. Labels were also attached to the van, addressed in the same manner. The packages themselves were not addressed to Bolton, some bearing no address at all, and others bearing old labels addressed to other destinations. The van was inadvertently detached at Manchester by an official of the railway company, who had been duly advised by telegram in respect of the van, but had mislaid the telegram. The official sent the addressed goods to the addresses on the old labels, and placed those bearing no addresses in the cloak room at Manchester. On account of this mistake the theatrical company was unable to give a matinée performance arranged to take place on the day after their arrival at Bolton and thereby suffered loss. The respondent had signed a form of application for tickets and a consignment note for conveyance of the goods at "owners risk." This form contained the following words:

"I agree on my own behalf, as well as on behalf of the respective persons owning or using the goods, to relieve you from all liability for loss, damage, mis-conveyance, misdelivery, delay or detention of or to such goods (during any portion of the transit or whilst left in your possession to be stored, whether the subject of a charge or otherwise), or of or to a trader's truck or sheet (if any) containing or covering them except upon proof that such loss, damage,

- A misconveyance, misdelivery, delay or detention arose from the wilful misconduct of the company's servants."

One of the conditions on the back of the form was to the effect that the company should not be liable for loss or delay "due to inadequate or incorrect address or imperfect labelling." An action having been brought in the county court to recover £28 4s. 3d. damages for breach of contract to carry the goods from Llandudno to Bolton, the damages being loss sustained and expenses incurred, the Court of Appeal held, affirming the decision of the Divisional Court, that the railway company were liable as the goods had been diverted from the route stipulated for by the contract and that the decision in *Foster v. Great Western Rail. Co.* (1) must be overruled. The railway company appealed.

- C *Barrington Ward, K.C.* and *Tristram Beresford* for the appellants.
Compston, K.C. and *A. W. Elkin* for the respondent.

The House took time for consideration.

May 12. The following opinions were read.

- D **LORD BUCKMASTER.**—The common law imposes upon the carriers of goods definite and well-known liabilities for the protection of owners. These liabilities are frequently modified by the terms of express contracts, but except to the extent to which plain language effects such relief they still remain and cannot be removed by subtle implications or ambiguous words. No doubt has found place in any of the judgments in this case as to the soundness of this principle and none exists. Its application has however an important bearing upon the controversy raised on this appeal.

- E The respondent is the proprietor of a theatrical company known as "My Soldier Boy" company, and in June, 1920, he was proposing to move the company from Llandudno to Bolton, in order to open at the latter place on Monday, June 28. The appellants, the London and North-Western Railway, by whose line the respondent proposed to travel, use a special form of contract applicable to the conveyance of theatrical companies and their scenery and luggage, and this was accepted by the respondent. It is headed as a "Combined form of application for tickets at reduced rate and consignment note for conveyance of scenery and luggage at owner's risk," and it continues by providing that the company will carry at special rates all the equipment of theatrical companies by passenger train at owner's risk when the baggage is accompanied by the owner. This makes plain that, if the form be used, the transit of the baggage for which the company is ready to contract is along the route of the passenger traffic between the points of departure and arrival, for it is only on the basis that the baggage is accompanied by the passengers that the contract applies. In the present instance the contract was made on June 27, 1920, the tickets were issued at Llandudno, and the station for arrival of the goods was named as Bolton. The route for the passengers between these stations was therefore the agreed transit for the luggage. It appears, however, that the respondent was informed that the journey was viâ Chester and Manchester, and that the luggage would travel with the passengers as far as Manchester, but that it would probably arrive at Bolton at 6.21 on the Monday morning, June 28, to this extent, therefore, it was contemplated that the luggage and the passengers might part company. A special van was reserved for the scenery and the journey proceeded without adventure as far as Manchester, which was reached at 7.38 p.m. on June 27. On arrival at that station it was found that the labels which had been duly affixed to the van had been accidentally detached, and there was no direction to enable the company's servants to ascertain its destination. A telegram was in fact despatched by the railway company to the inspector at Llandudno that would have given the necessary information, but by an oversight it was not examined in time. The consequence was that, having no knowledge as to the disposal of the goods, the inspector did what he thought was the best thing in the circumstances.

He dispersed the contents of the van. The pieces of luggage that bore no labels he placed in the cloak room, and the rest he dispatched according to the addresses they bore. Many of these were old and misleading, and in the result some went to Bath, some to Scarborough, and those rightly labelled went to Bolton. They were all ultimately reclaimed and finally delivered at Bolton on Wednesday, but the missing goods which included bagpipes and uniforms, prevented the matinée performance on Monday, and the respondent accordingly claimed £28 4s. 3d. damages against the railway company. About the amount of damage there is no dispute. The learned deputy county court judge dismissed the action, holding himself bound, as I think he might reasonably do, by *Foster v. Great Western Rail. Co.* (1). On appeal to the Divisional Court this judgment was reversed and the judgment of the Divisional Court was sustained in the Court of Appeal.

The real defence of the railway company rested on the following clause in the contract:

"I also request you to carry the personal luggage, costumes, scenery, and other usual equipment belonging to or used by the company above mentioned, or by the members thereof, at the owner's risk, on the terms and conditions allowed to such companies shown below and on back hereof. In consideration of your doing so I agree, on my own behalf, as well as on behalf of the respective persons owning or using the goods, to relieve you from all liability for loss, damage, misconveyance, misdelivery, delay or detention of or to such goods (during any portion of the transit or whilst left in your possession to be stored, whether the subject of a charge or otherwise), or of or to a trader's truck or sheet (if any) containing or covering them except upon proof that such loss, damage, misconveyance, misdelivery, delay or detention arose from the wilful misconduct of the company's servants."

On the decision of *Foster v. Great Western Rail. Co.* (1). Apart from the meaning of the word "misconveyance," to which I refer thereafter, I do not think that this defence can avail to relieve the company of liability. The exemption is from liability during "the transit," and when once the goods are diverted from that route the protection ends. This was made plain in *Mallett v. Great Eastern Rail. Co.* (2) and even there it was not new law, but the application of a well-known principle to a particular case. There fish was consigned to the Great Eastern Railway Co. for transit from Lowestoft to Jersey via Weymouth, Great Western Railway Co. They were sent via Southampton, with the result that there was departure from the contracted route, and the conditions were held inapplicable.

On this part of this case the only difficulty is caused by *Foster v. Great Western Rail. Co.* (1). In that case fish were consigned from Brixham to Jersey via Southampton. They ought to have been transferred at Exeter but by mistake were taken on to Taunton. LORD ALVERSTONE, C.J., regarded this as a "misdelivery," which was an excepted cause of damage, and KENNEDY, L.J., appears to have regarded it as an unintentional mistake. Neither reason appears to me adequate. I agree with BANKES, L.J., that this was not misdelivery, which applies to the final act of handing over to the consignee, and I am unable to see how intention can affect the question. If the route be abandoned, whether it was due to oversight, ignorance, accident, or design, equally the agreed transit is departed from, and the privileges the carrier enjoys by contract during that transit cease. I think *Foster v. Great Western Rail. Co.* (1) was wrongly decided, and it should be overruled. Junior counsel for the appellants has skilfully argued that the delay had begun on the agreed route, and all that subsequently happened was only an aggravation of excepted damage. This would, to my mind, be a more appropriate argument if confined to the goods placed in the cloak room, but it is unnecessary to decide whether even so restricted this contention is correct, for it appears that some of the uniforms went astray, and without the proper uniforms the music of the bagpipes might cease to charm.

- A There remains the consideration of the word "misconveyance." I share, with SCRUTTON, L.J., an inability to give this word a plain meaning, but as I regard conveyance as conveyance along the agreed route, misconveyance must equally mean a failure along that route, due it may be to accident or even to negligence if it were not wilful. Were the appellants' contention accepted, it would amount as counsel were compelled to concede, to reading the clause as one providing that
- B the company should not be liable for loss or damage for any cause other than wilful negligence on the part of their servants. Apart from the reasons I have already given to show that the word does not apply, this contention is answered by the proposition I have already mentioned and I decline to give to confused phrases in such a contract meaning which an ordinary man would be slow to realise. I think this appeal must fail and should be dismissed with costs.

- C **LORD DUNEDIN.**—The first necessity in this case is to see what are the facts. The first fact is that there was a contract to carry the theatrical properties from Llandudno to Bolton by an agreed route. That I deduce from the terms of the contract which specify the journey as from Llandudno to Bolton and say that the properties are to be accompanied by the passengers. The passenger route to
- D Bolton was admittedly via Chester and Manchester. Had nothing more been said it would have been part of the contract that the goods should accompany the passengers for the whole of the transport, but this was so far altered by agreement between the respondent and the railway officials, who explained to him that the van containing the goods would not go right through with the passengers, but would be detained at Manchester and then forwarded in the course of the next day, a
- E proposal which was acquiesced in by the respondent. The next fact is that admittedly the van was not forwarded with the goods, but that through an error induced by the losing of the destination labels the van was emptied at Manchester and the contents dispersed, some packages, which had old labels on them, being despatched respectively to Bath and Scarborough and the unlabelled packages being deposited in the cloak room as unclaimed luggage. When the goods did not
- F arrive at Bolton and the mistake was discovered, the various missing articles were reclaimed from the respective whereabouts and were all finally delivered at Bolton, but delay had occurred which occasioned damage which is sued for, and as to the quantum of the damage there is now no dispute.

The defendant railway company assert protection under the clause in the policy which is as follows :

- G "I agree, on my own behalf, as well as on behalf of the respective persons owning or using the goods, to relieve you from all liability for loss, damage, misconveyance, misdelivery, delay or detention of or to such goods (during any portion of the transit or whilst left in your possession to be stored whether the subject of a charge or otherwise)."
- H They say there was either delay or misconveyance. Delay there certainly was. I will deal with misconveyance subsequently. But, then, the delay must have occurred during the "transit." I do not think it did. The agreed on transit was from Llandudno to Bolton via Manchester, i.e. direct from Manchester to Bolton. It seems to me that when the goods were dispersed by the action of the officials clearing them out of the van at Manchester and then sending some to Scarborough and Bath and others to the cloak room, the agreed on transit to Bolton was by
- I this action put an end to. The detention in the cloak room might at first sight seem not so plainly to be an end of the transit, but when we see that the goods are put there, not for the purpose of being put back in another van—as might have happened if, e.g., the first van had had a heated axle—but as unclaimed luggage, that is, I think tantamount to saying that the transit of the goods had ended and that they were lying there for the owners to claim them. So far as delay is concerned, for these reasons I do not think the clause applies to what happened.

What, then, as to misconveyance? That is a coined word of no recognised significance. In order to serve the railway company's purpose and to escape the reasoning just used in the case of delay it must be given a meaning so wide as to override the idea of the agreed on transit and to be equivalent to every form of mischance which prevents the goods which started from Llandudno arriving at Bolton as they ought to have done. I entirely agree with the view expressed by SCRUTTON, L.J., and I venture to borrow his language: "If a carrier wishes to exempt himself from liability for negligence of his servants he must do it in clear and unambiguous language" and "he must use ordinary English and not inventive words of doubtful meaning." I cannot, therefore, read the word "misconveyance" as carrying the wide meaning which it is necessary to give it in order to make it, in the circumstances, availing. A

I have rested my judgment so far on the words which limit the exception to such causes as arise during the transit, but I add that I think the same result would follow if these words had been omitted. Here again I borrow from SCRUTTON, L.J., who says that it is a broad principle of great importance in all contracts of carriage that when a carrier protects himself by exceptions, unless they are very clearly worded they only apply to his carrying out of contract, and do not apply if he is doing something which he has not contracted to do. There is a familiar example of that rule in the cases which have held that an exception in a bill of lading is unavailing as against a loss due to causes falling within the words of the exception but incurred in the course of a deviated voyage. Holding, as I do, that the agreed on transit was put an end to at Manchester, all that happened after was on an unagreed on route. B

I agree with the judgment of DAY and LAWRENCE, JJ., in *Mallett v. Great Eastern Rail. Co.* (2). I do not agree with the judgment in *Foster v. Great Western Rail. Co.* (1). I do not think it is possible to distinguish that case upon the facts from *Mallett's Case* (2). In both the agreed on route had been so far followed, in the one case as far as London, in the other case as far as Exeter. What happened after that was that the goods were made to leave the agreed on route, and the general principle enunciated by SCRUTTON, L.J., seems to me to apply in both cases. For these reasons I think the appeal should be dismissed. C

LORD ATKINSON.—I concur. The facts have already been fully stated, and it is unnecessary to recapitulate them. Like SCRUTTON, L.J., I prefer to decide this case on two broad principles, both well established: first, that when a special provision such as that relied upon in this case is introduced into a contract such as that into which the parties in this case have entered, it must be held, in the absence of language indicating the contrary, to refer to the subject-matter of the contract and that alone—namely, the carriage of the goods from the point of departure to the destination named, by the route expressly or impliedly indicated. The special provision would admittedly have no application to a route wholly different, from start to finish, from the stipulated route. Neither can it, in my view, have any application to a deliberate diversion from the route indicated in the contract, after a portion of the authorised transit has been performed. I fail to appreciate the grounds upon which, according to common sense and reason, a distinction can be made between these two cases. As soon as the carrier deliberately deviates from the stipulated route he carries the goods where the consignor never agreed that they should be carried, and where he (the carrier) by his special contract never agreed he would carry them. So far from performing the duty to which the special protective provision applies, he abandons the attempt to perform it, ceases to act in accordance with it, and in fact violates it. SCRUTTON, L.J., in *Gibaud v. Great Eastern Rail. Co.* (3) clearly and forcibly states this principle, which is not confined to contracts of carriage by a railway company. He says ([1921] 2 K.B. at p. 435): D

- A "The principle is well known, and perhaps *Lilley v. Doubleday* (4) is the best illustration that if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you
- B carried out the contract in the way in which you had contracted to do it."

C That statement of the general principle was approved of by ATKIN, L.J., in *The Cap Palos* (5) ([1921] P. at p. 467). In the present case the transit of the several labelled articles from Manchester to Bath, Scarborough, and Newcastle, according to the name on the old labels which they respectively bore, was no part whatever of the transit contemplated by the contract of carriage. The diversion, though due to accident or mistake, was deliberate on the part of the company's servants. The delay in the performance by the company of the contract of carriage caused by these diversions is, in my view, not a delay to which the special provision of the contract applies, and the company are, therefore, as far as that goes, responsible for the loss sustained by the respondent resulting from this delay. It was proved in evidence

D that the uniforms which were loaded in the van were absolutely necessary to be worn in the theatrical performance arranged for Monday. But these were among the articles dispersed in different directions which did not arrive at Bolton till the following Wednesday, so that the non-delivery of them in time for the performance of the matinée on Monday, the 28th, was in itself sufficient to cause the loss for which the damages have been awarded. It is unnecessary, therefore, to enquire

E whether the articles stored in the cloak room were equally necessary with the uniforms to enable the matinée performance to take place on Monday. The evidence on the point is not as full and clear as would be desirable. None of the articles loaded on the van was "left in the company's possession to be stored." The company cannot, therefore, be protected under this clause of the special provision, neither were they "misdelivered" within the meaning of that provision. Where

F goods received by a carrier to be carried to a certain destination are retained by the carrier in his own possession and not delivered to any consignee or other person, it is a misuse of language to style that misdelivery.

If this be so, as I think it is, then the only word in the special provision which could afford protection to the company is the word "misconveyance." I quite concur in the observation of SCRUTTON, L.J., as to the meaning, or want of meaning, of this word as applied to the matter in hand. If by its use it was designed to protect the company though they should, through mistake or inadvertence, convey the goods they had contracted to carry by a certain route to a named destination, carry them away from that route and from that destination, the special provision would, then, in effect, amount to a stipulation that they should only be responsible for results caused by the wilful misconduct of their servants. If that

H be the real object with which this ambiguous word has been introduced in the contract, the second broad principle, already referred to, applies with full force, namely, that where a carrier seeks to protect himself from liability for the negligence of his servants by exceptions of such a far-reaching character he must do so in clear and unambiguous language, language which will convey to persons of ordinary understanding that he is reserving to himself a freedom from liability,

I save in the particular case indicated, for anything that may happen to the goods entrusted to him to be carried to any named destination whether the route be or be not indicated. I concur with BANKES, L.J., in the opinion he has expressed approving the passage he has quoted from the judgment of GREER, J. [namely, that the stipulation which had been inserted in the contract for the defendants' protection on the assumption that the goods would travel *viâ* Manchester to Bolton would have no application to the journeys which the goods performed by being sent to different towns and then returned to Bolton]. I think that passage contains a

clear, succinct, and accurate statement of the principle applicable to such a case as this. A

The only authority which has been cited, or indeed which can be found in conflict with it, is *Foster v. Great Western Rail. Co.* (1). I thoroughly concur in the criticism of that case contained in the judgment of each of the lords justices in the present case. LORD ALVERSTONE undoubtedly based his judgment on the ground that the taking of the fish past Exeter and on to Taunton instead of handing it over at Exeter to the South Western Co. to be conveyed to Southampton was a misdelivery. The other learned judges who took part in the decision apparently adopted that view. Like SCRUTTON, L.J., I cannot understand how the Great Western Co.'s allowing fish to remain in their truck at Exeter thus keeping it in their possession, bringing it on to Taunton, and not delivering it to anybody at Exeter, is a "misdelivery" of it. I am clearly of opinion that the decision appealed from was right and should be upheld, and this appeal should be dismissed with costs. B C

LORD SUMNER.—In order to obtain relief from liability for the damage, which the plaintiff admittedly sustained, the burden is on the appellant railway company to show that it was due to loss, misconveyance, delay or detention upon the transit from Llandudno to Bolton and during a portion of that transit. I think this correctly summarises the words relied on and correctly expands them with reference to the journey in question. If the appellants succeed in this, they succeed altogether, for liability for such damage arises only if wilful misconduct be proved by the plaintiff, which he tried but failed to prove at the trial. I think it is reasonably plain that the learned deputy county court judge found, and based his other findings on, the fact, that not only was the agreed route from Llandudno to Bolton to be the usual route, namely, through Chester and Manchester Exchange station but also that the goods were to be carried through in one van without unloading or breaking bulk. This alone will account for his finding that "the van was not forwarded to Bolton after being discharged," a fact otherwise immaterial. At any rate, the written contract is expressly designed for cases in which "such baggage is accompanied by the persons owning or using the same," and, as the appellants contended that, nevertheless, they were entitled to sever the baggage from its owners, it was for them to obtain a finding from the court showing to what extent and under what conditions this was to be done, and, particularly, whether discharge of the van at Manchester and removal of some of the packages to the cloak room there, as unclaimed luggage, could be consistent with such modification. This they have failed to do. E F G

I am willing to assume, as the hypothesis most favourable to the appellants, although it is by no means clearly established in fact, that the properties, the lack of which caused the actual money loss sued for, were among those put into the cloak room at Manchester, and not among those dispersed to Newcastle, Scarborough, and Bath. In my opinion, neither on the findings nor on the printed contract did the route from Llandudno to Bolton run through the Manchester Exchange station cloak room, nor was storage in a place where unclaimed luggage is deposited till it is claimed by someone, any portion of the transit between those two places. There was no delay till the goods were discharged from the van; no misconveyance, whatever that may mean, till they were conveyed from the van towards the cloak room. A fortiori delay and misconvenience to luggage en route for Bath or any other wrong destination did not occur during any portion of the agreed transit. Accordingly, I think the appeal fails. H I

I agree with the Court of Appeal that *Mallett's Case* (2) and *Foster's Case* (1) cannot both stand and that the former is preferable. This is not, however, conclusive of the present appeal, for in those cases the reference to the transit qualified the carrying companies, to whose benefit the limitation on their liability was to enure, while here it qualifies the occurrence of the circumstances causing loss, in respect of which relief from liability may be claimed.

A I will briefly deal with the appellants' arguments, as I understand them. However speedy and diligent the carriage from Manchester towards Bath or any of the other wrong destinations might be, every mile of it was a cause of delay to goods bound for Bolton. It cannot, therefore, be said that the delay or detention consisted entirely in the removal of the goods from the van at Manchester, and that thereafter no detention and delay occurred at all. Nor can it be said that, when
B once the inspector's blunder had been made, all that followed was inevitable, so that the misconveyance or detention was complete upon and consisted only in his causing the van to be discharged. If he had re-read the telegram, he could have undone his mistake and prevented any loss to the plaintiffs at any time during the next eight hours or so. It is said that "misconveyance" really means
C breach of the contract to convey, so that, as soon as he broke the company's contract, by conveying the goods out of the van on to the platform en route for an indefinite sojourn in the cloak room, his act, with all that followed from it, was covered by the word. If that be so, the expression really means, "not liable for any breach of contract or the consequences thereof, unless wilful misconduct is proved," and I agree that, if that is the meaning, it is so wrapped up in deliberate
D obscurity as to be unavailable to the railway company, when read, as it should be, *contra proferentem*. I am, however, of opinion that its meaning is much narrower and is clear enough, but this does not help the appellants. I say nothing about the fact of the word being new: it must at any rate describe something which is an act of conveying done under a contract of conveyance but done wrong. Now a contract of conveyance implies a place of departure and a destination, both of which are the subjects of agreement. If, in the course of such a conveyance, goods
E which should go by passenger train are sent by goods train, or goods which should be covered by a tarpaulin are sent uncovered, and so forth, I can see that this novel word may be apt to describe the occurrence, but in the present case the conduct which caused the damage to the plaintiffs occurred on no agreed conveyance at all. The luggage sent to Bath and other places was sent at the will of the railway
F company alone; the luggage placed in the cloak room was placed there as having no further destination until either someone claimed it and gave it a new destination, or took it away, or until it came to be sold as unclaimed luggage. There was no conveyance, right or wrong, about this matter at all. In saying this, I do not wish to be understood as adopting the appellants' argument, that "renunciation" of the contract is the test of liability. If the carriers so conducted themselves as to show
G that they no longer meant to be bound by the contract, the law provides for the case accordingly; if they break the contract without showing such an intention, they must seek relief from liability somewhere in its terms. This is a matter of construction, and I am unable to see that under the circumstances the terms used can cover what occurred. I therefore think that the appeal fails.

Appeal dismissed.

Solicitors : *H. L. Thornhill ; J. Moverley Sharp.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

H. AND C. SMITH, LTD. v. GREAT WESTERN RAIL. CO. A

[HOUSE OF LORDS (Lord Buckmaster, Lord Atkinson, Lord Sumner and Lord Wrenbury), February 13, 14, 1922]

[Reported [1922] 1 A.C. 178; 91 L.J.K.B. 423; 127 L.T. 1;
38 T.L.R. 359; 27 Com. Cas. 247]

Carriage of Goods—Special contract—Carrier excepted from liability except on proof that loss “arose from wilful misconduct” of carrier’s servants—Unexplained loss—Burden of proof—Discharge of burden. B

By a contract for the carriage by the defendant railway company of the plaintiffs’ goods at lower rates the plaintiffs agreed to relieve the company “from all liability for loss, damage, misconveyance, misdelivery, delay, or detention of or to such goods . . . except upon proof that such loss, damage, misconveyance, misdelivery, delay or detention arose from the wilful misconduct” of the company’s servants. The plaintiffs proved that they delivered to a servant of the defendants certain goods, properly packed and addressed, for carriage to a consignee in another town. The defendants’ servant took the goods to the local station of the defendants where the parcel was checked and weighed. Thereafter all trace of the goods was lost. They were never delivered to the consignee, and in answer to an interrogatory the defendants stated that they had no knowledge whether the goods had been despatched from the local station or received at the station in consignee’s town, and that they believed them to have been lost. C

Held: on this evidence the plaintiffs had not discharged the onus which was on them of proving that the loss of the goods was due to the wilful misconduct of the defendants’ servants, and, therefore the defendants were not liable for the loss. D

Curran v. Midland Great Western Rail. Co. of Ireland (1), [1896] 2 Ir. 183, distinguished. E

Decision of Court of Appeal, [1921] 2 K.B. 237, affirmed. F

Notes. As to the limitation of a carriers’ liability see 4 HALSBURY’S LAWS (3rd Edn.) 154 et seq., and *ibid.*, 2nd Edn., vol. 27, pp. 120, 121. For cases see 8 Digest (Repl.) 41 et seq.

Case referred to :

(1) *Curren v. Midland Great Western Rail. Co. of Ireland*, [1896] 2 I.R. 183; 8 Digest (Repl.) 147, *656. G

Also referred to in argument :

Mahony v. Waterford, Limerick and Western Rail. Co., [1900] 2 I.R. 273; 33 I.L.T. 112; 8 Digest (Repl.) 65, *235.

Neilson v. London and North Western Rail. Co., [1922] 1 K.B. 192; 38 T.L.R. 75; 66 Sol. Jo. (W.R.) 13, C.A.; affirmed ante, p. 395; [1922] 2 A.C. 263; 91 L.J.K.B. 680; 38 T.L.R. 653; 66 Sol. Jo. 502, H.L.; 8 Digest (Repl.) 69, 467. H

Appeal by the plaintiffs from an order of the Court of Appeal (BANKES and SCRUTTON, L.JJ., ATKIN, L.J., dissenting), reported [1921] 2 K.B. 237.

By a document in writing signed by the plaintiffs addressed to the defendant railway company and headed: “General agreement for perishable and other goods to be carried by passenger train or by other similar service at owner’s risk,” the plaintiffs stated : I

“In reference to the above we [the plaintiffs] request that all goods for which there are alternative rates by passenger train or other similar service delivered by us or on our account at any of your stations, for carriage by railway, may be carried at the lower rate (where and so long as such rate exists), except when

- A** specially consigned at the higher rate; and in consideration of your charging such lower rate we agree to relieve you from all liability for loss, damage, misconveyance, misdelivery, delay or detention of or to such goods or a trader's truck or sheet (if any) containing or covering them, except upon proof that such loss, damage, misconveyance, misdelivery, delay or detention arose from the wilful misconduct of your servants. . . ."
- B** On Feb. 15, 1919 the plaintiffs delivered to the defendants a parcel containing six pairs of men's boots in order that the same might be carried for reward and delivered by the defendants to the consignee, H. Daniels, 1, North Street, Wilton, Salisbury, Wilts. The goods, however, were not delivered, and the plaintiffs brought an action against the defendants in the county court for £10 11s. 6d., the value of the goods. At the trial the plaintiffs proved the terms of the contract of carriage, that the goods had been properly packed and delivered on their premises to the defendants' servant. The defendants called no evidence, but submitted that there was no case for them to answer as no evidence of wilful misconduct had been given against them. The county court judge decided, in favour of the plaintiffs, on the authority of *Curran v. Midland Great Western Rail. Co. of Ireland* (1), being of opinion that the evidence justified him in finding wilful misconduct on the part of the defendants. The Divisional Court (ROCHE and SALTER, JJ.) reversed this decision and entered judgment for the defendants. The Court of Appeal (BANKES and SCRUTTON, L.JJ., ATKIN, L.J., dissenting) held that the inference could not properly be drawn from the evidence that the loss of the parcel arose from the wilful misconduct of the defendants' servants and that the defendants were not liable. The plaintiffs appealed to the House of Lords.
- E**

R. A. Willes for the appellants.

Disturnal, K.C. (Douglas C. Bartley with him) for the respondents.

- LORD BUCKMASTER.**—I am of opinion that the appeal must fail. The claim out of which the appeal has arisen was brought by the appellants as the consignors of goods handed by them for carriage to the respondents, the Great Western Railway Co., and it is certainly not surprising in the circumstances that they have found themselves aggrieved by the treatment that they received. On Feb. 15, 1919, they handed in Birmingham to one Moss, a servant of the company, a parcel of goods weighing 19lb. and containing six pairs of boots of the total value of £10 11s. 6d. The boots were properly packed and properly addressed to the consignee, who lived at Wilton, near Salisbury. The parcel was taken by Moss to the Snow Hill Station at Birmingham of the respondent company, it was there checked and weighed, and from that moment it has never been heard of again; whether it was lost by accident, stolen by servants of the railway company, or by strangers, damaged, destroyed, or mislaid by some unaccountable accident, the appellants do not know, and it is quite impossible that they can ascertain. The claim that they make against the railway company in these circumstances is resisted upon this ground. They say: "We never accepted these goods for carriage as common carriers at all. There are two well-known rates which we charge for the carriage of goods, a higher and a lower rate, and the plaintiffs took the lower rate under an agreement which provided that the goods should be carried by passenger train at owner's risk." The conditions expressed upon the face of that bargain show in plain terms that the special provisions which the consignor was asked to accept were provisions which were the consideration for the lower rate which he had to pay. The agreement appears to be in common form addressed to any consignor and runs as follows: "If you wish to have the advantage of the lower rate, it will be necessary for you to fill up and sign the form printed below and return it to me." The particular clause in the form is in these words:
- I**

"In reference to the above we request that all goods for which there are alternative rates by passenger train or other similar service delivered by us . . . at any

of your stations, for carriage by railway, may be carried at the lower rate (where and so long as such rate exists) except when specially consigned at the higher rate; and in consideration of your charging such lower rate we agree to relieve you from all liability for loss, damage, misconveyance, misdelivery, delay, or detention of or to such goods or a trader's truck or sheet (if any) containing or covering them, except upon proof that such loss, damage, misconveyance, misdelivery, delay, or detention arose from the wilful misconduct of your servants."

The first question to be determined is what is the true meaning of that condition. It has been suggested on the part of the appellants that that must be read as though it contained exceptions in favour of the railway company with a proviso reserving to the consignor rights in a certain event, and that it was consequently incumbent upon them to prove that the goods had disappeared owing to the specified causes, and when that was proved it would become necessary for the consignor to establish that he had the benefit of the proviso, or, in other words, that the loss had arisen owing to the wilful misconduct of the company's servants. I am unable so to regard this clause. It is, in my opinion, a clause which throws upon the trader before he can recover for any of the goods the burden of proving, in the first instance, that the loss sustained arose from the wilful misconduct of the company's servants. It is perfectly true that this results in holding that the apparent protection afforded to the trader is really illusory, for it practically gives him no protection at all, as it is often impossible for a trader to know what it is that has caused the loss of his goods between the time when he delivered them into the hands of the railway company's servants and the time when they ought to have been delivered at the other end of the journey. The explanation of the loss is often within the exclusive knowledge of the railway company, and for the trader to be compelled to prove that it was due to wilful misconduct on the part of the railway company's servants is to call upon him to establish something which it may be almost impossible for him to prove.

None the less that is the burden which the plaintiffs have undertaken, and the question is whether in this case they have afforded any evidence which calls for an answer on the part of the railway company. All they have been able to show is this. They have proved the delivery of the goods in the manner that I have mentioned to the railway company's servants, and put in evidence a correspondence between themselves and the railway company and their answers to certain interrogatories. I am bound to say that the correspondence does not reflect very creditably upon the attitude which the railway company adopted and certainly does not show any anxiety on their part to satisfy one of their customers as to such of the circumstances as were, within their knowledge, associated with the loss of these goods. The correspondence begins on Mar. 4, 1919, by a letter from the plaintiffs which contains a statement of the contents of the parcel and the address and says that it "has not been delivered to addressee, apparently lost in transit." That is answered on the next day by the railway company saying that the letter "has been received and the matter shall have immediate attention." "Immediate attention" apparently means attention at some time within the next three months, for nothing whatever happens between Mar. 5 and June 6, when the solicitor for the appellants writes again to the railway company saying that he has had the papers handed to him understanding that his clients have communicated with the company and asking that the company will let him know "by whom and when the said parcel was or should have been handled, and what has become of it as it is necessary for my clients to make a claim against your company in respect of its non-delivery." That is answered on June 7 and the answer is: "The matter shall have immediate attention," exactly the same answer as had been given before. Nothing happens again from June 6 until June 27, when the appellants' solicitor once more writes and insists upon a reply, and then the solicitor to the railway

A company on June 28 says: "I regret to inform you that the reason of the delay in this case is because the whole of the papers have been lost in transit." As to what the papers were, where they had been transferred to, how they originated, what information they contained or why it was that their loss prevented any earlier reply there is no information whatever to enable your Lordships to decide. It may be accepted that the correspondence (and this was all the material correspondence that preceded the institution of proceedings) was correspondence in which the company took up the position that they did not intend to tell the plaintiffs what had happened to their goods or to give them any assistance whatever in establishing their claim against the company. It may well be that that was a position which legally they were fully justified in adopting, but a little more consideration might well have been shown to the customer for a loss for which he certainly was not to blame. The matter proceeded further after the action was instituted for interrogatories were then administered for the railway company to answer and of these interrogatory No. 2 was put in at the trial. It was in these terms:

"On what date and at what time was the parcel referred to in the first interrogatory (a) despatched by the defendants from Birmingham; (b) received by the defendant company, their servants or agents at Wilton; (c) delivered or tendered by the defendants, their servants or agents to the consignee?"

The answer to that was:

"Enquiries have been made, but the defendant company have no knowledge or means of knowledge (a) as to whether the said parcel was despatched from Birmingham; (b) as to whether the said parcel was received by the defendant company, their servants or agents at Wilton. There is no record of such receipt. (c) As there is no record of the said parcel being received at Wilton, it is believed the same was lost, never arrived at Wilton, and was never delivered or tendered to the consignee."

Of whom the enquiries were made, where they were made, what the result of the enquiries was beyond the fact that they left the company without knowledge or means of knowledge, it is impossible to know, but with the evidence in that form the plaintiffs proceed to trial and argue upon that material that wilful misconduct on the part of the company's servants must be assumed from the fact that the attitude of the company was only consistent with the culpability of their servants.

I find myself unable to accept that view. The materials disclosed by the letters and by the interrogatories are quite consistent with the position a litigant party is entitled to adopt of saying: "Whatever my position may be, I decline to render you the least assistance. I am not going to pay your claim and I am not going to let you know any more than I am bound of the facts that will enable you to establish your case." But this does not afford evidence which will enable the plaintiffs to discharge the onus of proving what after all is a very serious fact, an act of wilful misconduct on the part of one of the company's servants. At the very best nothing more can be said than that no explanation was offered, and no explanation is not sufficient to enable the plaintiffs to say that this does not amount to evidence of the fact that is unexplained.

The appellants not unnaturally rely strongly upon a case that was decided by PALLES, C.B., *Curran v. Midland Great Western Rail. Co. of Ireland* (1), and, although no Irish case is per se authority in an English court, the great legal position of the Chief Baron entitles all his utterances to be regarded with attention. This case, therefore, is one which requires examination. It was a case in which pigs had been delivered for carriage from Sligo to Manchester by the Midland Great Western Railway Co. of Ireland. Some pigs apparently were not delivered at the place of destination and some appear to have suffered from ill feeding on the voyage. Proceedings were taken to recover against the railway company, and

the claim ultimately took the form of a Special Case. The contract upon which the plaintiffs sued provided that the company were to take the pigs at a reduced rate upon the condition that

"they shall be free from all liability including liability for loss, injury or delay, whether in the loading, unloading, transit, or conveyance of the animals unless such injury or delay shall be occasioned by the intentional and wilful neglect or misconduct of their servants acting within the scope of their authority."

It has been pointed out by BANKES, L.J., in the Court of Appeal, that in point of actual language there is a general exclusion from liability for loss and that it is only in case of injury or delay that liability can be established if it be due to the wilful neglect or misconduct of the servants. I do not think that that matter really materially influenced the judgment of the learned Chief Baron, because I find that the principle upon which he relied to support his judgment was that, the pigs

"having been received into the possession of the defendants, there was a prima facie presumption that they continued to be in their possession until the contrary is shown, or until a different presumption arises from the nature of the subject . . ."

He continued :

"These circumstances are evidence from which a jury would be warranted in holding as a matter of fact that the defendants had the pigs in their possession. If that inference in fact were drawn, then I hold as matter of law that their unaccounted-for refusal to deliver them, so continuing in their possession, upon the plaintiffs' demand for them at the place and time at which they ought to have been delivered—of which there is ample evidence—amounted to wilful misconduct, for which this action will lie."

Now in that case there had been no answer given at all on the part of the railway company to the request for information as to what had happened, but in the present case the evidence that was before the learned county court judge included the answers to the interrogatories in which the defendant company had said that they had no knowledge whether the goods had been received by them at Wilton and that they believed that the same were lost and never arrived at Wilton. It is impossible to place such evidence on an exact parallel with the evidence which warranted PALLES, C.B., in *Curran v. Midland Great Western Rail. Co. of Ireland* (1), in assuming the possession of the pigs as a fact in the custody of the defendants and then inferring from that possession that the refusal to give any explanation of their whereabouts or their existence was an act of wilful misconduct. I desire to say nothing further about that authority because for the reasons I have given I do not think that it deals with the same facts as those in the present case, and it may be that on some later occasion the actual words of that judgment may come up for consideration. So far, therefore, as the main part of this case is concerned the appellants have failed, and this disposes of the case as it was opened and argued before the learned county court judge, although another point was raised by counsel for the plaintiffs in reply which he was excluded from raising in the Court of Appeal.

I am far from saying that the Court of Appeal was mistaken in the course they took, and we have not heard counsel for the respondents upon it. In dealing with this further argument I express no opinion upon its strict admissibility. The point so raised is that there is no evidence to show that the contract of carriage was ever set on foot at all, and it is, therefore, incumbent upon the defendants to bring evidence for that purpose, since apart from the contract they would be in the position of bailees, and then they must excuse their non-delivery of the goods. I think the answer is to be found in the fact that the special contract was in evidence

A and the goods were proved to have been carried by Moss to the Snow Hill railway station at Birmingham, a fact referable only to this contract of carriage. Then it was said that the defendants must show that the contract was not repudiated because it is in reliance upon the express terms of the contract that they must seek to escape from the liability which the circumstances would otherwise cast upon them. That appears to me to be the result of some confusion of thought

B with regard to the form in which proceedings to recover damages in such a case should have been clothed. Counsel for the plaintiffs has suggested that it would have been sufficient to have claimed that the goods were delivered for carriage, that they were not delivered to the consignee, and that liability consequently attached. But if, in fact, the defendants set up, as they would do, the terms of the contract in answer to that claim, it would be essential that the plaintiffs

C should, unless they were in a position to deny the contract or the delivery of the goods upon its terms, accept the defence, or they would be suing outside the only contract upon which they would have been entitled to recover. Whichever way the matter is approached, in the end the plaintiffs must face the actual circumstances in which these goods were dispatched—that is, that they were taken for carriage under the special terms of the special contract which enabled the plaintiffs

D to have the goods taken at the lower rate. If the plaintiffs desire to show that that contract was repudiated, it is incumbent upon them to bring evidence to establish that repudiation, and it certainly is not incumbent upon the defendants to go into the box to prove that they did not repudiate it. For these reasons it is my opinion that this appeal fails and should be dismissed with costs.

E **LORD ATKINSON.**—I concur.

LORD SUMNER.—I concur. I think the reasons given by BANKES, L.J., are quite sufficient to dispose of the case as it was presented in the Court of Appeal. We have had an exceedingly interesting and thoughtful argument putting a somewhat new aspect upon the matter, but I think that also fails. So far as the facts

F go it was common ground that the contract was in course of being performed, and the last that we know of these boots is that they had started—not very far, it is true—upon a transit which was to terminate at Wilton. I cannot find anything in this contract which justifies the contention that before the term as to wilful misconduct can be brought into operation, it is incumbent upon the

G defendants to show that they had not repudiated but were performing the contract of carriage which had been entered into. With regard to *Curran v. Midland Great Western Rail. Co. of Ireland* (1), I agree that it is distinguishable from the present case, and, therefore, I express no opinion upon it, but if it were necessary to consider that case, I should certainly desire an opportunity of looking into it with great care, and I am not prepared to say with what result I might eventually consider it.

H **LORD WRENBURY.**—I agree. When once it is realised that in the matter to which this action relates the railway company were not common carriers and were not under any statutory obligation as to the terms on which they were prepared to carry, it follows that they stood in a position in which they were competent to make such contract as they thought proper, being one in which their

I customer was willing to concur. There was here a contract entered into by the railway company thus unfettered with their customer in the terms which LORD BUCKMASTER has read. The only question, I think, for decision upon this appeal is whether there was before the county court judge any evidence upon which he could come to the conclusion that the plaintiffs had affirmatively established that there was wilful misconduct on the part of the railway company's servants. I agree with what has been said. There was, I think, no such evidence. As regards the question of repudiation by the railway company, I do not see myself that it

arises. The plaintiffs sued upon the contract and proved that transit under the contract had commenced. They alleged that there had been loss, and the only question to be determined was whether or not, there having been loss, it was occasioned by the wilful misconduct of the company's servants—a fact which it was for the plaintiffs to establish if it was set up. The railway company did not allege that the transit had not commenced and did not set up any contention that they did repudiate or could have repudiated the contract. As regards *Curran v. Midland Great Western Rail. Co. of Ireland* (1), I desire to protect myself (as LORD SUMNER has done) in respect of any further consideration which it may be necessary to give to that case should it hereafter be cited in your Lordship's House. It differs from the present one both in the terms of the contract and in the fact that it proceeds upon a presumption that cannot be made when the plaintiffs allege, as they do here, that the goods are lost, viz., that the goods are still in the defendants' possession, I think the appeal fails and must be dismissed.

Solicitors: Ward, Bowie & Co., for W. L. Highway, Birmingham; A. G. Hubbard.

Appeal dismissed.

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

WING v. SKINNER AND HOLFORD, LTD. AND ANOTHER

[KING'S BENCH DIVISION (Lord Hewart, C.J., Bailhache and Salter, JJ.), June 13 1922]

[Reported 128 L.T. 365; 87 J.P. 33; 27 Cox, C.C. 360]

Coal Mine—Hours of work—Work underground—Excess over statutory limit—“Workman working in a shift”—Other workmen in shift returned to surface within limit—Coal Mines Regulation Act, 1908 (8 Edw. 7, c. 57), s. 1 (1) and (2) as amended by Coal Mines Act, 1919 (9 & 10 Geo. 5, c. 48), s. 1.

By s. 1 (1) of the Coal Mines Regulation Act, 1908, as amended by s. 1 of the Coal Mines Act, 1919, a workman shall not be below ground in a mine for the purpose of his work for more than seven hours a day. By s. 1 (2), as amended by s. 1 of the Act of 1919, no contravention of this provision shall be deemed to take place in the case of a workman working in a shift “if the period between the times at which the last workman in the shift leaves the surface and the first workman in the shift returns to the surface does not exceed seven hours.”

The respondent company were the owners of a colliery, in which two workmen, working in shifts within s. 1 (2) of the Act of 1908, were on certain dates below ground in the mine for the purpose of their work for periods varying from 11 to 13 hours. On each of the occasions some of the workmen in each of the shifts returned to the surface within a period of seven hours from the time when the last workman in each of such shifts had left the surface.

- A **Held:** as the excess of time during which the men were working below ground over the seven hours limited by s. 1 (1) of the Coal Mines Regulation Act, 1908, as amended by s. 1 of the Coal Mines Act, 1919, could not be attributed to the time occupied by lowering and raising the shifts, the mere fact that some of the workmen in the shifts returned to the surface within seven hours from the time when the last workman in the shift had left the surface did not bring the case within s. 1 (2) of the Act, and the respondents were guilty of offences under s. 7 of the Act.
- B

Roger v. Stevenson (1), 1913 S.C.(J.) 30, disapproved and not followed.

- Notes.** As to hours of work below ground in a mine, see 26 HALSBURY'S LAWS (3rd Edn.) 617-620; and for cases see 34 DIGEST 729. For Coal Mines Regulation Act, 1908, and Coal Mines Act, 1919, see 16 HALSBURY'S STATUTES (2nd Edn.) 90, 182.
- C

Case referred to:

(1) *Roger v. Stevenson*, 1913 S.C.(J.) 30; 34 Digest 729, *g*.

- D **Case Stated** by Upper Strathforth and Tickhill (Yorkshire) justices.

- At a petty sessions holden at Rotherham in and for the petty sessional division of Upper Strathforth and Tickhill in the West Riding of Yorkshire, on Feb. 10, 1922, five informations were preferred by the appellant, James Edward Wing, under the Coal Mines Regulation Act, 1908, and the amending statute, the Coal Mines Act, 1919, against the respondents, Skinner and Holford, Ltd., for that they on Oct. 14 and 18, 1921, at Waleswood Collieries in the Riding aforesaid, then being the owners of such collieries, unlawfully did contravene the provisions of the Coal Mines Regulation Act, 1908, and the Coal Mines Act, 1919, in that one Arthur Timberlake, and one Andrew Thomas, workmen, were below ground in a mine of the said collieries, for the purpose of their work, and of going to and from their work, for more than seven hours during a consecutive period of twenty-four hours contrary to the said Acts. The respondents were also charged for that they between Oct. 28, 1921, and Nov. 3, 1921, inclusive, unlawfully failed to comply with the provisions of s. 2 of the Coal Mines Regulation Act, 1908, namely, that they did not cause a register to be kept in the form prescribed by the Secretary of State and containing the particulars prescribed by him in respect to the times at which men were lowered into and raised from the mine and the cases in which any man was below ground for more than the time fixed by the said Act, as amended by the Coal Mines Act, 1919, and the cause thereof, contrary to the said Acts. Five informations were also preferred by the appellant against John Tom Lee, the manager of the Waleswood Collieries, for the same offences, and on the same facts, and in respect of the same times, place and dates, as those charged against the respondent company. The justices dismissed each of the informations against each respondent.
- E
- F
- G
- H

By the Coal Mines Regulation Act, 1908, as amended by s. 1 (a) of the Coal Mines Act, 1919:

- I Section 1 (1). "Subject to the provisions of this Act a workman shall not be below ground in a mine for the purpose of his work, and of going to and from his work, for more than seven hours during any consecutive twenty-four hours. (2) No contravention of the foregoing provisions shall be deemed to take place in the case of a workman working in a shift if the period between the times at which the last workman in the shift leaves the surface and the first workman in the shift returns to the surface does not exceed seven hours. . . ."

At the hearing of the informations the following facts were admitted as being relevant to the alleged offences charged in respect of the workmen, Timberlake and Thomas, namely :

Waleswood Collieries.

Date.				Total number of men below ground in morning shift.	Arthur Timberlake below ground.	Andrew Thomas below ground.
1921.						
Oct. 14	Friday	...	...	117	12½ hours	12½ hours
„ 18	Tuesday	...	...	122	12½ hours	12½ hours
„ 28	Friday	...	...	110	11 hours	11 hours
„ 29	Saturday	...	...	—	None	None
„ 31	Monday	...	...	117	12½ hours	12½ hours
Nov. 1	Tuesday	...	...	119	12½ hours	12½ hours
„ 2	Wednesday	...	...	9	None	None
„ 3	Thursday	...	...	116	13 hours	13 hours

The above hours were those recorded in the respondent company's time-book which was produced. It was also an agreed fact that other workmen, in addition to Timberlake and Thomas, were working in the same shifts and were below ground for more than seven hours within a consecutive period of twenty-four hours, the dates and numbers being as follows : On Oct. 28, 1921, five others; Oct. 31, 1921, nine others; Nov. 1, 1921, seven others; Nov. 3, 1921, five others. It was further agreed that on Oct. 14, 1921, Oct. 18, 1921, and during the period between Oct. 28, 1921, and Nov. 3, 1921, inclusive, the working conditions and other relevant facts in connection therewith were as follows. Timberlake, Thomas, and the other workmen hereinbefore referred to, were workmen working in a shift within the meaning of the Coal Mines Regulation Act, 1908. All of them were working in the same morning shifts. Some of the workmen in each of such shifts returned to the surface within a period of seven hours from the time when the last workman in each of such shifts left the surface. No entry was made in the prescribed register between Oct. 28, 1921 and Nov. 3, 1921, inclusive, of the specific cases (and the causes thereof) where workmen working in a shift were below ground for more than seven hours, when any of the workmen of the shift returned to the surface within seven hours from the last workman in the shift leaving the surface.

The justices found (i) that Timberlake and Thomas, on Oct. 14 and 18, 1921, were workmen working in the morning shift at Waleswood Collieries, and that on each of those dates they were each below ground in the mine for the purpose of their work, and of going to and from their work, for more than seven hours, namely, twelve and a half hours; (ii) that, according to the register on Oct. 14, 1921, the lowering of the men on the morning shift commenced at 6 a.m., and was completed at 6.30 a.m., and the raising of that shift commenced at 1.30 p.m. and was completed at 2 p.m. On Oct. 18, 1921, the lowering of the morning shift commenced at 6 a.m. and was completed at 6.30 a.m., and the raising of that shift commenced at 1.30 p.m. and was completed at 2 p.m.; (iii) that on each of those dates some of the workmen working in the same morning shift as Timberlake and Thomas returned to the surface within a period of seven hours after the last workman in that shift left the surface; (iv) that between Oct. 28, 1921, and Nov. 3, 1921, inclusive, namely, on Oct. 28 and 31, 1921, and Nov. 1 and 3, 1921. Timberlake, Thomas, and the few other workmen hereinbefore referred to, were workmen working in the morning shift and were below ground in the mine at Waleswood Collieries for the purpose of their work, and of going to and from their work, for more than seven

- A hours during each consecutive period of twenty-four hours, and that some of the workmen working in each of such shifts returned to the surface within the period of seven hours after the last workman in each such shift left the surface; (v) that no entry was made in the prescribed register kept at the colliery of the fact that any of the said workmen were below ground on any of the said dates for more than seven hours, and of the cause thereof. Having considered *Roger v. Stevenson* (1)
- B the justices came to the conclusion that having regard to the high judicial status of the court which decided that case, its unanimous and emphatic judgment, and the fact that no steps were taken on the passing of the amending Coal Mines Act, 1919, to render that decision ineffective if it was not warranted, they could not accept the appellant's contention that that court had wrongly interpreted s. 1 (2) and s. 2 (1) of the statute, and, as the appellant had failed to satisfy the justices
- C that the respondents had committed the offences alleged against them, they dismissed all the informations.

The Attorney-General (Sir Ernest Pollock, K.C.) and H. M. Givven for the appellant.

Hogg, K.C. and Rabagliati for the respondents.

- D
- LORD HEWART, C.J.**—In this Case Stated the question is raised, under the Coal Mines Regulation Act, 1908, as amended by the Coal Mines Act, 1919, whether, where men are said to be working in a shift, the requirements of the statute are complied with merely because some person or persons working in that shift may be said to have observed the hours fixed by the statute?

- E The two persons referred to in these informations had been working below ground for periods like eleven, twelve, and thirteen hours. It is tolerably obvious, therefore, that the time in excess of that which the statute permits cannot possibly be explained by reference to the time consumed in lowering and raising the shift of workmen, a time which is provided for in sub-s. (4) of s. 1 of the Act of 1908. One of two conclusions is, therefore, apparent—either these men are to be regarded
- F as individuals in which case their period below ground exceeded what is permitted, or, if they are to be labelled "workmen working in a shift," it may be that they began by being workers in a shift and it may be that they so regarded themselves, but on the facts it was not possible to find at the particular time that they were working in a shift so as to comply with the requirements of the Act.

- Attention has been directed to the Scottish case of *Roger v. Stevenson* (1), and it is possible, as has been suggested by the learned Attorney-General, that there is some ambiguity in the facts of that case and in the import of the decision. Speaking for myself, I think that LORD MACKENZIE intended to say that where one is dealing with a shift there can be no contravention of s. 1 (1), of the Act, so long as somebody working in that shift complies with the statutory requirements as to hours. If that is what that judgment was intended to decide, I am not prepared to
- H follow it. I think if that were indeed the case the utility of this Act of Parliament would be, to say the least of it, very seriously impaired. No doubt, if persons are working in a true shift and are complying with the requirements of this Act—among others, the requirement that their hours for beginning and terminating work in the mine are to be approximately the same—no difficulty arises and this question cannot arise. Whether the facts be represented as relating to individual workmen
- I not working in a shift, or to workmen professing to work in a shift, seems to me to matter not. One has to look at the number of hours worked, and, unless the explanation offered is an explanation which the Act permits, it is idle to say that the men were working in a shift. It is true to say in this case that the justices have found as a fact—indeed, I think they expressed it as an agreed fact—that the persons referred to in the informations were workmen working in a shift. If that finding were meant as a finding that in the true sense of the term they were working in a shift, I should be disposed to say that there was no material on which that

finding could properly be based. In the circumstances I think the justices were wrong, and upon those grounds there ought to have been a conviction for conniving at a contravention of the statute, and for failing to cause a register to be kept as required by s. 2 (1) of the Act of 1908. A

BAILHACHE, J.—I am of the same opinion, and there is only one point on which I desire to say a word or two. That turns on s. 1 (2) of the Coal Mines Regulation Act, 1908, which reads in this way : B

“No contravention of the foregoing provisions, [those are the provisions for an eight-hour underground day, altered by the Act of 1919 to a seven-hour underground day] shall be deemed to take place in the case of a workman working in a shift if the period between the times at which the last workman in the shift leaves the surface and the first workman in the shift returns to the surface does not exceed eight hours,” C

now altered to “seven hours.” It has been boldly argued that those words must be taken absolutely literally and without any qualification of any sort or kind, and that what they mean is that no matter how many men there are in a shift, if one comes up within the prescribed period the Act is complied with and there is no contravention of the Act though the rest of the men may remain underground for an indefinite period of time. I entirely dissent from that view of the Act. There seems to be some support for it in the Scottish case to which my Lord has referred. If that case does support that proposition, all that I can say is that I do not agree with it and do not propose to follow it. I understand the Act, as amended, to mean that there is a statutory period of seven hours for being underground, but in the case of a shift it takes some time to get the men down and some time to bring them up, and the time of getting them down and bringing them up is a time to be arranged between the mine manager and the government inspector of mines, and, provided that the men are taken down within those times and brought up within those times, so arranged between the mine manager and the government inspector, there shall be no contravention if the seven hours count from the time when the last man goes down to the time when the first man comes up—not as an individual man but as the first of a shift which is to come up within the time limited for winding the men out. I entirely dissent from the proposition that the adventitious arrival of one man on the surface entitles the owners of the pit to get the other men to remain down for an indefinite period of time. D E F G

SALTER, J.—I am of the same opinion. I think the question is whether these workmen, Timberlake and Thomas, were “workmen working in a shift” within the meaning of s. 1 (2). In working that section out a practical difficulty might arise because, as the men work in gangs or shifts, it takes a considerable time to lower them and to bring them back, and the men do not go below and return in the same order. If it happens that the man first to go below is the last to return to the surface, it would follow that he must be below longer than the prescribed time, or that the rest of the gang must be below for a shorter period than it is desired to enforce. The first part of s. 1 (2) was intended to meet that difficulty, and in order to see what is a shift the whole purpose of the Act must be looked at, as a shift is to go below and to return in fixed periods of time to be settled by authority subject to appeal, and a shift is a body of men whose working hours are approximately the same. Here, as I understand, there was a shift or gang of something over 100 men, and the workman, Timberlake, went below under instructions, which he accepted, not to come up with the rest of the shift between half-past one and two in the afternoon, but to remain below and work overtime for some two hours after the others stopped. In my opinion, it cannot be said that he was a workman whose hours were approximately the same as those of the other men, and H I

A there was no evidence on which the justices could so find. Therefore, s. 2 (1) has no application, and I think there should be a conviction.

Appeal allowed.

Solicitors: *Treasury Solicitor; Johnson, Weatherall & Sturt, for Parker, Rhodes & Co., Rotherham.*

[Reported by J. F. WALKER, ESQ., Barrister-at-Law.]

LOCKHARTS, LTD. v. BERNARD ROSEN & CO., LTD.

[CHANCERY DIVISION (Astbury, J.), February 21, 1922]

[Reported [1922] 1 Ch. 433; 91 L.J.Ch. 321; 127 L.T. 18; 66 Sol. Jo. 350]

D *Sale of Land—Outgoings pending completion—Sale of lease—Assignment subject to landlord's consent and premises being taken "in present condition"—Landlord's consent conditional on premises being repaired—Repairs executed by vendors—Liability of purchasers to indemnify vendors.*

E On the sale of premises, held under a lease by the terms of which the consent of the landlord was necessary to an assignment, the purchasers agreed to purchase at a low price "subject to the consent of the superior landlord and to the premises being taken in their present condition," the premises, to the knowledge of the purchasers, then being in a bad state of repair. No notice to repair had been given by the landlord at the date of the contract, but, on the vendors applying for a licence to assign, the landlord served a schedule of dilapidations with a notice to repair, and refused to grant a licence until the repairs were done. The vendors executed the repairs at a cost of £225.

F **Held:** as from the date of the contract the property, in its existing state of disrepair, belonged in equity to the purchasers and the vendors became trustees for the purchasers to complete the bargain; while the vendors had to expend the £225 on repairs to enable them to show a good title to the property, they had spent that money in doing repairs which under the express terms of the contract and as from its date the purchasers became liable to do themselves; and, therefore, the vendors were entitled to be reimbursed by the purchasers.

G **Notes.** Referred to: *Butler v. Mountview Estates, Ltd.*, [1951] 1 All E.R. 693.

H As to liability to maintain the property sold pending completion see 29 HALSBURY'S LAWS (2nd Edn.) 341-344; and for cases see 40 DIGEST (Repl.) 207-210.

Case referred to:

(1) *Re Taunton and West of England Perpetual Benefit Building Society and Roberts' Contract*, [1912] 2 Ch. 381; 81 L.J.Ch. 690; 107 L.T. 378; 56 Sol. Jo. 688; 40 Digest (Repl.) 140, 1076.

I Also referred to in argument:

Lysaght v. Edwards (1876), 2 Ch.D. 499; 45 L.J.Ch. 554; 34 L.T. 787; 24 W.R. 778; 40 Digest (Repl.) 195, 1579.

Hardoon v. Belilios, [1901] A.C. 118; 70 L.J.P.C. 9; 83 L.T. 573; 49 W.R. 209; 17 T.L.R. 126, P.C.; 43 Digest 761, 2045.

Barnett v. Wheeler (1841), 7 M. & W. 364; 10 L.J.Ex. 102; 151 E.R. 806; 40 Digest (Repl.) 165, 1274.

Re Highett and Bird's Contract, [1903] 1 Ch. 287; 72 L.J.Ch. 220; 87 L.T. 697; 51 W.R. 227; 47 Sol. Jo. 204, C.A.; 40 Digest (Repl.) 199, 1609. A

Re Allen and Driscoll's Contract, [1904] 2 Ch. 226; 73 L.J.Ch. 614; 91 L.T. 676; 68 J.P. 469; 52 W.R. 680; 20 T.L.R. 605; 48 Sol. Jo. 587; 2 L.G.R. 959, C.A.; 40 Digest (Repl.) 209, 1701.

Action for specific performance.

In January, 1921, the plaintiffs, Lockharts, Ltd., held certain premises, No. 54, Victoria Dock Road, Canning Town, Essex, under a lease dated Feb. 1, 1888, for a term of fifty years from June 24, 1886, at the yearly rent of £85, under which lease the consent of the landlord to an assignment was necessary. Lockharts, Ltd., had placed the premises in the hands of John Lloyd & Sons, house agents, to obtain a purchaser of the residue of the lease, and they had an application from the defendants, Bernard Rosen & Co., Ltd., who made an offer of £150. The defendants had previously instructed a surveyor to inspect the premises who reported to them. On Jan. 4, 1921, the secretary to the plaintiff company wrote to John Lloyd & Sons a letter in which he said:

"I am now in a position to inform you that my directors are prepared to accept the offer of Messrs. Bernard Rosen & Co., Ltd. of £150 for an assignment of their premises, 54, Victoria Dock Road, subject to the consent of the superior landlord, and to the premises being taken in their present condition."

On Jan. 11 the defendants' solicitor informed the plaintiffs' secretary that his clients were prepared to take an assignment of the lease, and those letters were taken by the parties to constitute a contract for the sale of the residue of the lease, and an abstract of title was duly delivered by the plaintiffs' solicitors to the defendants' solicitor. On Jan. 21 the plaintiffs' solicitors wrote to the superior landlord asking for his consent to the assignment of the lease, and his solicitors replied that before they could advise the consent being given they must make an inspection of the property to ascertain that the covenants of the lease had been duly observed. The property was in a very bad state of repair. On Feb. 2 the solicitors of the landlord served on the plaintiffs notice of breach of covenant with a schedule of dilapidations, and declined to grant the licence until the repairs were done. On Feb. 4 the secretary to the plaintiffs wrote to the defendants telling them that the plaintiffs had been served with a schedule of dilapidations which they enclosed, and stating that the landlord's consent to the assignment would be withheld until the notice to repair the dilapidations had been complied with. The letter continued:

"I would remind you that my directors only agreed to accept the low sum of £150 in consideration of the fact that they were not to lay out any money on the premises, but that you were to take them in their present condition. Under these circumstances I shall be glad to hear that you are prepared to have the repairs executed forthwith. When the landlords are satisfied the licence will be granted, and the matter can then be at once completed between us."

The defendants' solicitor wrote to the plaintiffs' solicitors on Feb. 7 stating that the contract did not render the defendants liable for heavy dilapidations, and that the defendants were not prepared to do any repairs to the premises, and that unless the plaintiffs did the repairs he should have no alternative but to advise his clients to issue a writ for specific performance of the contract. A long correspondence ensued between the respective solicitors, in which the plaintiffs' solicitors contended that the defendants were well aware that the premises were in a bad state of repair, and that the landlord might require the dilapidations to be repaired at any time, when they agreed to take the premises in their present condition, while the defendants' solicitor contended that the defendants were not liable to do the repairs, and also that the correspondence did not constitute a valid contract. The plaintiffs were pressed by their landlord to do the repairs, which they did at the cost of £225. On completion of the repairs the landlord, on the June 20, 1921, granted a licence

A for the assignment. On June 21 the plaintiffs issued the writ in this action for
specific performance, and by their statement of claim claimed specific performance
on the footing that the costs and expenses incurred by them in complying with the
landlord's notice to repair and the rent and other outgoings in respect of the
premises since Feb. 1 ought to be borne and paid by the defendants. The defend-
ants by their defence denied any liability to pay the £225 claimed by the plaintiffs,
B and alleged that the plaintiffs could not make a good title until they had done the
repairs, and that they were not liable to perform the agreement, and they also
pleaded the Statute of Frauds. In the course of the argument ASTBURY, J., de-
cided that the letters constituted a valid contract..

Luxmoore, K.C. and R. H. Hodge for the plaintiffs.

C *W. F. Swords* for the defendants.

ASTBURY, J.—This is a specific performance action, which raises a short but
extremely interesting point. The plaintiffs and the defendants by certain letters in
January, 1921, entered into an agreement that the defendants should buy from the
plaintiffs, for a sum of £150, certain leasehold premises, known as 54, Victoria
Dock Road, Canning Town, for the remainder of the term for which they were
then held, and take the assignment of them, subject to the consent of the superior
landlord being obtained, and to the premises being taken in their then existing
condition. The premises were inspected by the defendants, and they had had a
report made upon their condition prior to the conclusion of the contract. The defend-
ants, obviously from what I have said, knew that these were leasehold premises,
knew that there was a superior landlord, and knew that the premises inside and
outside were in a bad and unsatisfactory state of repair, and they must be taken to
E have known that the plaintiffs were agreeing to sell them for a much smaller sum
than they otherwise would have done, by reason of that fact. The title was
approved, the draft assignment was approved, and everything was ready for com-
pletion, when the plaintiffs, who had asked for the consent of the superior land-
lord to the assignment, received from him a notice of dilapidations by reason of
F the property not having been kept in repair in accordance with the covenants of
the lease, refusing his consent to a licence to assign until the repairs had been
done, and threatening a forfeiture in the event of their not being carried out.
In these circumstances, the plaintiffs' solicitors wrote and informed the defendants'
solicitor of what had transpired and on Feb. 7, 1921, received the letter of that date.
G There were a large number of further letters which passed between the parties, and
ultimately the plaintiffs completed the necessary repairs at a cost of £225, obtained
the licence to assign, and called upon the defendants to carry out their contract.
That the defendants refused to do, and this action is the result. The defendants,
in their defence rely on the Statute of Frauds, in respect of which I think they are
wrong, and they deny liability specifically to perform this contract or to indemnify
the plaintiffs in respect of their outlay on the repairs. The plaintiffs have, in
H addition to the repairs paid rates and taxes on the premises since the date of the
contract amounting to £85. They ask for specific performance of the agreement
on the footing that the costs, expenses and payments which they have incurred and
made, amounting in all to £310, ought to be borne by the defendants in addition
to the purchase money.

I The point in issue is by no means an easy one to determine. There is no
express agreement on the plaintiffs' part to make a good title, but, except for such
relief from being compelled to do so as must be inferred from the agreement on the
part of the defendants to take the premises in their then existing state of repair and
condition, the plaintiffs are bound, in my judgment, under this otherwise open
contract to make and show a good title. They say, however, with regard to the
repairs, that the effect of the agreement was that, as from its date, they should be
under no obligation to spend any further sums on the repair of the premises, but
that that burden should be taken over by the defendants, involving a liability on

their part to indemnify the plaintiffs against any such risk or obligation. To A
enable the plaintiffs to obtain, as they were bound to obtain if they could, the
licence by the landlord permitting them to assign these premises, and thus carry
out their contract with the defendants, they had to execute the repairs which B
were necessary by reason of the property, as was known to the defendants, having
fallen into disrepair. The execution of the repairs, therefore, became a term on
which, and on which alone, they could carry out their contract, and obtain the
consent of the superior landlord, and thus show, as they were bound to show, if
they could, a good title, irrespective of the non-repair of the premises. As from the
date of the contract, this property belonging in equity, in its existing state of
disrepair, to the defendants, and the plaintiffs became, as from that date, trustees
for the defendants to complete the bargain that they had made. It is quite true that C
in one sense the plaintiffs had to expend £225 on repairs in obtaining a title to the
property, because they could not assign it without the landlord's consent but, on
the other hand, they had expended the money in doing those repairs which under
the express terms of this contract, and as from its date, the defendants became
liable to do themselves. I think that the defendants were liable, as from the date of
their bargain, to indemnify the plaintiffs against liability to put the property into D
any state of repair, other than that in which the defendants agreed to purchase it.
For instance, it would not, I think, have been open to the defendants to say to the
plaintiffs after the notice for dilapidations had been served by the superior landlord :
"We will prevent you obtaining the licence to assign, which you are bound to
obtain in order to carry out your contract, by refusing to take the burden we have
agreed to take, and hold you liable in damages for breach of contract."

E
Counsel for the defendants has cited a number of authorities which are decisions
to the effect that when a vendor has entered into an express contract to produce
a good title, he is bound to do so, although the purchaser at the time of the sale
was aware of there having been a previous breach of contract, but, where there
is no express contract to make a good title, and the purchaser has notice at the
date of the contract of a breach of the vendor's obligations under his lease, he
cannot rely upon this breach as excusing him from performance. The authorities F
relied upon are summed up and referred to by PARKER, J., in *Re Taunton
and West of England Perpetual Benefit Building Society and Roberts' Contract* (1).
I think, on the whole, that the plaintiffs, as trustees for the defendants, have ex-
pended moneys which, under the express terms of this contract and the true in-
ference to be drawn from those terms, the defendants themselves became liable
as from its date, to pay and to indemnify the plaintiffs against them. That being so, G
I think the plaintiffs are entitled to succeed, and there must be judgment for
specific performance in accordance with the claim, with costs.

Solicitors : *Biddle, Thorne, Welsford & Gait; J. E. Holloway-Pike.*

[Reported by E. K. CORRIE, ESQ., Barrister-at-Law.]

A

WHITE AND ANOTHER v. WILLIAMS

[COURT OF APPEAL (Bankes, Atkin and Younger, L.JJ.), February 24, 1922]

[Reported [1922] 1 K.B. 727; 91 L.J.K.B. 721; 127 L.T. 231;
38 T.L.R. 419; 66 Sol. Jo. 405]B *Sale of Land—Profit à prendre—Inclusion in conveyance—Right to depasture sheep—Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 6 (1).*

By s. 6 (1) of the Conveyancing Act, 1881 [now s. 62 of the Law of Property Act, 1925]: "A conveyance of land shall be deemed to include and shall . . . operate to convey, with the land, all . . . liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land or any part thereof." Section 6 (2) contains the same words with reference to a conveyance of land "having houses or other buildings thereon."

C

Held: the words were apt to pass to a purchaser a profit à prendre in alieno solo, and, consequently, to pass to the purchaser of a farm the right to depasture sheep on a sheepwalk in the ownership of another, and that even though the right was only exercised intermittently and temporarily.

D

Notes. Referred to: *Long v. Gowlett*, [1923] All E.R. Rep. 335; *Wright v. Macadam*, [1949] 2 All E.R. 565.

As to profits à prendre see 12 HALSBURY'S LAWS (3rd Edn.) 620 et seq.; and for cases see 19 DIGEST 196 et seq. For Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

E Case referred to:

(1) *International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165; 72 L.J.Ch. 543; 88 L.T. 725; 51 W.R. 615; 19 Digest 37, 193.

Also referred to in argument:

Gateward's Case (1607), 6 Co. Rep. 59 b; 77 E.R. 344; sub nom. *Smith v. Gatewood*, Cro. Jac. 152; 19 Digest 204, 1556.

F

Weekly v. Wildman (1698), 1 Ld. Raym. 405; 91 E.R. 1169; 19 Digest 204, 1557.

Doidge v. Carpenter (1817), 6 M. & S. 47; 105 E.R. 1160; 11 Digest (Repl.) 29, 367.

Blewett v. Tregonning (1835), 3 Ad. & El. 554; 1 Har. & W. 431; 5 Nev. & M.K.B. 234; 4 L.J.K.B. 223; 111 E.R. 524; 19 Digest 204, 1562.

G

Dyce v. Lady Hay (1852), 1 Macq. 305, H.L.; 19 Digest 16, 42.

Race v. Ward (1855), 4 E. & B. 702; 3 C.L.R. 744; 24 L.J.Q.B. 153; 24 L.T. O.S. 270; 19 J.P. 563; 1 Jur. N.S. 704; 3 W.R. 240; 119 E.R. 259; 19 Digest 145, 997.

Constable v. Nicholson (1863), 14 C.B.N.S. 230; 2 New Rep. 76; 32 L.J.C.P. 240; 11 W.R. 698; 143 E.R. 434; 11 Digest (Repl.) 21, 244.

H

Polden v. Bastard (1865), L.R. 1 Q.B. 156; 7 B. & S. 130; 35 L.J.Q.B. 92; 13 L.T. 441; 30 J.P. 73; 14 W.R. 198, Ex.Ch.; 19 Digest 20, 60.

Kay v. Oxley (1875), L.R. 10 Q.B. 360; 44 L.J.Q.B. 210; 33 L.T. 164; 40 J.P. 277; 19 Digest 35, 176.

Lord Rivers v. Adams (1878), 3 Ex.D. 361; 48 L.J.Q.B. 47; 39 L.T. 39; 42 J.P. 728; 27 W.R. 381; 19 Digest 205, 1568.

I

Goodman v. Saltash Corpn. (1882), 7 App. Cas. 633; 52 L.J.Q.B. 193; 48 L.T. 239; 47 J.P. 276; 31 W.R. 293, H.L.; 19 Digest 56, 322.

Taws v. Knowles, [1891] 2 Q.B. 564; 60 L.J.Q.B. 641; 65 L.T. 124; 56 J.P. 68, sub nom. *Taws v. Knowles*, 39 W.R. 675, C.A.; 19 Digest 39, 209.

Baring v. Abingdon, [1892] 2 Ch. 374; 62 L.J.Ch. 105; 67 L.T. 6; 41 W.R. 22; 8 T.L.R. 576; 36 Sol. Jo. 522, C.A.; 11 Digest (Repl.) 11, 93.

Haig v. West, [1893] 2 Q.B. 19; 62 L.J.Q.B. 532; 69 L.T. 165; 57 J.P. 358; 4 R. 396, C.A.; 11 Digest (Repl.) 82, 1021.

Quicke v. Chapman, [1903] 1 Ch. 659; 72 L.J.Ch. 373; 88 L.T. 610; 51 W.R. 452; 19 T.L.R. 284, C.A.; 19 Digest 37, 191. A

Lord Chesterfield v. Harris, [1908] 2 Ch. 397; 77 L.J.Ch. 688; 99 L.T. 558; 24 T.L.R. 763; 52 Sol. Jo. 639, C.A.; affirmed sub nom. *Harris v. Earl of Chesterfield*, [1911] A.C. 623; 80 L.J.Ch. 626; 105 L.T. 453; 27 T.L.R. 548; 55 Sol. Jo. 686, H.L.; 19 Digest 207, 1577. B

Appeal by the plaintiffs from an order of a Divisional Court of the King's Bench Division (HORRIDGE and SHEARMAN, JJ.), affirming an order of the Portmadoc County Court, Carnarvonshire.

The plaintiffs were the owners as tenants in common in fee simple in possession of the mountain sheepwalk known as Cwm-yr-haf, or Craig Goch, in the parish of Dolbenmaen in the county of Carnarvon containing by admeasurement 772 acres, 1 rood, and 36 perches or thereabouts, and they alleged that on June 24, 1920, the defendant by herself, her servants or agents broke and entered the said land and depastured the same with 250 sheep. The plaintiffs claimed damages for damage to herbage caused by the said sheep between June 24, 1920, and before action brought at the rate of 1s. 6d. per head, £25, an injunction restraining the defendant her servants and agents from any repetition of the acts complained of, and declaration that the defendant was in no way entitled to depasture sheep or other animals on the sheepwalk without the consent and approval of the plaintiffs. The defendant claimed the right to depasture her sheep on Cwm-yr-haf as appurtenant to her farm known as Rhwng-y-ddwy-afon, which was conveyed to her by a deed of May 1, 1908. She claimed that this right, being appurtenant to the farm, passed to her by virtue of s. 6 of the Conveyancing Act, 1881 [now Law of Property Act, 1925, s. 62], which provided : C D E

“(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof. (2) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed. . . . F G

(3) A conveyance of a manor shall be deemed to include . . . all pastures, feeding, wastes, warrens, commons, mines, minerals, quarries . . . fishings, fisheries . . . liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain” H

The title of the parties as disclosed by the evidence in the county court was as follows. On Aug. 20, 1907, a portion of the Brynkir Estate, Carnarvonshire, was offered for sale by auction in lots at Criccieth by the Rev. G. A. W. Huddart and C. R. French, the trustees of the will of G. A. Huddart then deceased. The property was offered in lots. Lot 6 consisted of an upland farm with farmhouse and out-buildings known as Rhwng-y-ddwy-afon and about 337 acres of land. The particulars of sale contained the following statements : I

“(a) The right of sheep pasturage hitherto enjoyed by this holding in common with others on Craig Goch or Cwm-yr-haf and Ffridd Cwm-yr-haf sheepwalk (now forming part of lot 8) is included in this lot, and this lot is sold with the benefit of the same. (b) The minerals underlying Nos. 185 and 213 [—Ffridd

A bach Mynydd, 7 acres, 2 roods, 17 perches, and Ffrydd Mynydd, 16 acres and 24 perches—] in this lot are claimed by the Crown. . . .”

No. 9 of the Conditions of Sale provided that the several lots were sold subject to the rights and claims mentioned in the particulars and to all Crown, quit, fee farm, chief, and other rents, rights of way, water light, and other easements, and to all claims of the Crown to mines and minerals, and that :

B “The rights of pasturage over the sheepwalk 786, 786a, and 787 [i.e., Cwm-yr-haf sheepwalk] part of lot 8, now enjoyed by the occupiers of lots 1, 2, 5, and 6, are intended to be secured in perpetuity for the benefit of those lots and accordingly lot 8 is sold and will be conveyed subject to such rights and to all similar rights referred to in the particulars but the vendors shall not be required to

C give particulars of the nature or extent of such rights or to make any grant or conveyance thereof to the purchasers of lots 1, 2, 5 and 6.”

At this auction E. E. Roberts, the brother of the defendant Margaret Williams, became the purchaser of lot 6. By an indenture dated Nov. 9, 1907, G. A. W. Huddart and C. R. French as trustees conveyed to E. E. Roberts Rhwng-y-ddwy-afon and the premises, “which said premises constituted lot 6 at the sale by auction

D at Criccieth, North Wales, on Aug. 20, 1907, of the remaining portions of the Brynkir Estate,” to hold all the said hereditaments and premises to the said E. E. Roberts, his heirs and assigns for ever. By an indenture, dated May 1, 1908, the said E. E. Roberts conveyed the farmhouse Rhwng-y-ddwy-afon and the 337 acres aforesaid to the defendant Margaret Williams in fee simple. Lot 8 was not

E sold at the auction in August, 1907, but the lands and hereditaments comprised in that lot were sold in 1913 by private treaty to one D. W. Owen, and by an indenture dated Aug. 2, 1913, the then trustees of the estate of G. A. Huddart conveyed Tydden Mawr and 447 acres and the sheepwalk known as Cwm-yr-haf or Craig Goch containing about 772 acres to hold the said premises unto and to the use of D. W. Owen in fee simple. By an indenture dated Mar. 26, 1920, and made between D. W. Owen, of the one part, and the plaintiffs of the other part, it was

F witnessed that in consideration of the sum of £100, paid by the plaintiffs, D. W. Owen, as beneficial owner, conveyed to the plaintiffs

“Firstly, all that mountain sheepwalk known as Cwm-yr-haf or Craig Goch in the parish of Dolbenmaen in the county of Carnarvon containing by ad-

G measurement 772 acres, 1 rood, 36 perches or thereabouts with the appurtenances thereto belonging . . . to hold the same unto and to the use of [the plaintiffs] in fee simple as tenants in common subject to all rights of way or common or other easements (if any) affecting the same.”

The county court judge gave judgment for the defendant. The plaintiffs appealed to the Divisional Court, who dismissed the appeal, and they now appealed to the Court of Appeal.

H *J. E. G. de Montmorency*, for the plaintiffs.

Montgomery, K.C. and *T. E. Morris*, for the defendant, were not called on to argue.

BANKES, L.J.—The action was for an alleged trespass in depasturing sheep upon a sheepwalk of which the plaintiffs said that they were the owners. They claimed

I damages and an injunction, and a declaration that the defendant was not entitled to put her sheep on this ground.

In 1907 there was offered for sale by auction an estate consisting of a number of upland farms the tenants of which, together with the tenants holding under an adjoining landowner, claimed the right to depasture sheep on this sheepwalk. The defendant's predecessor in title bought one of these farms, specified as lot 6 in the particulars of sale exhibited at the auction. It was conveyed to the purchaser, Edward Ellis Roberts, by a deed dated Nov. 19, 1907, and was described

therein by its Welsh name of Rhwng-y-ddwy-afon with several pieces or parcels of land containing in all about 337 acres, A

"which said premises constituted lot 6 at the sale by auction at Criccieth, North Wales, on Aug. 20, 1907, of the remaining portions of the Brynkir estate."

Another portion of the estate, lot 8, was also offered, but was not sold at this auction. It consisted of another farm and of the sheepwalk in question. It was subsequently sold to the predecessor in title of the plaintiffs, and the sheepwalk was finally conveyed to the plaintiffs for a consideration of £100 by deed of Mar. 26, 1920, in which it was described as : B

"All that mountain sheepwalk known as Cwm-yr-haf or Craig Goch in the parish of Dolbenmaen in the county of Carnarvon containing by admeasure-ment 772 acres, 1 rood, 36 perches, or thereabouts with the appurtenances thereto belonging which premises are delineated in the plan annexed to these presents." C

There follow certain parcels to which I need not refer, and then there is this reservation :

"Save and excepting all rights and (sic) turbary or common (if any) up to Mar. 14, 1890, enjoyed by the occupier of the said premises on other lands then belonging to Sir Hugh John Ellis Nanney, Baronet, And also save and excepting thereout all ores mines minerals coal limestone or slate and all rights powers and privileges reserved in or affecting the said premises by virtue of any Act of Parliament or award thereunder." D

The habendum is as follows : E

"To hold the same unto and to the use of the purchasers in fee simple as tenants in common subject to all rights of way or common or other easements (if any) affecting the same." F

The learned county court judge held that he was entitled to look at the particulars of sale, as they were expressly referred to in the conveyance to the defendants predecessor in title. He also had before him parol evidence of the exercise of a right of pasture on the sheepwalk by occupiers of farms held under adjoining landowners. In these circumstances he came to the conclusion that the particulars of the sale by auction at Criccieth on Aug. 20, 1907, were sufficiently referred to in the conveyance of Nov. 19, 1907, to Edward Ellis Roberts to entitled the defendant to put them in evidence. That is a matter of law and, in my opinion, the learned judge was quite right. Secondly, he finds G

"that the right of depasturing sheep on Craig Goch was a right at all times appertaining to Rhwng-y-ddwy-afon farm and had always been exercised and enjoyed with and reputed and known as appurtenant to the farm." H

I think the evidence before the learned judge justified him in coming to that conclusion. He continues, H

"And, therefore, by virtue of the Conveyancing Act, 1881, s. 6, it passed under the deeds of Nov. 19, 1907, and May 1, 1908, to the grantees without specific mention. . . ."

This raises the only question of law discussed before us—namely, whether the learned judge was justified in holding that the right so described by him passed under the general words in s. 6 (1) of the Conveyancing Act, 1881 : I

"all privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof."

Counsel for the plaintiffs argued that the Court ought not to include in those general words any right of the nature of a profit à prendre—that it would be

- A against public policy to do so. The right in question is a right to depasture sheep upon what is known in Wales as a sheepwalk, that is, mountain land adjoining an upland farm and for myself, unless there is some authority to the contrary which I am bound to follow, I am prepared to hold, and I do hold, that the general words in s. 6 are quite wide enough to include, and do include, the particular right claimed in this action.
- B The learned judge, whose opinion is of great weight in these matters, clearly indicates that in his view Mr. Huddart, the common predecessor in title of both these parties, was not the absolute owner in fee simple of Craig Goch, the piece of land over which this right is claimed, but that it was either Crown land or common land upon which Mr. Huddart had merely the right with others to depasture sheep. It is not necessary to express an opinion upon this point, and I base my judgment on the other conclusions of the learned judge and on his findings of fact included therein. Those findings could only be questioned on the ground that there was no evidence, and, in my opinion, there was ample evidence, to support them. For these reasons I think this appeal should be dismissed.

- ATKIN, L.J.—I agree. The defendant and her husband before her had been tenants of a Welsh farm and during the tenancy had enjoyed the right of pasturing sheep upon an extensive sheepwalk of nearly 800 acres. This right had been enjoyed in common with the tenants of some eight or nine other farms, some of them belonging to the defendant's landlord, Mr. Huddart, and some of them to another landed proprietor. Mr. Huddart was formerly the owner of this farm. He was also the owner of the sheepwalk, subject to such rights, if any, as existed in other persons. His trustees put up the whole property for sale by auction. The particulars and conditions of sale show a clear intention to pass to the purchaser of this farm the right of depasturing sheep over the sheepwalk which had been enjoyed by former tenants of the farm. The farm was in fact sold to a brother of the defendant, and there cannot be the least doubt of the vendor's intention that the purchaser should continue to enjoy the rights which the tenant had, so far as is known, always enjoyed. The particulars of sale also recognise the rights of the tenants of farms other than those owned by the vendors to exercise rights of pasturage over this sheepwalk and make it one of the terms of the sale of the sheepwalk that it is subject to these rights. Thereupon a conveyance was executed to the defendants brother and predecessor in title.

- Counsel for the plaintiffs says that it will be a black day for conveyancing if a right like this should pass to a purchaser under the general words introduced into conveyances by s. 6 of the Conveyancing Act, 1881. To my mind it would be a still blacker day if such a right did not pass under those words, because anything more contrary to justice could hardly be imagined. In my view, if the common predecessor in title was the unrestricted owner in fee simple both of the farm and of the land over which this right of pasture is claimed, and if there were no common or quasi-common rights over the land, so that the right which he in fact exercised of depasturing sheep upon the land was included in his rights as owner in fee simple of both the farm and the land, the general words in s. 6 would still be sufficient to pass to the purchaser of the farm the right of depasturing sheep upon the land. Such a right is well known to the law and quite capable of being granted when a hereditament is severed.)

- I I think that is enough to dispose of this case. But the learned county court judge, whose experience gives great weight to his opinion, came to the conclusion that the plaintiffs had failed to prove that Mr. Huddart was in fact the unrestricted owner in fee simple of the land, inasmuch as his acts of ownership were consistent with his merely having a right of common or pasturage over it. The particulars and conditions of sale, which are obviously admissions against him, and the evidence given in the county court confirming those admissions—namely, that tenants of other farms had exercised rights of pasturage over this sheepwalk—constitute a

considerable body of evidence in favour of the learned judge's conclusion. For these reasons I think that this appeal should be dismissed. A

YOUNGER, L.J.—I am of the same opinion. In 1907 the trustees of the will of Mr. G. A. Huddart were trustees for sale of this Welsh estate, which consisted, among other things, of several farms, and this hereditament which has been called the "sheepwalk." The trustees offered a portion of the estate, including the farms and the sheepwalk, for sale by auction in 1907 in lots under particulars and conditions of sale, and the defendant's predecessor in title became the purchaser at the auction of lot 6, consisting of a farm and land which were conveyed to him by a deed of Nov. 19, 1907, in which the hereditaments conveyed were comprehensively further described as follows : B

"which said premises constituted lot 6 at the sale by auction at Criccieth, North Wales, on Aug. 20, 1907, of the remaining portions of the Brynkir estate." C

The effect of this description is to introduce the relevant particulars of sale at the auction as the source from which more precise information as to the property thereby intended to be conveyed may be derived. On referring to these particulars it is found that lot 6 included a right of pasturage over the sheepwalk which was "intended to be secured in perpetuity for the benefit of (inter alia) lot 6." The county court judge has found that at the date of this conveyance there existed "the right of depasturing sheep on Craig Goch," that is on the sheepwalk, that it was "a right at all times appertaining to the farm included in lot 6," and that it "had always been exercised and enjoyed with and reputed and known as appurtenant to the farm." Therefore, that was what the purchaser of lot 6 was intended to have, and the only question is whether the conveyance of Nov. 19, 1907, gave it to him. D

By s. 6 of the Conveyancing Act, 1881, that conveyance gave the purchaser, unless a contrary intention was therein expressed (and it is agreed that no such intention is there expressed), among other things, all E

"commons, liberties, privileges, rights, and advantages whatsoever appertaining or reputed to appertain to the land, or any part thereof," F

and the conveyance is to be read as if those words were included in the parcels conveyed. Did this right of depasturing so described by the learned judge pass by a conveyance including those words? So put, the question admits of only one answer. Take the words used in s. 6, commons, privileges, rights, advantages : what more apt words could be found to describe this right of depasturing found by the county court judge to have existed at the date of the conveyance—a right, moreover, plainly intended to be conveyed, as is shown by the particulars of sale. So experience a conveyancer as counsel for the plaintiffs did not, and could not, deny that this right would pass by a conveyance which referred to it in terms. In my opinion, no description in terms of this particular right could be more effective to convey it than the words which I have quoted from the Conveyancing Act. If that be so, it follows from counsel's admission that the right passed under the deed of Nov. 19, 1907. G

The only possible objection that can be urged against this conclusion is the broad proposition that never, under the general words imported into conveyances by s. 6 of the Conveyancing Act, 1881, can a *profit à prendre* in alieno solo pass to a purchaser. In answer to that objection I say with BANKES, L.J., that, unless authority is produced to support it, I am not prepared to accede to it. I cannot think the contention so broadly stated is well founded. Counsel for the plaintiffs also contended that the right does not pass under the general words, because it was only exercised from time to time. He did not deny that there had been an intermittent user. I doubt whether we can enter upon this question in view of the finding of the county court judge; but even if no more than an intermittent and temporary user H I

A had been exercised, the right would, nevertheless, in my opinion, be included within these words in s. 6, because it is a right known to the law and, that being so, it matters not, so far as s. 6 of the Conveyancing Act is concerned, whether the user is continuous and permanent or permissive and precarious: *International Tea Stores Co. v. Hobbs* (1).

B There is one further aspect of this case. The sheepwalk itself was not sold at the auction in 1907, but was sold about six years later by Mr. Huddart's trustees to the plaintiffs' predecessor in title to whom it was conveyed by deed of Aug. 2, 1913. This appears to have been an out-and-out conveyance of the sheepwalk without qualification or reservation and without reference to any rights therein enjoyed or exercisable by other persons. But I do not doubt that the purchaser had full notice of those rights. At any rate, the plaintiffs have always had full notice of them, C because the conveyance to them of Mar. 26, 1920, is expressed to be made subject to the rights of common exercise by other persons over this land. Accordingly, it is clear, first, that this right was intended to be conveyed to and enjoyed by the purchaser of lot 6, and, secondly, that the plaintiffs took with full notice of it. In my opinion, therefore, this appeal must be dismissed.

Appeal dismissed.

D Solicitors: Griffith & Son, for Maddocks, Ogden & Co., Coventry; Jaques & Co., for O. Robyns Owen, Pwllheli.

[Reported by W. C. SANDFORD, Esq., Barrister-at-Law.]

E

F YANDLE & SONS v. SUTTON. YOUNG v. SUTTON

[CHANCERY DIVISION (Sargant, J.), April 4, 5, 6, 1922]

[Reported [1922] 2 Ch. 199; 91 L.J.Ch. 567; 127 L.T. 783]

G *Sale of Land—Contract—Rescission—Defect in quality of land—Right of way—Patent or latent defect—Indication of private way—Existence of public way.*

H It is undoubted that in the case of a sale of land the rule caveat emptor applies where there is a patent defect in the quality of the land, and then the purchaser cannot because of it object to the title. The purchaser takes what he sees and is not entitled to have anything better than that which he sees. The existence of a right of way over the land is not a defect in itself. It is, or may be, a defect only as indicating the existence of rights in other persons.

I The physical condition of the way may be such as necessarily to indicate that there is a right of way over the land, and in such a case the purchaser who has bought the land after seeing it is bound to take it subject to that patent right. But if the way is not of such a nature as to indicate that there must necessarily be a right of way over it, the purchaser, only seeing something which might or might not indicate the existence of rights in others, is not bound to take the property subject to a public or private right of way if it is of such a nature as to be a fundamental objection to the property. It would not be fair to hold that a purchaser is to be subjected to all the rights which he might have discovered if he had pursued an inquiry based on that which was presented to his eye. He is only liable to take the property subject to those defects which are patent to the eye, including those defects which are a necessary consequence of something which is patent to the eye.

If the condition of the land were such as necessarily to indicate a private right of way, but not a public right of way, a purchaser who discovered after his purchase that there was a public right of way over the property might, if such a public right of way was distinctly more onerous than a private right of way, be entitled to rescind, or, at any rate, to resist a demand for specific performance.

Notes. Referred to: *Simpson v. Gilley* (1922), 92 L.J.Ch. 194.

As to defects in the quality of land see 29 HALSBURY'S LAWS (2nd Edn.) 248-256; and for cases see 40 DIGEST (Repl.) 45 et seq.

Cases referred to:

- (1) *Oldfield (or Bowles) v. Round* (1800), 5 Ves. 508; 31 E.R. 707, L.C.; 40 Digest (Repl.) 46, 281.
- (2) *Shackleton v. Sutcliffe* (1847), 1 De G. & Sm. 609; 10 L.T.O.S. 411; 12 Jur. 199; 63 E.R. 1217; 40 Digest (Repl.) 155, 1196.
- (3) *Ashburner v. Sewell*, [1891] 3 Ch. 405; 60 L.J.Ch. 784; 65 L.T. 524; 40 W.R. 169; 7 T.L.R. 736; 40 Digest (Repl.) 95, 723.

Also referred to in argument:

- Shepherd v. Croft*, [1911] 1 Ch. 521; 80 L.J.Ch. 170; 103 L.T. 874; 40 Digest (Repl.) 48, 299.
- McGrory v. Alderdale Estate Co.*, [1918] A.C. 503; 87 L.J.Ch. 435; 119 L.T. 1; 62 Sol. Jo. 518, H.L.; 42 Digest 556, 1196.
- Dyer v. Hargrave*, *Hargrave v. Dyer* (1805), 10 Ves. 505; 32 E.R. 941; 40 Digest (Repl.) 46, 285.
- Denny v. Hancock* (1870), 6 Ch. App. 1; 23 L.T. 686; 35 J.P. 295; 19 W.R. 54; L.J.J.; 42 Digest 484, 512.

Witness Actions by vendors for specific performance of contracts for the sale of land.

On Mar. 30, 1921, F. T. Young, the plaintiff in the second action, agreed in writing to sell and the defendant, Sutton, to purchase a field called South Hill at Somerton, Somersetshire. The price was £250 and £10 for the timber. On Apr. 7, 1921, the plaintiff Young, as agent for the plaintiffs in the first action, agreed in writing to sell, and the defendant, Sutton, agreed to purchase a plantation called Harding's Stile Plantation immediately to the south of South Hill. The price was £100. Both the agreements were open contracts. From the north-east corner of South Hill to the south-west corner of Harding's Stile Plantation there was a public right of way across both the field and plantation, starting from a public highway at a heavy iron gate. This right of way was an unmetalled and somewhat irregular track. Where it left South Hill and entered Harding's Stile Plantation there was a stone stile. When the path left Harding's Stile Plantation at the south-west corner it continued over some adjoining fields, and ultimately emerged on another highway. The defendant inspected the property in company with the plaintiff Young before he had entered into either of the contracts. He declined to complete both contracts alleging that the public right of way was a defect in both titles, and the plaintiffs started these proceedings for specific performance and damages. The plaintiffs in their statements of claim alleged, first that the right of way was obvious to anyone on inspection; and, secondly, that on Mar. 30 the plaintiff Young had called the defendant's attention to it, and the defendant had expressed himself satisfied. Both these allegations the defendant denied, and he counterclaimed for cancellation of the contracts and return of the deposits. The actions were tried together. On the evidence the learned judge came to the conclusion that the plaintiff Young had not drawn the defendant's attention to the right of way on Mar. 30, and the case is reported on the question whether the right of way was a latent or a patent defect.

Alexander Grant, K.C. and *Russell Gilbert* for the plaintiffs.

Greene, K.C. and *Warwick Draper* for the defendant.

A **SARGANT, J.**—These are two actions which have been tried together. The substantial defence to both is that the field and plantation were bought together for the purpose of being used by the defendant as a site for a residence which he was intending to build, and that there is running across the field and the plantation a public footpath.

B Of course, if there was no knowledge at all on the part of the defendant of the existence of the public footpath, that would be a good objection to the title. No one who buys the unencumbered fee simple of a piece of land can have forced on him land which is subject to a public right of way. What is said on behalf of the vendors is, first, that the public right of way was expressly pointed out to the defendant, Mr. Sutton, by Mr. Young, who acted as vendor on his own account, in respect of the field, and as agent of Messrs. Yandle & Sons in respect of the plantation.

C It is said that it was expressly pointed out to the defendant on the occasion of his visit to the property when he agreed to buy it. Secondly it is said that even if that were not so, yet, inasmuch as there is in existence over the field and plantation a defined track, reaching in the case of the field from an iron gate on the north to a stone stile on the south, and reaching in the case of the plantation from the stone stile, which is on the north of the plantation, to the south of the plantation, the right of way constitutes a patent defect subject to which the purchaser takes. It is undoubted that in the case of a patent defect, the rule caveat emptor applies. The purchaser takes which he sees, and it not entitled to have anything better than that which he sees. [His Lordship examined the evidence with regard to the question whether the right of way was expressly pointed out to the defendant, and decided that there was no express mention to the purchaser of the existence of the way, either over the field or over the plantation.]

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I now come to a more difficult question. Was there such a physical indication of the existence of a public right of way over the field and plantation as amounted to a patent defect—that is, a defect obvious to the purchaser at the time of his purchase? On that point the evidence is that there was across the field a definite track or path, not a metalled track but a worn track across the grass, not a very regular track, but still a track sufficient to call the attention of anybody who looked with ordinary care at the field to the fact that persons were in the habit of passing in a defined line from the iron gate on the north down to the stone stile on the south.

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The evidence is that on Mar. 30, 1921, Mr. and Mrs. Sutton were driven over the field, but they were then looking at the surrounding scenery rather than considering the desirability of the field as a site for the house. They were not paying any special attention to the field itself. When they came to the southern end of the field they left their vehicle and strolled off towards the eastern portion of the field. Then Mrs. Sutton came back and walked west, returning near to the place where they had been deposited. Then she came to the stone stile, and after sitting on it for a little, she managed with some little difficulty to get over it, and went into the plantation. She says that at the time there was nothing to indicate a path in the plantation at all, and, accordingly, that she did not realise that there was a path there. I think that in this she is probably mistaken to some extent. It is quite clear from the evidence that has been given that about twenty days later there was a fairly well-defined track through the plantation. I think it improbable that

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H she would have got over into the plantation and walked some yards into it if there had been merely cut brushwood and brambles, and stuff of that sort lying about in the plantation, without any sort of path. I find, as matter of fact, that on Mar. 30, the date of the visit, as well as on subsequent dates, which, however, are not material except for the purpose of determining the conditions on Mar. 30, there was a fairly well-defined track through the plantation. Therefore, both in the case of the field and in the case of the plantation, there was a pathway or track visible such as would indicate that the track was used by a number of persons from

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time to time. That, in my view, was the position, and I am fortified in my conclusion by the fact that on the ordinance map a defined track is shown by dotted lines over the field and plantation. That there is in fact a track there, must, I think, be taken as an established fact; but it is not anything in the nature of a metallad track. It is the sort of track which might have been formed by quite a small number of persons using it from time to time. In point of fact, however, it is admitted on both sides that the track is formed by the public in the exercise of a public right of way. A B

The question is whether the physical existence of that track across those two pieces of land amounted to a patent defect indicating to the purchaser that he was buying two pieces of land which were subject to a public right of way. With regard to that, there is some general authority, and one case which seems to me to be a special authority almost entirely covering the point. The first general authority is *Bowles v. Round* (1), a decision of LORD LOUGHBOROUGH. There certain objections had been made by the defendant and the object of the bill was to obtain specific performance of an agreement entered into by the defendant to purchase a meadow called Burnett's Meadow near Clewer. The first objection, which is the only one I need refer to here, was this: "That the premises were described as a meadow, consisting of fifteen acres, without any notice of a way round, and a footpath, across it." The Lord Chancellor said: C D

"Certainly the meadow is very much the worse for a road going through it; but I cannot help the carelessness of the purchaser who does not choose to inquire. It is not a latent defect."

The report is a very short one (5 Ves. 508). Nothing is said as to the physical condition of the road in question in that case. It looks to me as if the road was, on the face of it; a public road. If that be so, the decision was obviously the only possible decision that could be arrived at. I think that if there had been merely a track, and the question had arisen whether the track indicated the existence of a way over which the public had rights or only of a private right of way or of a track used by the owner of the land alone, the Lord Chancellor would have examined the condition of the property as presented to him in the evidence and would have founded his judgment on the result of that examination. I have also been referred to *Shackleton v. Sutcliffe* (2). The question was with regard to the right to have water supplied from an upper meadow to a lower meadow. I think the facts are too different from the facts of the present case for it to be of any real assistance, and there is no general statement of the law in it which appears to me to be of much use for the present purpose. E F G

But there has been a much more recent case, *Ashburner v. Sewell* (3), which came before CHITTY, J. That case raised the question whether the vendor had the right to rescind the contract, or whether the purchaser was entitled to compensation. It turned on the existence of a road over the property. There is no doubt whatever that the purchaser at the time of the purchase knew of the physical existence of the footpath or road, because CHITTY, J., said in his judgment: H

"The plan is of a house and garden coloured red and of a field coloured green, and the road, over which, as it now appears, strangers have a right, is actually delineated. There are dotted lines on the plan which indicate that there is a road there on that part of the surface of the earth; but they do not indicate that any third person has a right to pass along such road. Neither the plan nor the schedule shows the existence of any right of way. The general rule of law in regard to rights of way may be stated as follows: where it is obvious that there is a right of way enjoyed by some third person, or by the public in general, the existence of such right of way cannot give rise to any objection to the title, as, for example, if the estate sold is a large one with a public highway running through it, then it is obvious that it is not intended to sell the property free from such right of way; but the purchaser would take subject I

- A to the right of way. The right is in such a case patent as opposed to the term 'latent,' as used by LORD LOUGHBOROUGH in the case of *Bowles v. Round* (1) where he said that the road going through a meadow was not a 'latent defect.' In the case before me there is, as both sides have admitted, a 'latent defect,' the right of way being unknown to both vendor and purchaser, and the question is whether the existence of this latent right of way is a matter which falls within cl. 6. I am of the opinion that it does."
- B

Clause 6 was a clause giving the vendor the right to rescind in the case of any objection to the title as distinct from another clause which gave compensation.

- C It seems to me that this decision is of great assistance in the present case; and indeed governs it, having regard to the view I take of the facts. It is to be remarked that the pathway or track is in itself no defect at all. The only defect is that which is, or may be, implied from the existence of the path or track. If the path or track is one which is formed merely by those who are in the employment of the owner of the land, then, of course, there is nothing to prevent the owner of the land from giving a full title to anyone else; and, therefore, it is wrong to speak, in the case of an objection founded on the existence of a public right of way, of the mere physical existence of the track as being a patent defect. It is not a defect at all in itself. It is, or may be, a defect only as indicating the existence of rights in other persons. The physical condition of the path itself may be such as necessarily to indicate that there is a highway over which the public have rights. If it were such as necessarily to indicate that to anybody who saw it, then the purchaser, who bought the property after having seen it, would necessarily be bound to take it subject to that patent right but if the track were not of such a nature as to indicate that there must necessarily be a right of way over it, the case is otherwise. In such a case the purchaser, not having been brought face to face with a patent defect, but only seeing something which might or might not indicate the existence of rights in others, is not bound to take the property subject to a public or private right of way, if it exists and is of such a nature as to be a fundamental objection to the property.
- D
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Counsel for the plaintiffs relied on this passage in CHITTY, J.'s judgment in *Ashburner v. Sewell* (3):

"Where it is obvious that there is a right of way enjoyed by some third person, or by the public in general, the existence of such right of way cannot give rise to any objection to the title."

- G I think the learned judge did not mean there to say that if in any case it were obvious that there was at the least a private right of way, no objection could be taken by the purchaser, if in fact it turned out afterwards that there was not a private but a public right of way. I think he is only considering cases where the actual existence of a private or a public right of way, as the case may be, is obvious to the purchaser from the condition of the property. It may well be that if the physical condition of the property were such as necessarily to indicate at least a private right of way, but not such as necessarily to indicate a public right of way, then a purchaser who discovered after his purchase that there was a public right of way over the property might, if such public right of way was distinctly more onerous than a private right of way, as is often the case, be entitled to rescind, or at any rate to resist a demand for specific performance of his contract.
- H
- I

In the present case I have come to the conclusion that not only is there not necessarily an indication of the existence of a public right of way over the field and the plantation, but there is not even a necessary indication of the existence of a private right of way. I think there is one very excellent indication of this. It so happens that the field and plantation are now in different ownership. They were, until quite recently, in the same ownership and formed part of a considerable estate of Lord Ilchester, which had been put up for sale by auction a year or two

previously. When Messrs. Yandle & Sons' solicitors, Carne Hill and Wedd, desired to find out particulars with regard to the footpath, they wrote to the agents of Lord Ilchester, and, after pointing out that a footpath was shown in the plan, inquired: "Can you tell us whether this is a public path or a private one used by the gamekeeper only?" It is clear that they, at any rate, thought that neither the existence of dotted lines on the plan nor the physical condition of the property was a necessary indication that there was a public right of way, or even a private right of way, over this property. At the north end of the field the path is approached by a gate which is difficult to open, and at the south end of the field there is a stone stile which is from 2ft. 6in. to 3ft. high and has apparently a stone about 6in. high on its north side, but no similar stone on the other side; and although there is some indication of public user, it seems to me extremely slight. The stile might have been put there merely to facilitate the passage of the gamekeeper on his rounds, or as a convenience for shooting parties. The whole circumstances seem to me to be compatible with the existence of a public right of way, a private right of way, or an accommodation track for the use of persons entitled either to other parts of the property or to those two fields.

There is a general observation that I should like to make in conclusion. In all these cases between vendor and purchaser, the vendor knows what the property is, and what the rights with regard to it are. The purchaser is generally in the dark, I think, therefore, that, in considering what is a latent defect and what a patent defect, one ought to take the general view that a patent defect, which can be thrust upon the purchaser, must be a defect which arises either to the eye, or by necessary implication from something which is visible to the eye. It would not be fair to hold that a purchaser is to be subjected to all the rights which he might have found out if he had pursued an inquiry based upon that which was presented to his eye. I think he is only liable to take the property subject to those defects which are patent to the eye, including those defects which are a necessary consequence of something which is patent to the eye. In the circumstances both the actions must be dismissed, and the defendant is entitled in both actions to judgment on his counterclaim.

Solicitors: *Hancock & Willis*, for *Carne Hill & Wedd*, Langport, Somerset;
Peacock & Goddard, for *Trevanion, Curtis & Ridley*, Bournemouth.

[Reported by L. MORGAN MAY, ESQ., Barrister-at-Law.]

R. v. SULLIVAN

[COURT OF CRIMINAL APPEAL (Avory, Sankey and Salter, JJ.), March 6, 7, 1922]

[Reported [1923] 1 K.B. 47; 91 L.J.K.B. 927; 126 L.T. 643; 86 J.P. 167;
27 Cox, C.C. 187; 16 Cr. App. Rep. 121]

B *Criminal Law—Evidence—Rebutting evidence—Right of judge to recall witnesses for the prosecution after prisoner's evidence and after final speech for defence.*

A judge at a criminal trial has a discretionary power to recall witnesses at any stage of the trial, even after the prisoner has given evidence and after the final speech for the defence, to rebut a case set up by the defence.

C **Notes.** Considered: *R. v. McKenna* (1956), 40 Cr. App. Rep. 65. Referred to: *R. v. Harris* [1927] 2 K.B. 587; *R. v. Owen* [1952] 1 All E.R. 1040.

As to powers of judge to recall witnesses, see 10 HALSBURY'S LAWS (3rd Edn.) 423; and for cases see 14 DIGEST (Repl.) 321 et seq.

Cases referred to:

D (1) *R. v. Crippen*, [1911] 1 K.B. 149; 80 L.J.K.B. 290; 103 L.T. 704; 75 J.P. 141; 27 T.L.R. 69; 22 Cox, C.C. 289; 5 Cr. App. Rep. 255, C.C.A.; 14 Digest (Repl.) 323, 3128.

(2) *R. v. Remnant* (1807), Russ. & Ry. 136, C.C.R.; 14 Digest (Repl.) 298, 2779.

Also referred to in argument:

E *R. v. Watson* (1834), 6 C. & P. 653; 14 Digest (Repl.) 298, 2780.

R. v. Frost (1840), 9 C. & P. 129; 4 State Tr. N.S. 85, 386; 1 Town St. Tr. 1; 1 Gurney's Reps. 749; 14 Digest (Repl.) 322, 3120.

R. v. Haynes (1859), 1 F. & F. 666; 14 Digest (Repl.) 323, 3127.

R. v. Howarth (1918), 82 J.P. 152; 13 Cr. App. Rep. 99, C.C.A.; 14 Digest (Repl.) 321, 3108.

F **Application** for leave to appeal against a conviction of murder at Monmouth Assizes before DARLING, J.

The appellant was convicted of the murder of a woman. At the trial he was the only witness for the defence and after he had given evidence the judge recalled certain witnesses for the prosecution; after counsel had addressed the jury the judge again recalled further witnesses for the prosecution.

G *S. R. C. Bosanquet* for appellant.

A. Powell, K.C., and *J. R. Lort Williams* for Crown.

The judgment of the court was delivered by

H **AVORY, J.**—There was obviously evidence on which the jury could come to the conclusion that the appellant committed the murder. The appellant in his evidence alleged an alibi, saying he had been with a man named Stuart who had been called as a witness for the prosecution, and he denied the possession of the things found in the house and that he had sold the clothes stolen from it. The judge directed Stuart to be recalled. Subject to the objections which we have to consider, it was not disputed that there was evidence on which the jury could convict. It was objected that the judge himself had committed irregularities in recalling witnesses under two headings: (i) after prisoner had given evidence, (ii) after counsel for the defence had addressed the jury. In the first case so far as it was rebutting evidence to answer evidence set up by the prisoner for the first time, no objection can be taken, and it cannot be contended there was any irregularity. With regard to Stuart the appellant had in his evidence set up this alibi for the first time, and it was obviously reasonable and necessary that Stuart should be recalled on this subject. The judge also recalled a witness named Jones, who had served the appellant with drinks at a public house for the purpose of

making it plain that the appellant had tendered a treasury note in paying for the drinks. It was true that this witness had given evidence before, but the prisoner had said that he had spent 6s. only and had implied that it was paid in silver. It was necessary that Miss Jones should be recalled to rebut that evidence. In addition Mrs. Groves was recalled for the purpose of making it clear that the appellant was the person who sold the blue suit. All these witnesses properly came within the principle of rebutting evidence, and if the prosecution had applied to recall them, the court did not doubt that the judge would properly have allowed them to be recalled. We act upon the principle laid down in *R. v. Crippen* (1). So far as the evidence called after the prisoner gave evidence was concerned, it was admissible. A B

We are satisfied that counsel for the defence, in the course of his address, put before the jury in terms which they could not misunderstand the theory that the murder might have been committed by David Thomas, the husband of the murdered woman. We do not say that it was not perfectly proper for him to have made that suggestion. In a case of murder the defending counsel is entitled to explore every avenue which may lead to an acquittal. The questions asked in cross-examination of Thomas did not sufficiently clearly raise this issue, though it was clear that counsel for the Crown appreciated it, as was shown by his questions in re-examination, but a jury is not always as astute as counsel. The judge, in the exercise of his discretion, then recalled two police constables and the husband, David Thomas. As to the husband, counsel for the defence does not object, but he complains that the police constables were recalled merely to state over again the evidence they had given for the prosecution, and if the court had come to the conclusion that the police constables were merely recalled to re-state the evidence which they had already given, we should have been bound to hold that it was an irregularity and to consider whether a substantial miscarriage of justice had occurred. But the court has come to the conclusion that they were recalled to answer the suggestion that Thomas was the murderer and to make it more clear that the articles found could not have been put there by Thomas. C D E

The right or power of the presiding judge to recall witnesses has been much discussed before us, and counsel for the defence has assisted the court. It appears this power of the judge to recall witnesses stands on much the same footing as the power to admit rebutting evidence. The judge has discretionary power of recalling witnesses at any stage of the trial, and to make further inquiry after counsel have closed their case (*R. v. Remnant* (2)). There has been no irregularity or injustice to the prisoner. F

Application dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.*

[*Reported by J. N. FLETCHER, Esq., Barrister-at-Law.*]

A R. v. WILLIAMS

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Darling and Salter, JJ.), December 11, 1922]

[Reported [1923] 1 K.B. 340; 92 L.J.K.B. 230; 128 L.T. 128; 87 J.P. 67; 39 T.L.R. 131; 67 Sol. Jo. 263; 27 Cox, C.C. 350; 17 Cr. App. Rep. 56]

B

Criminal Law—Rape—Defence—Consent—Consent obtained by fraud—Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 3 (2), s. 16.

A consent or submission obtained by fraud is not a defence to a charge of rape or cognate offences.

C

The appellant gave lessons in singing and voice production to a girl of 16 and under the pretext that he was performing a surgical operation to improve her breathing he had carnal knowledge of her.

Held: section 3 (2) of the Criminal Law Amendment Act, 1885, which made it a misdemeanour to procure a woman by false pretences to have unlawful carnal connection did not override the common law that where there was no real consent to such connection, the crime of rape was committed, and, therefore, the appellant was guilty of rape.

D

R. v. *O'Shay* (1), (1898), 19 Cox, C.C. 76, overruled.

Notes. The Criminal Law Amendment Act, 1885, s. 3 (2), has been replaced by s. 3 (1) of the Sexual Offences Act, 1956 [36 HALSBURY'S STATUTES (2nd Edn.) 215].

As to rape see 10 HALSBURY'S LAWS (3rd Edn.) 746 et seq. and for cases see 15 DIGEST (Repl.) 1012 et seq. For the Criminal Law Amendment Act, 1885, see 5 HALSBURY'S STATUTES (2nd Edn.) 905.

E

Cases referred to :

- (1) *R. v. O'Shay* (1898), 19 Cox, C.C. 76; 15 Digest (Repl.) 1012, 9969.
- (2) *R. v. Case* (1850), 1 Den. 580; T. & M. 318; 4 New Sess. Cas. 347; 19 L.J.M.C. 174; 15 L.T.O.S. 306; 14 J.P. 339; 14 Jur. 489; 4 Cox, C.C. 220, C.C.R.; 15 Digest 991, 9717.
- (3) *R. v. Flattery* (1877), 2 Q.B.D. 410; 46 L.J.M.C. 130; 36 L.T. 32; 25 W.R. 398; 13 Cox, C.C. 388, C.C.R.; 15 Digest (Repl.) 1012, 9967.
- (4) *R. v. Dicken* (1877), 14 Cox, C.C. 8; 15 Digest (Repl.) 1009, 9942.
- (5) *R. v. Young* (1878), 38 L.T. 540; 14 Cox, C.C. 114, C.C.R.; 15 Digest (Repl.) 1013, 9978.

F

Also referred to in argument :

R. v. Barrow (1868), L.R. 1 C.C.R. 156; 38 L.J.M.C. 20; 19 L.T. 293; 17 W.R. 102; 11 Cox, C.C. 191, C.C.R.; 15 Digest (Repl.) 1013, 9986.

Appeal against conviction.

The appellant was convicted at the Liverpool Assizes on Nov. 10, 1922, before H BRANSON, J., of rape and indecent assault, and was sentenced to seven years' penal servitude and twelve months' imprisonment with hard labour. The appellant under the pretences of improving the breathing of two girls was permitted to have carnal connection with one and to indecently assault the other.

E. M. Gorst for the appellant.

I

Noel Goldie, for the Crown, was not called on to argue.

The judgment of the Court was delivered by

LORD HEWART, C.J.—The appellant was convicted upon an indictment which charged him upon two counts with rape and upon two counts with indecent assault. The appellant was a choirmaster at a Presbyterian chapel and gave lessons in singing and voice production to two girls aged 16 and 19 years. By pretending to test their breathing power with an instrument, he had sexual connection with the younger and was permitted to assault the elder.

Counsel for the appellant has taken one point and one point only—that, in view of the evidence disclosed, it was not lawful that the appellant should be convicted of rape, and for the purpose of enforcing that argument he refers to *R. v. O'Shay* (1) and s. 3 (2) of the Criminal Law Amendment Act, 1885. No doubt before the Act of 1885 a man, who by false pretences, succeeded in obtaining sexual intercourse with a woman could be convicted of rape: *R. v. Case* (2) *R. v. Flattery* (3); but it is said that matter were changed by reason of the passing of the Act of 1885. Counsel did not go so far as to say that *R. v. Flattery* (3) was no longer law, but he did say that in such a case as the present it was impossible to indict a person for rape. By s. 3 (2) of the Act of 1885 it was enacted that

“any person who by false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection, either within or without the King's Dominions shall be guilty of a misdemeanour.”

These words, it is obvious, go far beyond the case of rape and it would not be difficult to imagine many cases, comprehended by the words of that sub-section, which were not rape. That sub-section was dealt with in *R. v. O'Shay* (1) and in that case RIDLEY, J., did appear to say that after the passing of the Criminal Law Amendment Act, 1885 *R. v. Flattery* (3) was no longer law. It is quite clear when one looks at the report of that case that attention was not called to s. 16 of the Act which enacts that

“this Act shall not exempt any person from any proceeding for an offence which is punishable at common law or under any Act of Parliament other than this Act, so that a person be not punished twice for the same offence.”

It is perfectly clear that s. 3 (2) of the Act of 1885 does not override the common law, but makes an addition to the common law and statute law, and it is also clear that the decision in *R. v. O'Shay* (1) was given under a misapprehension and has no binding effect. Mention has been made of another case *R. v. Dicken* (4). There counsel for the accused argued that, as by s. 4 of the Offences Against the Person Act, 1875 [repealed by the Act of 1885], it was enacted that

“Whosoever shall unlawfully and carnally know and abuse any girl being above the age of twelve years and under the age of thirteen years, whether with or without her consent, shall be guilty of a misdemeanour,”

earlier statutes making the offence of rape in such cases a felony were repealed, but MELLOR, J., said

“The law remained exactly as it was previously—that is to say, if she consented, the prisoner might be convicted of the statutory misdemeanour; if she did not, a fortiori, he might be so. But if she did not consent, his offence would amount also to the higher crime—the felony—of rape, and he might be indicted and tried for it quite irrespective of the modern statutes throwing special protection around children. The present indictment is for rape, and, therefore, if the girl consented to the carnal knowledge, the act was not done ‘against her will’ and the crime is not made out. It would be preposterous to suppose that Parliament intended to repeal the law of rape as to girls of the very age during which exact statutory protection is cast over them, and I am clearly of opinion that no such repeal has been effected.”

In the present case the argument is that after the passing of the Act of 1885 it is no longer possible to indict for rape in such cases as *R. v. Flattery* (3) and *R. v. Case* (2), and that it is no longer rape to obtain possession of a woman without her real consent. When one looks at s. 16 of the Act of 1885 that argument is absolutely untenable. Here the appellant pretended that what he did was a necessary operation. The girl never consented to an act of sexual intercourse; she consented to the act, not because she thought it was an act of sexual intercourse but because she thought it was a necessary operation. In RUSSELL ON CRIMES (7th

A Edn.) vol. 1, at p. 934, where reference is made to such cases as this, including *R. v. Young* (5), it is said

"A consent or submission obtained by fraud is, it would seem, not a defence to a charge of rape or cognate offences."

B In the opinion of this court that is the true law and nothing in the Criminal Law Amendment Act, 1885 has affected it.

Appeal dismissed.

Solicitors: Registrar of the Court of Criminal Appeal; Town Clerk of Liverpool.

[Reported by J. N. FLETCHER, Esq., Barrister-at-Law.]

C

R. v. REDD

D [COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Avory and Sankey, JJ.), October 30, 1922]

[Reported [1923] 1 K.B. 104; 92 L.J.K.B. 208; 128 L.T. 30; 87 J.P. 43; 67 Sol. Jo. 171; 27 Cox, C.C. 318; 17 Cr. App. Rep. 36]

E *Criminal Law—Evidence—Character of accused—Endeavour to establish good character—Voluntary statement by defence witness as to good character of accused—Criminal Evidence Act, 1898 (61 & 62 Vict., c. 36), s. 1 (f) (ii).*

F A witness called by the appellant at his trial solely to produce certain letters volunteered a statement to the effect that the appellant had a good character, whereupon counsel for the prosecution cross-examined him as to the appellant's previous convictions and later cross-examined the appellant on his character.

G **Held:** the appellant, by calling the witness who had, possibly against his (the appellant's) wish, volunteered this statement, had not endeavoured to establish a good character within the rule in *R. v. Gadbury* (1) (1838), 8 C. & P. 676, nor had he, within s. 1 (f) (ii) of the Criminal Evidence Act, 1898, "given evidence of his good character," and, therefore, the cross-examination was improper.

H **Notes.** As to evidence of character, see 10 HALSBURY'S LAWS (3rd Edn.) 445 et seq. and for grounds for allowing appeals against conviction see *ibid.* p. 535 and for cases see 14 DIGEST (Repl.) 408 et seq., 636 et seq. For the Criminal Evidence Act, 1898, see 9 HALSBURY'S STATUTES (2nd Edn.) 613, and for the Criminal Appeal Act, 1907, see *ibid.*, vol. 5, p. 926.

Cases referred to:

- I (1) *R. v. Gadbury* (1838), 8 C. & P. 676; 14 Digest (Repl.) 409, 3980.
 (2) *R. v. Hemingway* (1912), 77 J.P. 15; 29 T.L.R. 13; 8 Cr. App. Rep. 47, C.C.A.; 14 Digest (Repl.) 637, 6457.
 (3) *R. v. Ratcliffe* (1919), 89 L.J.K.B. 135; 122 L.T. 384; 84 J.P. 15; 26 Cox, C.C. 554; 14 Cr. App. Rep. 95, C.C.A.; 14 Digest (Repl.) 669, 6780.

Appeal against conviction on a point of law. The appellant was convicted at the Northamptonshire Quarter Sessions of housebreaking, stealing from the house, and receiving, and was sentenced to seven years' penal servitude. At the trial he conducted his own defence, and a witness called by him, without any question or suggestion on the part of appellant, volunteered the statements: "He held a good position in the army as a warrant officer," and "As far as I know he is all right." Counsel for the prosecution thereupon asked the witness whether he was aware

that the appellant had been convicted at Usk in 1912 and sentenced to five years' penal servitude, and also whether he was aware that appellant had been convicted no fewer than eleven times and sentenced once to five years' and once to three years' penal servitude. Further, in cross-examination of the appellant, counsel asked him how many times he had deserted from the army.

C. K. Tatham for the appellant.

B. Campion for the Crown.

The judgment of the court was delivered by

AYORY, J.—The appellant was charged with housebreaking and stealing from the house; the indictment also charged him with receiving, and he was convicted on all counts. In the course of the trial he called a witness to produce certain letters, and the witness produced a letter which was read to the court. That letter, written by the prosecutrix, contained an expression of opinion that it was the prisoner's wife who committed the theft. The witness was called for that purpose only, and then, without any question by the appellant, he took upon himself to volunteer a statement that the appellant had held a good position in the army, and was all right as far as he knew. Thereupon, counsel for the prosecution claimed that he was entitled to give evidence of appellant's bad character, and suggested to the witness that the appellant had been convicted in 1912 and sentenced to five years' penal servitude and that he had been convicted no fewer than eleven times. Although the witness did not assent, it is impossible to say that the jury were not influenced thereby, and they would feel that a member of the Bar would not put such questions unless they were true. It does not rest there, for, on the appellant being called as a witness, he was cross-examined by counsel as to the number of times he had deserted from the army, and gave an answer indicating that there was some truth in the suggestion.

The question for this court to decide is: "Was this evidence or, rather, this suggestion, of previous bad character rightly put to the jury?" The question is not one that arises under the Criminal Evidence Act, 1898, but whether the case comes within or without the rule in *R. v. Gadbury* (1). In the opinion of this court, that rule of law is correctly stated in *ARCHBOLD'S CRIMINAL PLEADING EVIDENCE AND PRACTICE* (26th Edn.), at p. 366, where it is said:

"If the prisoner endeavours to establish a good character, either by calling witnesses himself, or by cross-examining the witness for the prosecution the prosecution is at liberty, in most cases, to give proof of the prisoner's previous convictions."

The question here is: "Was the prisoner, within the meaning of the rule, endeavouring to establish a good character?" In the opinion of this court, he was not. Because a witness, whom he called, volunteered a statement, perhaps against his wish, about his character, it cannot be held that he was so endeavouring. The question regarding the appellant's desertion from the army comes under s. 1 (f) of the Criminal Evidence Act, 1898, and, as in the opinion of this court the statement of the witness did not amount to an attempt by the appellant to establish his own good character, this question was equally unjustifiable.

The court has now to consider the proviso to s. 4 of the Criminal Appeal Act, 1907. It has frequently been laid down that such a conviction can only be upheld if the jury would inevitably or must inevitably have come to the same conclusion. It was so laid down as far back as 1912 in *R. v. Hemingway* (2), where it was said by *LORD ALVERSTONE, C.J.*:

"Unfortunately, in attempting to assist the prisoner, the judge quite innocently elicited the fact that the prisoner had been previously convicted,"

and the court held that in the circumstances, though there was evidence on which the jury might have convicted the prisoner, the conviction must be

A quashed, and in 1919, in a similar case—*R. v. Ratcliffe* (3)—LORD READING, C.J., said :

B “Now counsel for the Crown relies on the proviso to s. 4 of the Criminal Appeal Act, 1907, and argues that notwithstanding the irregularity, no substantial miscarriage of justice has actually occurred. We are unable to arrive at that conclusion. We cannot say that we are satisfied that, assuming that the improper questions had not been put, the jury would nevertheless have been bound to come to the same conclusion. The principle has often been laid down that the fact that the jury might have convicted is not sufficient to justify us in applying the proviso.”

C In the present case there was undoubtedly substantial evidence on which the jury might have convicted the appellant, apart from the questions objected to. On the other hand it is sufficient to say that the jury might have been in doubt without this evidence, having regard to the fact that the wife of the appellant gave damning evidence against him, and she was the person originally suspected by the prosecutrix. It is impossible to say that the jury might not have doubted whether the appellant was guilty, and this court is not prepared to say that they must D inevitably have found him guilty, and the conviction must be quashed.

Appeal allowed.

Solicitors: *Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.*

[*Reported by J. N. FLETCHER, Esq., Barrister-at-Law.*]

F R. v. PILLEY

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Shearman and Salter, JJ.), April 10, 1922]

G [Reported 127 L.T. 220; 86 J.P. 190; 27 Cox, C.C. 230;
16 Cr. App. Rep. 138]

Criminal Law—Evidence—Admissibility—Accused confronted with other persons charged with same offence—Statements made by such persons implicating the accused.

H Two men, H. and S., were arrested about 12.30 a.m. on Jan. 12, 1922, and charged with housebreaking. At about 11.45 a.m. the appellant was arrested and charged with being concerned in the housebreaking. He denied the offence. Later, a fourth man, R., was arrested. The following day the appellant and R. were taken to the police station at which H. and S. were detained and confronted with one another. Thereupon H. and S. made admissions which implicated the appellant. R. then said: “The game is up. I We admit your offences.” The appellant said: “That’s right.” At the trial the only evidence against the appellant besides these words was the fact that he had been seen in the company of the other prisoners.

Held: the practice of confronting persons with each other who were charged with the same offence was objectionable and contrary to the Judges’ Rules (see r. 8: 10 HALSBURY’S LAWS (3rd Edn.) 470–473), and where evidence of a statement made as a result of such confrontation was admitted at the trial and a conviction followed, the court would not uphold that conviction

unless it was of the opinion that the jury must inevitably have convicted on the evidence apart from the statements improperly obtained; in the present case there was insufficient other evidence, and the conviction must be quashed.

Notes. As to confessions arising from questions by the police, see 10 HALSBURY'S LAWS (3rd Edn.) 470-473. For cases see 14 DIGEST (Repl.) 474 et seq.

Case referred to:

- (1) *R. v. Gardner and Hancox* (1915), 85 L.J.K.B. 206; 114 L.T. 78; 80 J.P. 135; 32 T.L.R. 97; 25 Cox, C.C. 221; 11 Cr. App. Rep. 265; sub nom. *R. v. Hancox*, 60 Sol. Jo. 76, C.C.A.; 14 Digest (Repl.) 447, 4333.

Appeal against conviction.

The appellant was convicted at the Lancashire (Salford Hundred) Quarter Sessions of housebreaking and larceny.

The facts appear in the headnote and the judgment of LORD HEWART, C.J.

E. M. Gorst for appellant.

J. H. Thorpe for the Crown.

The judgment of the court was delivered by

LORD HEWART, C.J.—In this case the appellant was convicted of house-breaking and larceny and sentenced to eighteen months' imprisonment with hard labour. He was indicted with three others, one H. who pleaded Guilty, and S. and R. who were convicted by the jury. The case was excellently tried by the learned chairman and the summing-up all that a summing-up should be. In the course of the evidence it was made plain that on four occasions the appellant was invited—it might, perhaps, be right to use a stronger term—to make statements for the use of the prosecution. On the first three occasions he said nothing; on the fourth, when the other three prisoners were present, and the man R. had said: "The game is up, we admit your offences," he made the remark "That's right."

There can be no doubt that obtaining evidence in that way is most objectionable. It was observed upon in *R. v. Gardner and Hancox* (1). The court is not prepared to say that the prisoners were confronted with one another to get a confession, but we do say that, if the practice is followed, it is reprehensible and ought to be discontinued. More than that it is a fact that such procedure is in direct contradiction to Judges' Rules regarding the statements of prisoners in the custody of the police. Rule 8 says:

"Where two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of the statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered."

That course is not only the course not pursued in this case, but the very opposite. One of the mischiefs of this objectionable practice is that such statements are not inadmissible. In this case there was the piece of evidence thus obtained and, apart from that, little evidence. The practice of the court is sufficiently clear. Where something is done which ought not to have been done, the court will not uphold the conviction unless the jury must inevitably have convicted the prisoner upon the evidence apart from the statements improperly obtained. The conviction must be quashed.

Appeal allowed.

Solicitors: Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.

[Reported by J. N. FLETCHER, Esq., Barrister-at-Law.]

A Re WALTON'S SETTLEMENT. WALTON v. PEIRSON

[CHANCERY DIVISION (Eve, J.), June 21, 22, 1922]

[Reported [1922] 2 Ch. 509; 92 L.J.Ch. 32; 127 L.T. 626; 66 Sol. Jo. 666]

B Mistake—Mistake in expression of intention—Rectification—Deed of revocation of settlement—Result effected not contemplated—Cancellation of deed.

C By a post-nuptial settlement, dated Sept. 16, 1912, joint funds of husband and wife were settled by creating two separating funds which were to remain in their then state of investment during the joint lives of the husband and wife with power for the funds to be sold and the proceeds invested in an annuity in the joint names of the husband and wife with benefit of survivorship, and, if the annuity was not purchased, then on the death of the husband in the lifetime of the wife the whole funds were to be held jointly by the wife and the executors of the husband on trust to be invested in the purchase of an annuity for the sole and separate use of the wife. The settlement contained a power of revocation by deed at any time. No annuity having been purchased at the date of the husband's death on Oct. 31, 1920, his widow, an elderly woman, did not desire the trust funds to be invested in the purchase of an annuity and instructed her solicitor to avert this necessity, and on his advice, on Apr. 28, 1921, she executed a deed poll prepared by him, which revoked the settlement. The effect of this was that the settlement was put an end to for all purposes with the result, not contemplated, that the husband's fund reverted to his estate and the wife's fund reverted to her. The solicitor did not appreciate that the widow, being solely entitled to the annuity when purchased, could call for a transfer to her of the capital applicable for its purchase. In an action against the executors of her husband's will, the widow claimed cancellation or rectification of the deed poll and transfer of her husband's fund to her.

F **Held:** the instructions of the widow to her solicitor to avert the necessity of purchasing an annuity had been exceeded in the deed revoking the settlement, which had a more far reaching effect than that contemplated, and the deed poll would be cancelled and the husband's fund transferred to her.

Dictum of TURNER, L.J., in *Walker v. Armstrong* (1), (1856), 8 De G.M. & G., at p. 544, applied.

G **Notes.** As to mistake in the expression of intention, see 26 HALSBURY'S LAWS (3rd Edn.) 902, 903; and for cases see 35 Digest (Repl.) 116, 117.

Case referred to:

(1) *Walker v. Armstrong* (1856), 8 De G.M. & G. 531; 25 L.J.Ch. 738; 27 L.T.O.S. 329; 2 Jur. N.S. 959; 4 W.R. 770; 44 E.R. 495; 35 Digest 116, 206.

H Also referred to in argument:

Daniel v. Arkwright, *Courthorpe v. Daniel*, *Daniel v. Courthorpe* (1864), 2 Hem. & M. 95; 4 New Rep. 418; 11 L.T. 18; 10 Jur. N.S. 764; 71 E.R. 396; 35 Digest 134, 342.

I **Witness Action.**

By a post-nuptial settlement, dated Sept. 16, 1912, and made between James Walton of the one part, and the plaintiff, Elizabeth Anne Walton, his wife, of the other part, after reciting that the husband was then entitled to funds and property described in the first part of the schedule thereto, and the wife was entitled to the funds and property described in the second part of the schedule in her own right, which were then standing in the joint names of husband and wife, and that they were mutually desirous of settling and making such disposition and arrangement concerning their respective funds and properties as thereafter

appeared, it was witnessed that in consideration of the premises and of their natural love and affection the parties thereby covenanted as follows: (i) Subject to the provisions thereafter contained, the funds and property comprised in the first and second parts of the schedule should, during the joint lives of husband and wife, remain in their then state of investment, but it should be lawful for husband and wife jointly in respect of the funds and property referred to in the second part of the schedule, and for the husband alone in respect of the funds and property referred to in the first part of the schedule, to sell and dispose of or otherwise to call in and convert into money all or any parts of the respective funds, and to invest the proceeds in the purchase of an annuity in the joint names of husband and wife, with benefit of survivorship, or, at the discretion of the husband in any other mode of investment to be held upon the trusts of the settlement; (ii) during the joint lives of husband and wife the income of the respective funds was to be applicable, and the annuity, if purchased, apportioned as therein mentioned; (iii) if the annuity was not purchased the investments at any time representing the respective funds and property or the proceeds of sale thereof were (iv) in the event of the death of the husband in the lifetime of the wife, to be dealt with and disposed of as follows; the funds and property described in the first and second parts of the schedule or the investments for the time being representing the same should vest in and be held jointly by the wife and the executors of the husband upon trust to invest the whole of the funds and investments then remaining, subject to the trusts of the settlement in the purchase for the sole and separate use of the wife of a life annuity, such annuity to be paid to the wife for her separate use. The settlement contained a power for either of the parties thereto at any time thereafter by any deed revocable or irrevocable, wholly or partially to revoke and make void the settlement and the trusts, powers, and provisions therein declared of and concerning the property thereby settled or such of its provisions as might not then have been performed.

The funds and property described in the first part of schedule to the settlement were (i) £18 North-Eastern Railway Co. consols; (ii) £386 deposited in March, 1912, with the Scottish Widows Fund in the name of the husband; (iii) an endowment policy for £700 upon the life of the husband, dated June 19, 1902, effected with the Northern Assurance Co., with profits payable at death or on June 17, 1916, at an annual premium, and in the second part of the schedule four sums of railway stock. The husband died on Oct. 31, 1920, having, by his will, appointed the defendants, John Edmund Peirson and John William Connolly executors. During his life, the husband converted into money a part of the property comprised in the first part of the schedule to the settlement and reinvested the same, and at the date of his death, the securities referable to that part of the schedule were £18 North-Eastern Railway Co. consols, as therein set out, £18 East India Railway annuity, class B, and £800 4 per cent. War Loan stock in bearer bonds. The East India Railway annuity appeared to have been purchased in the joint names of husband and wife.

There were no children of the marriage. The widow was desirous that the funds and investments subject, on the death of her husband, to the settlement trusts should not be invested in the purchase of an annuity for her, and by a deed poll dated Apr. 28, 1921, executed by her on the advice of her solicitor who prepared the deed under her hand and seal, and reciting (inter alia) the provision in the settlement providing that, in the event of the death of her husband in her lifetime, the funds and property described in the first and second parts of the schedule should be held upon trust to invest the whole of the funds and investments then remaining subject to the trust in the purchase of a life annuity for herself and also reciting the power of revocation, the death of her husband, the state of investment, and the dealings with the securities secondly and thirdly described in the first part of the schedule, that the funds had not been invested in the purchase

A of the life annuity referred to in cl. 4 of the settlement, and that she was desirous by the deed now in statement of revoking the indenture of Sept. 16, 1912, and the trusts, powers, and provisions therein declared and contained of any concerning the respective funds and property thereby settled, it was witnessed that the widow, in pursuance and exercise of the power given to her by the indenture of Sept. 16, 1912, and of all other powers thereunto enabling her thereby revoked
B and made void the said indenture, and all the trusts, powers, and provisions therein contained of and concerning the respective funds and property thereby settled. After taking up the position that the result of the execution of the deed of revocation was that the securities set out in the first part of the schedule to the settlement, or such of them as still existed, reverted to her husband's estate, her solicitor, by letters of Sept. 2 and 27, 1921, claimed the East India Railway
C annuity for herself, as survivor in the joint account with her husband, and also the stock certificate for the £800 4 per cent. War Loan, neither of which had been included in the inland revenue affidavit and account of her husband's estate. The defendant executors took the view that the securities brought into settlement by the husband reverted to his estate, and that the widow had become entitled to the income from these investments for her life at the hearing. The evidence
D of the widow was that she had not intended to give up any interest in the settled funds, and of her solicitor, that she understood that by not purchasing the annuity the funds would be hers; that it did not occur to him that the effect might be to give up part of her interest and that her husband had told her that the funds were to be hers in the event of her surviving him.

E In the widow's action against the defendant executors of her husband's will she claimed that under the settlement and deed poll the investments at the death of her husband, subject to the settlement trusts, belonged to her husband absolutely, and alternatively a declaration that the deed poll was prepared in its existing form by mistake and ought to be cancelled or rectified so as to give effect to her intention that the funds should belong to her free from the direction in the settlement to invest the same in the purchase of an annuity, and cancellation or rectification
F of the deed poll accordingly.

F. Baden Fuller for the plaintiff, the widow.

R. H. Hodge for the defendants, the executors of the husband's will.

EVE, J. (after stating the material trusts of the settlement, continued):—It is not surprising that the widow, aged seventy at the date of her husband's death,
G was desirous, if possible, of preventing the trust funds being applied in the purchase of an annuity, and she so stated to her friend and solicitor, Mr. Brewer. After considering the matter, he came to the conclusion, and so advised her, that the only way in which she could give effect to her wishes was by exercising the power of revocation contained in the settlement. Accordingly, when he was
H instructed to do what was necessary to avoid the purchase of the annuity, he prepared, and the plaintiff, in due course, executed the deed of Apr. 28, 1921, which she desires to get rid of by this action. The effect of that deed was to put an end to the settlement for all purposes, and as a result the settled fund representing the husband's contribution reverted to his estate, and that representing the wife's contribution reverted to her. Mr. Brewer gave evidence, and frankly
I assumed full responsibility for what has been done. His instructions were to avert the necessity of purchasing the annuity and he admits that he did not at the time appreciate that the plaintiff, being solely entitled to the annuity when purchased, was in a position to call for a transfer to her of the capital applicable for its purchase. He did not, in fact, appreciate the legal position; he thought that in some way or another the trust for the purchase of the annuity must be got rid of, and that the only course open was the exercise by the plaintiff of the power of revocation. Afterwards he realised that the deed might have a more far-reaching effect than either he or the plaintiff had contemplated. Hence this

action, the evidence in which discloses this state of things—the client desirous only of putting an end to the trust for the purchase of the annuity and so instructing her adviser—the solicitor, in temporary forgetfulness of the fact that the trust could be determined by a simple instruction to the trustees, preparing a deed which not only puts an end to the particular trust, but revokes all the trusts of the settlement, and allowing the client to execute it without appreciating that it does a great deal more than give effect to her instructions. Can the client in these circumstances be held bound by the deed? A
B

I think the case to which my attention has been called, *Walker v. Armstrong* (1), is very good authority for saying she cannot. TURNER, L.J., says (8 De G.M. & G. at p. 544):

“I feel no doubt that the deed of 1840 went beyond the instructions, and beyond the intentions of the parties, and what then is the consequence? The very principle of this court in correcting instruments is that the parties are to be placed in the same situation as they would have stood in if the error to be corrected had not been committed, and adopting this principle, the will, must, in this case, be supported.” C

He then goes on to deal with an argument addressed to him by counsel, and says: D

“The respondent’s argument throughout rested on this basis, that this is a case in which there are two modes of doing the same thing, and that it was left to the solicitor to determine which mode should be adopted, and that he adopted the mode which is in question, but this argument seems to me fallacious. The answer to it is that to correct the mistake was one thing, and that to correct the mistake and do a great deal more was another, and that the latter course, and not the former, was adopted.” E

That is exactly what has happened in this case. The solicitor was instructed to get rid of the trust for the purchase of an annuity, and he drew this deed, which not only gave effect to his instructions, but went far beyond what the plaintiff intended. I think the case is entirely within that authority, and I must give the plaintiff the relief she claims. The executors of the husband’s will have acted quite properly in defending the action on behalf of their beneficiaries, and their costs must be provided for. The judgment will declare that the trust funds, subject to the settlement at the death of James Walton, belong absolutely to the plaintiff free from any trust to invest the same in the purchase of an annuity, and will order cancellation of the deed of Apr. 28, 1921, and subject to the retention of their costs of the action to be taxed as between solicitor and client will direct the defendants to transfer to the plaintiff the investments constituting the husband’s fund. F
G

Solicitors: *Brewer & Son; Rollit, Sons, & Compston.*

[Reported by W. P. PAIN, Esq., Barrister-at-Law.] ·

A GALBRAITH AND GRANT, LTD. v. BLOCK

[KING'S BENCH DIVISION (Lush and Greer, JJ.), May 2, 16, 24, 25, 1922]

[Reported [1922] 2 K.B. 155; 91 L.J.K.B. 649; 127 L.T. 521;
38 T.L.R. 669; 66 Sol. Jo. 596]B *Sale of Goods—Delivery—Vendor instructed to deliver at buyer's premises—Duty of vendor—Delivery to person with apparent authority to receive goods.*

Where a vendor of goods has been told to deliver the goods at the buyer's premises, he discharges his obligation if he delivers them there, without negligence, to a person apparently having authority to receive them. His duty is to deliver the goods at the proper place and to take proper care to see that no unauthorised person receives them.

C **Notes.** As to delivery of goods, see 29 HALSBURY'S LAWS (2nd Edn.) 120 et seq.; and for cases see 39 DIGEST 541 et seq.

Appeal from Clerkenwell County Court.

D The plaintiffs, who were wine merchants, claimed £16 2s. 11d., the price of a case of 1906 Moët and Chandon champagne, which they alleged had been delivered to the defendant, who was a licensed victualler, under a contract of sale. The defendant admitted the contract, but said that the wine had never been delivered to him. The defendant had requested the plaintiffs to deliver the champagne at his premises. Accordingly, the plaintiffs handed the wine to a firm of carriers and employed them to take the wine and deliver it at the defendant's premises.

E The carriers delivered it at the defendant's premises and obtained a receipt signed in the name of the defendant by some person on the defendant's premises, but who, as it transpired, had no authority to sign for the goods. The goods, in fact, never reached the defendant. The county court judge held, on the facts, that there was no good delivery to the defendant. The plaintiffs appealed.

F *S. E. Pocock* for the plaintiffs.
E. H. Cannon for the defendant.

Cur. adv. vult.

May 25. **LUSH, J.**, read the following judgment of the court: This action was brought to recover the price of some wine which, it was alleged, was sold and delivered to the defendant. The defendant admitted the contract, but he denied the delivery. The wine was delivered, if at all, by a carrier who was engaged by the plaintiffs. The only issue in the case was whether the wine was properly delivered in pursuance of the contract. The learned judge gave judgment for the defendant. In his judgment he found as a fact that the carrier was the plaintiffs' servant, so that delivery to the carrier was no delivery to the defendant. No objection can be taken to this finding. It was, no doubt, a correct conclusion, as the carrier was employed and paid by the plaintiffs. The learned judge then said:

"As I am satisfied that the carrier did not deliver the wine either to the defendant or to anyone authorised by him to receive the wine there must be judgment for the defendant."

I The plaintiffs, by leave of the learned judge, appealed against that judgment. At the hearing of the appeal, it was contended for the plaintiffs that, even though the carrier was the plaintiffs' agent, the wine had been duly delivered because the plaintiffs had been told to deliver it at the defendant's premises, and the carrier had done so, and that the learned judge was wrong in law in holding that, because it was not actually handed to the defendant himself or some authorised servant, there had been no delivery. Counsel were not agreed, and they were doubtful what was the exact meaning of the learned judge's notes, or what were his findings of fact. We intimated to counsel that we proposed to communicate with the learned

judge and have these difficulties cleared up. No objection was taken to this not unusual course in such cases. Accordingly, we did communicate with him, and he has been good enough to send us a further note, the contents of which we communicated to counsel. It certainly appears to us that the learned judge decided the case on this view of the law—namely, that, even though goods are delivered at the place at which the vendor was directed to deliver them, yet if an authorised person takes them and appropriates them to himself there has been no delivery, however reasonably the vendor's agent may have acted in handing the goods to the actual recipient of them. If that is what the learned judge decided, we cannot agree with his view. He has decided the case on a wrong view of the law. A seller who is told to deliver goods at the buyer's premises discharges his obligations if he delivers them there, without negligence, to a person apparently having authority to receive them. He cannot know what authority the actual recipient has. His duty is to deliver the goods at the proper place, and, of course, to take all proper care to see that no unauthorised person receives them. He is under no obligation to do more. If the purchaser has been unfortunate enough to have had access to his premises obtained by some apparently respectable person, and the goods are received by that person who signs for the goods in the buyer's absence, and appropriates them, the loss must fall on the buyer, and not on the innocent carrier or seller. The learned judge, however, does not seem to have considered the question whether the carrier in this case exercised all proper care in handing the goods over to the person who took them and signed for them, and we think that the proper course is to send the case back for a new trial on the one question whether the goods were duly delivered having regard to the principle which we have stated. In the circumstances, the costs of the hearing and of the appeal will be costs in the cause.

Appeal allowed.

Solicitors: *Bate & Co.*; *Claud Lumley & Co.*

[*Reported by T. W. MORGAN, Esq., Barrister-at-Law.*]

UNITED DAIRIES, LTD. v. PUBLIC TRUSTEE AND ANOTHER

[KING'S BENCH DIVISION (Greer, J.), November 6, 7, 1922]

[Reported [1923] 1 K.B. 469; 92 L.J.K.B. 326; 128 L.T. 768;
39 T.L.R. 125; 67 Sol. Jo. 199]

Landlord and Tenant—Repair—Breach of covenant—Liability of tenant—Breach by lessees, tenants in common—Right of landlord to recover in full from each tenant.

A lease containing a covenant to repair by the lessees became, by assignment, vested in two tenants in common. On the expiration of the lease the lessor claimed to recover from the tenants in common damages for breach of the covenant.

Held: the lessor could recover from either of the two tenants in common the whole of the damages found due for breach of the covenant.

Norval v. Pascoe (1) (1864), 34 L.J.Ch. 82, applied.

Merceron v. Dowson (2) (1826), 5 B. & C. 479; 8 Dow. Ry. K.B. 264, considered.

Notes. As to the liabilities of a tenant and an assignee, see 23 HALSBURY'S LAWS (3rd Edn.) 651 et seq.; and for cases see 31 DIGEST (Repl.) 443 et seq.

A Cases referred to :

- (1) *Norval v. Pascoe* (1864), 4 New Rep. 390; 34 L.J.Ch. 82; 10 L.T. 809; 28 J.P. 548; 10 Jur. N.S. 792; 12 W.R. 973; 31 Digest (Repl.) 448, 5758.
 (2) *Merceron v. Dowson* (1826), 5 B. & C. 479; 8 Dow. & Ry. K.B. 264; 4 L.J.O.S.K.B. 211; 108 E.R. 179; 31 Digest (Repl.) 448, 5753.

B

- (3) *Congham v. King* (1631), Cro. Car. 221; 79 E.R. 794; 31 Digest (Repl.) 447, 5750.
 (4) *Goodright d. Hare v. Cator* (1780), 2 Doug. K.B. 477; 99 E.R. 304; 31 Digest (Repl.) 533, 6578.
 (5) *Curtis v. Spitty* (1835), 1 Bing. N.C. 756; 1 Hodg. 153; 1 Scott, 737; 4 L.J.C.P. 236; 131 E.R. 1309; 31 Digest (Repl.) 448, 5754.

C

- (6) *Gratton v. Wall* (1868) I.R. 2 C.L. 484.
 (7) *Shee v. Gray* (1864), 15 I.C.L.R. 296.
 (8) *Orme v. Wills* (1878), 2 L.R.Ir. 124; 31 Digest (Repl.) 448, *1875.
 (9) *Dooner v. Odlum*, [1914] 2 I.R. 411; 31 Digest (Repl.) 283, *1412.
 (10) *Holloway v. Berkeley* (1826), 6 B. & C. 2; 9 Dow. & Ry. K.B. 83; 5 L.J.O.S.K.B. 1; 108 E.R. 353.

D

- (11) *Gamon v. Vernon* (1678), 2 Lev. 231; 83 E.R. 532; sub nom. *Gammon v. Vernon*, T.Jo. 104; 31 Digest (Repl.) 447, 5752.
 (12) *Stevenson v. Lambard* (1802), 2 East, 575; 102 E.R. 490; 31 Digest (Repl.) 287, 4217.

E

- (13) *Thompson v. Hakewill* (1865), 19 C.B.N.S. 713; 35 L.J.C.P. 18; 13 L.T. 289; 11 Jur. N.S. 732; 14 W.R. 11; 144 E.R. 966; 31 Digest (Repl.) 367, 4983.
 (14) *Roberts v. Holland*, [1893] 1 Q.B. 665; 62 L.J.Q.B. 621; 41 W.R. 494; 5 R. 370, D.C.; 31 Digest (Repl.) 474, 6000.

Also referred to in argument :

- Simpson v. Clayton* (1838), 4 Bing. N.C. 758; 1 Arn. 299; 6 Scott, 469; 8 L.J.C.P. 59; 2 Jur. 892; 132 E.R. 981; 31 Digest (Repl.) 67, 2241.

F

Point of law on pleadings set down for hearing as a Special Case.

By a lease dated Oct. 10, 1826, certain premises were demised to one John Johnson the elder and John Johnson the younger, their executors, administrators and assigns for a term of ninety-four years from Sept. 29, 1825. The lease contained covenants by the lessees, their heirs, executors, administrators and assigns or some or one of them to keep the premises in repair during the term and to yield them up well and sufficiently repaired at the expiration of the term. After divers mesne assignments, the lease became vested in 1888 in Lewis William Thomas and Alfred James Thomas as tenants in common. Lewis William Thomas died on Apr. 12, 1919, leaving the Public Trustee as his executor. The lease thereupon became vested in the Public Trustee as such executor and the said Alfred James Thomas as tenants in common. By an indenture dated Aug. 20, 1919, the plaintiffs purchased from Lord Southampton all his reversionary interest in the premises comprised in the lease of Oct. 10, 1826. On the expiration of that lease on Sept. 29, 1919, the plaintiffs alleged that the premises were out of repair in breach of the covenant contained in the lease, and sued the Public Trustee and Alfred James Thomas as tenants in common by assignment of the lease. The plaintiffs claimed to recover from both the defendants the whole of the alleged damage arising out of the breach of covenant. Each defendant denied that the premises were out of repair and denied liability, but the Public Trustee, while denying liability, brought into court the sum of £2,000 in satisfaction of the plaintiff's claim against him. The defendant Alfred James Thomas did not pay any sum into court. Each defendant in his defence submitted "that the liability of this defendant is limited to one moiety of the damages claimed" and this question was by order set down for argument.

G

H

I

Wootten, K.C., and R. O. B. Lane for the plaintiffs.

Barrington Ward, K.C., and H. C. Davenport for the defendant, the Public Trustee.

The defendant Alfred James Thomas was not represented.

Cur. adv. vult.

Nov. 21. **GREER, J.**, read the following judgment.—In this case, by an order made under Ord. 25, r. 2, I have to decide the point of law raised by para. 9 (b) of the defence of the defendant the Public Trustee, and para. 8 (b) of the defence of the defendant Alfred James Thomas. The action is one to recover damages against the two defendants as tenants in common by assignment of the interests of the lessee in certain land originally leased to the defendants' predecessors in title by lease dated Oct. 10, 1826, for breach of covenant to repair the leased property and to deliver up the same well and sufficiently repaired at the expiration or sooner determination of the term. The plaintiffs claim that they are entitled to a judgment against both defendants for the whole of the damages. The defendants plead respectively in the paragraphs of their defences above referred to that the liability of each of them is limited by law to one moiety of the damages. The question that I have to decide is whether tenants in common by assignment of the interests of a lessee are each liable in an action against both of them to have judgment entered against both for the whole amount of the damages, or whether there must be a judgment against each of them for one half of the damages only. The question is one of some difficulty, and, after examining a large number of authorities, I have come to the conclusion that there is no actual decision on the point in the English courts except *Norval v. Pascoe* (1). As the decision is one that has been standing since 1864, I could content myself by saying that I decide the present case in the plaintiffs' favour on the authority of *Norval v. Pascoe* (1), but the decision is one that has been very much criticised, and it therefore seems to me desirable that I should investigate the question a little further.

Tenants who take a leasehold interest by assignment are not under any contractual obligation to perform the covenants of the lease. The original lessees and their representatives continue liable under the lease, but the law imposes on the assignees while they are assignees, a liability to perform the covenants contained in the lease by reason of what is called "privity of estate," that is to say, inasmuch as they take under the original lease they are liable to perform the covenants for the benefit of any person who succeeds to the title of the original lessor. Where the assignee is a single person who takes the whole of the leased property no difficulty arises. Where the leased property has been physically divided amongst two or more assignees it is clear that the obligations of the lease, so far as they affect the assignees, become separate, and each of the assignees is liable, while he is assignee, to perform the covenant so far as they affect his divided part of the leased property (see *Congham v. King* (3), *Goodright d. Hare v. Cator* (4), *Curtis v. Spitty* (5), *Gratton v. Wall* (6), *Shee v. Gray* (7), *Orme v. Wills* (8), and *Dooner v. Odum* (9)). In the latter case, **KENNY, J.**, after referring to a number of cases, including *Norval v. Pascoe* (1), *Curtis v. Spitty* (5), *Shee v. Gray* (7), *Gratton v. Wall* (6), and *Orme v. Wills* (8), says this ([1914] 2 I.R. at p. 480):

"But, while many of those cases turned on points of pleading, it will be found that throughout all of them the principle was recognised that, in order to free the assignee of part of the lands from payment of the entire rent, he must hold the part in physical severalty. When he does so there is no privity of estate, as between him and the reversioner, in the entire of the lands. If the share be not held in severalty—whether it be held jointly or in common with others—he is owner with those others of the whole estate, and would be liable accordingly for the whole rent."

A I have looked at the Irish cases and they seem, in my judgment, to support the
view expressed by KENNY, J., in the words quoted; though it does not seem to
me quite accurate to say that a tenant in common is an owner with others of
the whole estate. Unlike a joint tenant, he is not a joint owner of the whole
estate, but, inasmuch as he has a share of every part of the estate, it seems
to me to be true to say that there is privity of estate between him and the
B landlord in the whole of the leased property. The view expressed by KENNY, J.,
concerns a covenant to pay rent which in its nature is apportionable, and, of
course, applies, if right, a fortiori to a covenant to repair which in its nature
is not apportionable.

The present case was argued before me on the assumption that, in English
law, whatever may be the case in Ireland, a tenant in common is not liable for
C the whole rent, but only for a proportionate part, but I do not think this question
appears to be definitely concluded by any of the decisions in the English courts.
In LEAKE ON CONTRACTS (7th Edn.), p. 931, a view is expressed similar to that
I have quoted from the decision of KENNY, J. BAYLEY, J., in giving judgment in
Holloway v. Berkeley (10), a case dealing with heriots, points out that, where
D there are tenants in common with undivided moieties, there is only one tenement
in the whole of which each tenant shares. Though there may in a sense be two
estates, it is obvious that each tenant in common has an estate in the whole of
the single tenement, and that, as regards this estate, there is privity between
him and the landlord. There appears, therefore, to be no logical reason why a
covenant which is imposed on him by the law based on privity of estate should
not be co-extensive with his estate which is an estate in the whole of the lease-
E ment. BAYLEY, J., goes on to say (6 B. & C. at p. 11):

"Where the tenement is sub-divided, each tenant holds his share in severalty,
and it is subject to nothing beyond its own services. In the case of a tenancy
in common, the tenement is undivided; none of the tenants in common,
be there what number there may, knows his own in severalty; the services,
F which in case of division would be divisible, remain entire, and the whole
land is liable to all the services."

BAYLEY, J., is there dealing with the services which a freeholder may be called
on to perform, which, of course, may include a rent which is in itself divisible
as well as other services which may be indivisible; but in either case his view is,
apparently, that the tenant in common is under liability to perform the whole
G of the services. If this is right, it is an authority in favour of the view that a
tenant in common of leased land is liable for the whole rent, as I cannot see why
there should be any distinction between the incidence of covenants running with
the land on an assignment of freehold land and on an assignment of leasehold
land. However, there is what seems at first sight decisive authority for the
proposition that in England at any rate an assignee who is a tenant in common
H is only liable for his due proportion of the rent: see *Gamon v. Vernon* (11) and
Stevenson v. Lambard (12), but if these decisions are closely examined it becomes
apparent that they are not actual decision on the question, and that they do
not necessarily involve the proposition that a tenant in common cannot be sued
for the whole of the rent.

Gamon v. Vernon (11) was an action for debt against an assignee of an undivided
I moiety of the land for a moiety of the rent. It was moved in arrest of judgment
that both the privity of estate and contract remained entirely in the lessee and
the assignee was not chargeable, but the court held that

"the assignee having the entire estate in one moiety of the land, he hath
the privity of the estate sufficient to be charged by the lessor for the moiety
of the rent, if he will; and judgment was given for the plaintiff."

It is not clear what the court meant by the words "if he will." DODD, J., in
Dooner v. Odlum (9), suggests ([1914] 2 I.R. at p. 415) that these words mean

if he prefers to sue the assignee for half of the rent rather than sue the lessee for the whole, but this is by no means clear. The words may mean, if he is content to take half when he might take the whole, he can do so; but in any event the case is not a decision that a tenant in common of a moiety of lands cannot be sued for the whole of the rent; it is only an authority that, if an action is brought for half the rent, it is no answer to say that he is only a tenant of a moiety. In *Stevenson v. Lambard* (12), the landlord claimed from the defendant the whole rent under a covenant in the original lease, alleging that all the right, title and interest in the term had vested by assignment in the defendant. The defendant pleaded (i) non est factum, (ii) that all the interest and title of the original lessee did not vest by assignment in the defendant, (iii) no rent in arrear, and (iv) that, as to so much of the said supposed breach of covenant as related to the non-payment of half the rent, the defendant had been ejected by title paramount of one undivided moiety. To the fourth plea the plaintiff demurred. Judgment was given for the plaintiff on the demurrer, on the ground that the plea was bad, as it was a plea to the whole of the claim and was no answer to the whole of the claim. Judgment was given for the plaintiff, and the defendant was given leave to amend his plea by pleading it only to one moiety of the rent. It was not necessary for the court to decide anything more than that the plea as pleaded was bad, but it is quite clear from the judgment that LORD ELLENBOROUGH and the other judges thought that, under these circumstances, the covenant was divisible and that the defendant was liable for only half the rent. It may well be that, where an assignee has been evicted from a portion of the land by title paramount, he cannot be made liable for more than half of the rent, as he and the owner of the other moiety do not hold the same tenement. They occupy under different leases and are not in the same position as two tenants in common who take their title under a lease from the plaintiff or his predecessor in title.

It seems to me on the authorities that it has never been conclusively established that an assignee holding with other tenants under the terms of the original lease is not liable jointly with those other tenants for the whole rent. He has an interest in the whole of the land leased, though it is only a partial interest; his estate extends over the whole of the land leased; and I see no valid reason why tenants in common should be in a position as regards liability for rent different from that of joint tenants. I am inclined to think that each of the tenants in common has the privity of estate with the landlord in the whole of the land leased. However this may be, even if tenants in common are only liable for the duly apportioned part of the rent, it by no means follows that they are only liable for an apportioned part of the damages for breach of covenant to repair. It seems clear that, before breach, the obligation of each of them is of necessity an obligation to repair the whole estate. This, in itself, is not divisible and, if one of the tenants in common expended in repairs one-half the sum necessary to repair the whole property, he would not thereby be in a position to say that he had fulfilled his obligation as assignee of an undivided share over the whole of the leased land, inasmuch as there is only one indivisible obligation extending over the whole of the land. Where leased land is physically divided, it is possible to say that the covenant imposed by law through privity of estate on the assignee is confined to the part of the land in respect of which there is privity of estate between the assignee and the landlord, but where the land is not physically divided, it is not possible to split the covenant into two covenants capable of enforcement. It is to be remembered that the covenant is not to pay damages if the repair is not done, but it is a covenant to do the repairs, and it seems to me on principle that the right to damages must be co-extensive with the right conferred on the landlord and the duty imposed on the tenant. A covenant which before an action is brought is necessarily a covenant to repair the whole of the property cannot by the issue of a writ become a covenant to pay half the damages

- A for non-repair. In *Thompson v. Hakewill* (13), BYLES, J., dealing with the question from the point of view of tenants in common of the reversion, points out (19 C.B.N.S. at p. 723) that they may have separate claims according to the extent of their interest for a money rent, but with reference to such services as a hawk or horse which cannot be severed they can only have one claim. In support of this he cites a passage from LITTLETON, s. 314, and then points out
- B (ibid. at p. 729):

"The analogy of this to the case of a covenant with two tenants in common to repair a house, in every brick whereof they are jointly interested, and more especially to such a covenant to repair after notice."

- C It was accordingly held in that case that, where the original lease had been a joint lease by two tenants in common, the assignee of one of the tenants in common could not sue alone on a covenant to repair. In *Roberts v. Holland* (14), it was held by WILLS and CHARLES, JJ., that, if a lease be granted by one person, containing a covenant with the lessor which runs with the land, and the reversion afterwards becomes severed and vests in several tenants in common, one of the tenants in common can maintain an action to recover such damages as he has
- D suffered under the breach of covenant to repair. *Thompson v. Hakewill* (13) was cited, and distinguished on the ground that, in that case, originally the lease had been a joint one. In the present case, the covenant was joint and several.

- E *Merceron v. Dowson* (2) was cited by the defendants as an authority in their favour. It seems to me that that case can only be treated as an authority for what it in fact decided, viz., that, if the reversioner brings an action against one tenant in common for damages for breach of covenant to repair, it is not a good answer to plead that the defendant has only an undivided share in the land which is subject to the covenant. In giving judgment, BAYLEY, J., said (8 Dow. & Ry. K.B. at p. 268):

- F "The defendant is the assignee of the lessee; and though he has no entire interest in any part of the estate, he has a qualified interest in the whole: and as the whole estate is burthened with the liability to repair, he is liable for a portion of the repair commensurate with his interest. But he by his plea says, that he is not liable at all. That is a plea in bar, and as such, clearly bad. He should have pleaded that he was not liable for the whole in the manner in which he is charged, and should have described the other persons
- G who are jointly liable with him, so as to enable, and consequently to compel, the plaintiffs to join them in the declaration. His only ground of objection is that he is charged singly, whereas he ought to have been charged jointly with others, and that was matter which should have been pleaded in abatement, and not in bar."

- H HOLROYD, J., said (ibid.) that the defendant ought to have pleaded in abatement and not in bar. LITTLEDALE, J., said (ibid. at p. 269):

- I "If the meaning of the defendant was to deny his liability except in respect of one-sixth or one-third, he should have compiled his plea to the residue. I am by no means satisfied that, so far as that, he might not have pleaded in bar, because he might not know who the other tenants in common were; but as this plea is bad either in bar, or in abatement, it is not necessary to decide that point. It was decided in *Gamon v. Vernon* (11), that either debt or covenant will lie for rent against the assignee of part of an estate; and assuming that to be law, I see no reason why covenant should not lie against such an assignee for a portion of the damages arising from non-repair: for such damages appear to me to be as easily apportionable as rent. But, however that may be, it is clear that this plea is bad, and consequently the plaintiff is entitled to judgment on the demurrer."

It seems to me clear that this decision does not necessarily involve the proposition that a tenant in common can only be sued for his proportion of the damages. Some words in the judgment of BAYLEY, J., already quoted, appear to indicate that he thought that the defendant would have had a defence if he had pleaded it in bar to half of the claim, but, if he really thought this, it is difficult to understand his reference to a plea in abatement, as a plea in abatement would only be necessary if there were other persons liable to perform the same duties as himself. LITTLEDALE, J., obviously was inclined to think that the plea would have been a good one if confined to a portion of the liability, but he says it is unnecessary to decide this.

I, therefore, do not think that *Merceron v. Dowson* (2) affords conclusive authority for the proposition put forward by the defendants. As I have already stated, I think the decision of KINDERSLEY, V.-C., in *Norval v. Pascoe* (1) involves the proposition contended for by the plaintiffs, viz., that each tenant in common is liable for the whole of the damages. It is true that that was a case relating to mining licences, but it was argued and decided on the assumption that covenants run with a licence in the same way as they do with leased land. It has been pointed out that the last words of the judgment, in which it is stated that the result is exactly consistent with justice since the defendant, though he took only two-thirds, had in fact been working the whole, shows that the decision is unsatisfactory. It seems to me that what the Vice-Chancellor meant by those words was that he was satisfied that the principle on which he decided the case did not have the unfortunate result of making the defendant pay what was in reality someone else's debt. This, however, was no part of the ratio decidendi but only an expression of satisfaction that the law did not work unjustly in the case before him. In my view, both on principle and on authority, my judgment should be in favour of the plaintiffs, that the plea contained in para. 9 (b) of the defence of the Public Trustee, and para. 8 (b) of the defence of A. J. Thomas, affords no answer to the plaintiffs' claim to recover from them or either of them the whole of the damages which the plaintiffs may prove they have sustained by reason of the alleged breach of covenant. There must be judgment for the plaintiffs on the point of law, and the defendant, the Public Trustee, must pay the costs in any event of this hearing and incidental thereto.

Judgment for plaintiffs on point of law.

Solicitors : S. L. MacAndrew ; Corbin, Greener & Cook.

[Reported by ROCHFORD BLAKISTON, Esq., Barrister-at-Law.]

A

ELLIS v. DEHEER

[COURT OF APPEAL (Bankes, Warrington and Atkin, L.JJ.), April 26, 27, 1922]

[Reported [1922] 2 K.B. 113; 91 L.J.K.B. 937; 127 L.T. 431; 86 J.P. 169;
38 T.L.R. 605; 66 Sol. Jo. 537; 20 L.G.R. 625]B *Practice*—*New trial*—*Verdict given by foreman not that of whole jury*—*Admissibility of affidavits of jurors.*

On an application for a new trial of an action tried before a jury, on the ground that the verdict given by the foreman was not that arrived at by the whole jury, affidavits of certain of the jurors were put in stating that they did not hear what the foreman said, and that, if they had heard, they would have protested against it.

C **Held:** the affidavits were admissible, and, accepting the statements in them as being true, a new trial would be ordered.

Notes. Applied: *R. v. Thomas*, [1933] All E.R. Rep. 726. Considered: *Ras Behari Lal v. The King Emperor*, [1933] All E.R. Rep. 723. Referred to: *Hawksley v. Fewtrell*, [1953] 2 All E.R. 1486.

D As to the giving of a verdict by a jury, see 23 HALSBURY'S LAWS (3rd Edn.) 34 et seq.; and for cases see 30 DIGEST (Repl.) 280 et seq.

Cases referred to:

- (1) *R. v. Wooler* (1817), 6 M. & S. 366; 2 Stark. 111; 105 E.R. 1280; 30 Digest (Repl.) 280, 485.
- E (2) *Roberts v. Hughes* (1841), 7 M. & W. 399; 1 Dowl. N.S. 82; 10 L.J.Ex. 337; 151 E.R. 821; 30 Digest (Repl.) 293, 659.
- (3) *R. v. Willmont* (1914), 78 J.P. 352; 30 T.L.R. 499; 10 Cr. App. Rep. 173, C.C.A.; 30 Digest (Repl.) 269, 340.
- (4) *Pirie v. Caledonian Rail. Co.* (1890), 17 R. (Ct. of Sess.) 1157; 27 Sc.L.R. 973.

F **Application** for a new trial in an action tried before Mr. Commissioner MACMORRAN, K.C., and a special jury at the Leeds Assizes.

The facts are set out in the judgment of BANKES, L.J.

Mitchell-Innes, K.C., and *Paley Scott* for the plaintiff.

Waugh, K.C., and *Gilbert Stone* for the defendant.

G **BANKES, L.J.**—This is a peculiar and from some points of view an important case, which arises out of an action for personal injuries which was tried before Mr. Commissioner MACMORRAN, K.C., and a special jury, at the Leeds Assizes. After the summing-up, the jury retired to their room to consider their verdict and another jury which had been empanelled to try the next case then went into the jury box, and they were still there when the first jury returned. On returning

H into court, the first jury could not all stand together owing to the structural condition of the court; the foreman went into the witness box and some members of the jury were out of sight of the judge at the time when it was obvious that it was essential that they must hear what passed between the judge and the foreman of the jury. The latter announced what purported to be their verdict, namely, that both parties were equally to blame, and judgment was, accordingly,

I entered for the defendant. The plaintiff now seeks to obtain an order for a new trial on the ground that the verdict as recorded was not the verdict of the jury as a whole.

A mass of evidence has been tendered in the shape of affidavits by jurymen, which are largely composed of statements, not only as to what happened after the jury had retired to their room to consider their verdict and as to how that verdict was arrived at, but also as to what took place in court after they had returned. As to this, I desire to make it very clear that the court will never

admit, for the purpose either of questioning or of supporting a verdict, any evidence from jurymen of the discussion which they may have had between themselves when they were considering their verdict or of the reasons for their decision, whether the discussion took place in the jury room after their retirement or in the jury box itself. This has been a well-accepted rule for many years, the policy underlying it being that it ought not, when once a verdict has been given, to be open to an individual jurymen to challenge the verdict, or, if it was challenged, to attempt to support it. But I think the matter goes further. Not only is there such a rule of law, but it has also been generally accepted by the public and by the Press as a rule of conduct that what passes in the jury room during the discussion by the jury as to what their verdict should be is something which ought to be treated as private and confidential. Speaking for myself and, I am sure, for a large number of other persons, I saw the other day with astonishment and disgust the publication, in what are generally accepted as respectable newspapers, of a statement by the foreman of the jury in a criminal case which attracted much public attention as to what took place in the jury room after the jury had retired. I feel confident that anybody who read that statement will realise the importance of maintaining the rule as it has been generally accepted, and I say nothing whether a person who invites such a statement and publishes it does or does not commit contempt of court.

I now proceed to consider the application of the rule to the facts of the present case. Here the motion for a new trial is not based on anything that took place during the discussion of the jury in their private room, but on something that happened after their return to the court. It is said that the verdict given by the foreman was not that arrived at by the jury. When a verdict is delivered in the sight and hearing of all the jury without any protest on their part, the inference is irresistible that they assented to it; but there is no such presumption where some of them did not hear it delivered. Here we have it on the affidavit of Mr. Patrick, one of the jurymen, that, owing to his position in the court, he did not hear what the foreman said, and that, if he had heard it, he would have protested at the time; and two other jurors have also made affidavits to the effect that they did not hear the verdict delivered. In my opinion, these affidavits are admissible, and I see no reason why I should not accept those statements as being correct.

Certain cases were cited to us in the course of the arguments and I now desire to refer to them in their order. The first was *R. v. Wooler* (1), which seems to me to be an authority in support of the present application. The facts in that case were curiously similar to the facts in the present case. In that case, the box being occupied by the second jury, the foreman and three other jurymen of the first jury only appeared in view of the court, the others answering to their names from a small room behind the judge's seat, and separated from the court by a wooden partition. The foreman, in answer to the usual question, answered that they found the defendant guilty, but that three of the jurymen who had not been able to get into the court when the verdict had been given, and had not heard what passed, wished to add something. LORD ELLENBOROUGH said (2 *Stark*. at p. 114):

"The court think that they are shut out from acquiring any knowledge of the fact by means of an affidavit. From the statement made by the learned judge who tried the cause, it appears that the verdict was given under circumstances which render it doubtful whether the usual assent was given by all the jury to the verdict delivered by the foreman. The danger would be infinite if an affidavit could be received from a jurymen for the purpose of setting aside a verdict."

And BAYLEY, J., said (*ibid.*):

"I concur entirely in every observation which has been made by my Lord in this case. The jury were not all in view when the verdict was given, and

- A the learned judge who tried the cause has himself expressed a doubt whether all the jury heard what passed, and the matter was mentioned in the court at as early an opportunity as it could have been with decency."

Accordingly, the court declined to accept an affidavit from a jurymen, but they granted a new trial on a statement made by the learned judge who tried the case, from which it appeared that the verdict was given under circumstances which rendered it doubtful whether the usual assent was given by all the jury to the verdict delivered by the foreman.

- B The next case in order of date is *Roberts v. Hughes* (2), where the complaint was that the verdict had been entered for the plaintiff by a mistake of the under-sheriff. It was proposed to read an affidavit of one of the jurors as to what had passed on the delivery of their verdict. It was held per curiam that

- C "the rule does not exclude jurymen from swearing to what took place in open court, but only as to what took place in their private room, or the grounds on which they found their verdict,"

and the affidavit was, accordingly, read. The third case to which I desire to refer, and to which I was a party, is *R. v. Willmont* (3), in the Court of Criminal Appeal. It was a curious case because there, on the trial of a prisoner at Assizes, some time after the jury had retired to consider their verdict the clerk of assize went to their room and asked whether they had agreed or were likely to agree. The jury then put some questions to him which he answered, and a discussion took place. Later he visited the jury again, and a further discussion took place. On appeal, it was sought to admit evidence from the jurymen to prove these facts.

- E The court held that evidence from the jurymen to prove the above facts was inadmissible, but that the court would act on a report made by the clerk of assize, and that, as it was impossible to say that, but for the discussions and the advice given by him, the jury would have come to a unanimous conclusion, the conviction must be quashed. With regard to *Pirie v. Caledonian Rail. Co.* (4), which was cited by counsel for the defendant, and on which he relied, I do not think that it assists very much. It was there held by the Court of Session that, after a jury has been discharged, it is incompetent to show by the evidence of jurymen that the verdict does not correctly express the result at which the jury arrived. The foreman purported to give the verdict of the majority, and an attempt was made to put in an affidavit by a juror that the jury were equally divided, but that attempt failed and the court supported the rule as already formulated and gave its reason why the court would not allow the verdict to be challenged. LORD M'LAREN states the principle as follows (17 R. (Ct. of Sess.) at p. 1163):

- H "LORD ELLENBOROUGH explained that, when a verdict is propounded by the foreman of the jury in presence of the others, an opportunity is given to any jurymen who thinks a mistake has been made to correct that mistake or to state his impression as to the result of their deliberations, and, if he does not avail himself of the opportunity which he has of correcting the foreman either as to the general question or as to the sum of damages, whichever it might be, which they were agreed on, he is held to have acquiesced in the verdict as delivered. This seems to me to be a perfectly sound and unimpeachable principle."

- I The court, accordingly, refused to accept the affidavit and discharged the rule for a new trial. That is a very different case from the present.

As I have already said, we ought to accept the affidavits of the three jurors who stated that they did not hear what the foreman said, and, further, as to one of them, that, if he had heard it, he would have protested that it was not the verdict of the jury as a whole. In my opinion, these statements are admissible. The result is that the verdict is shown not to be the unanimous verdict of the

jury. In these circumstances, there must be a new trial, the costs of the first trial to abide the result of the second. A

WARRINGTON, L.J.—I agree. I desire to express my concurrence with what BANKES, L.J., has said as to the extreme impropriety of publishing what takes place after the jury have retired and are considering their verdict. As the verdict which has been recorded in this case was not the unanimous verdict of the jury, I agree there ought to be a new trial. Our decision in so granting it is given, not on the ground of anything that happened whilst the jury were considering their verdict, but because, after their return into court, they were placed in such a position that they could not all hear. I see no reason why this fact should not be proved by affidavits of the jurymen in question. B

ATKIN, L.J.—This was an action for personal injuries caused by negligence, tried at the Leeds Assizes before a special jury and the learned commissioner, and, in order to determine the issue, it was necessary that there should be a unanimous verdict of the twelve jurymen all agreed on the verdict at the time it was delivered. In accordance with the ordinary practice, the verdict of the jury is delivered by the foreman in open court, and it is, or ought to be, delivered by the foreman in the presence of all the other jurymen, and their assent to the verdict is inferred from the fact that the verdict is delivered by the foreman in their presence. And if it is delivered in their presence, *prima facie*, it is the unanimous verdict of them all. But it is always a question of fact whether there has been a unanimous verdict of the jury. It would certainly require very strong evidence to satisfy the court that a verdict delivered by the foreman in open court in the presence of all the jury was not, in fact, assented to by all the jury. I can hardly imagine any case in which that fact, by itself, would not be conclusive. But circumstances may arise as to the delivery of the verdict from which the assent of all the jurymen could not be inferred, and one such case is *R. v. Wooler* (1), where the jury, having come into court while another jury were considering what in that case happened to be a second information against the same defendant, had not all come into court so as to be seen or to be able to see or hear anything that was going on. Evidence was admitted of a jurymen that he had not heard or that they had not heard the verdict, and had not assented to it. In this case, precisely the same state of facts arises. The jury had retired, the second case was in course of being heard when the first jury filed into court and the evidence of one of the jurymen is that some of the jury were so placed, being behind the partition of the jury box, that they were not able to see or hear what took place. It seems to me that there is no rule of law which prevents that evidence from being given or prevents the court, if it believes the fact, from giving effect to the true conclusion of fact, namely, that the verdict as given was not the unanimous verdict of the twelve jurymen. I see no reason for impugning the veracity of the jurymen. It is true he did not make a protest at once, but neither did the jurymen in *R. v. Wooler* (1) make a protest at once, because it was not until the judge had finished his summing-up in the second case and the jury had retired that any mention of the matter was made to the judge in respect of the first matter. However, that is merely a detail of fact. The court are prepared to accept the evidence of the jurymen as being the evidence of a witness of truth, and, under those circumstances, it seems to me to follow that a new trial should be ordered. C

I also wish to express my complete agreement with what has fallen from my Lord in respect of the general proposition, which is that the court does not entertain or admit evidence by a jurymen of what took place in the jury room either by way of explaining the grounds on which the jury arrived at their conclusion or by way of a statement as to what he believed its effect to be. The reason why that evidence is not admitted is both in order to secure the finality of decisions D E F G H I

- A of fact arrived at by a jury, and, also, which is a matter of great importance for the protection of jurymen themselves, to prevent their being exposed to pressure that might otherwise be put on them with a view to explaining the reasons which actuated them individually in arriving at their verdict. To my mind, it is a principle which it is of the very highest importance in the interests of justice to maintain, and an infringement of the rule appears to me to be a very serious interference with the administration of justice. I do not propose to decide (for it is not before us) whether such a publication on the part of the Press of the view or reason of a particular jurymen for arriving at his decision is, or is not, a contempt of court, and I purposely avoid expressing such an opinion. For the present, I am content to express my complete adherence with the views enunciated by the other members of the court on that matter.

C New trial ordered.

Solicitors: *Smith & Hudson*, for *Payne & Payne*, Hull; *Collyer-Bristow & Co.*, for *Laverack, Wray & Co.*, Hull.

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.]

D

DENNIS v. HUTCHINSON. TRAFFORD v. SAME

- E [KING'S BENCH DIVISION (Lord Trevethin, C.J., Avory and Roche, JJ.), January 17, 18, 1922]

[Reported [1922] 1 K.B. 693; 91 L.J.K.B. 584; 126 L.T. 669; 86 J.P. 85; 38 T.L.R. 263; 66 Sol. Jo. 316; 20 L.G.R. 199; 27 Cox, C.C. 202]

- F *Shop—Hours of closing—Amusement stalls—"Shop"—"Premises where any retail trade or business is carried on"—Shops Act, 1912 (2 Geo. 5, c. 3), s. 19 (1)—Shops (Early Closing) Act, 1920 (10 & 11 Geo. 5, c. 58), Schedule, Part I, para. 4.*

- G The appellants were the occupiers of sites or pitches on the beach whereon they each erected a wooden building or stall containing a mechanical contrivance by means of which games were played by members of the public, each competitor paying an entrance fee, for prizes of cigarettes or sweets. The appellants, who carried on no other trade or business at the stalls, were convicted of being the occupiers of shops which, on certain evenings, were not closed at the hours fixed by the Shops (Early Closing) Act, 1920, Schedule, Part I, para. (a), as amended. By para. 4 of the Schedule to the Act of 1920, "shop" and "retail trade or business" had the same meanings respectively as in the Shops Act, 1912, s. 19 (1). On appeal,

- H **Held:** neither of the stalls was a "shop" within the meaning of the Shops Act, 1912, s. 19 (1), since they were not "premises where any retail trade or business" was carried on within that subsection, and, therefore, the conviction must be quashed.

- I **Notes.** The Shops Act, 1912, has been repealed and replaced by the Shops Act, 1950. The Shops (Early Closing) Act, 1920, was repealed by the Shops (Hours of Closing) Act, 1928, which has been repealed and replaced by the Shops Act, 1950. For s. 19 (1) of the Act of 1912, see s. 74 (1) of the Act of 1950.

Referred to: *Summers v. Roberts*, [1943] 2 All E.R. 757; *Deeble v. Robinson*, [1953] 2 All E.R. 1348.

As to the meaning of "shops," see 17 HALSBURY'S LAWS (3rd Edn.) 17, 18; and for cases see 24 DIGEST (Repl.) 1107 et seq. For the Shops Act, 1950, s. 74, see 29 HALSBURY'S STATUTES (2nd Edn.) 246.

Case referred to :

(1) *Wallace v. Dixon*, [1917] 2 I.R. 236; 24 Digest (Repl.) 1109, *171.

Also referred to in argument :

Ward v. W. H. Smith & Son, [1913] 3 K.B. 154; 82 L.J.K.B. 941; 109 L.T. 439; 77 J.P. 370; 29 T.L.R. 536; 11 L.G.R. 741; 23 Cox, C.C. 562, D.C.; 24 Digest (Repl.) 1112, 544.

R. v. Chapman and Alderman (1849), 7 J.P. 132; 15 Digest (Repl.) 1136, 11,422.

Pope v. Whalley (1865), 6 B. & S. 303; 5 New Rep. 323; 34 L.J.M.C. 76; 11 L.T. 769; 29 J.P. 134; 11 Jur. N.S. 444; 13 W.R. 402; 122 E.R. 1208; 33 Digest 555, 377.

Palmer v. Snow, [1900] 1 Q.B. 725; 69 L.J.Q.B. 356; 82 L.T. 199; 64 J.P. 342; 48 W.R. 351; 16 T.L.R. 168; 44 Sol. Jo. 211; 19 Cox, C.C. 475, D.C.; 43 Digest 5, 5.

Harris v. Amery (1865), L.R. 1 C.P. 148; Hop. & Ph. 294; Har. & Ruth. 357; 35 L.J.C.P. 89; 13 L.T. 504; 30 J.P. 56; 12 Jur. N.S. 165; 14 W.R. 199; 43 Digest 7, 23.

Coombs v. Cook (1883), Cab. & El. 75; 40 Digest (Repl.) 353, 2841.

Case Stated by justices.

At a court of summary jurisdiction sitting at Skegness on Aug. 2, 1921, the respondent, Joseph Hutchinson, a police inspector, preferred informations against the appellants, George Alfred Dennis and George Trafford, charging that, on July 18, 1921, Dennis, and on July 16, 1921 (which was a Saturday), Trafford, at the parish of Skegness, were the occupiers of shops which were not closed for the serving of customers not later than eight o'clock in the evening (or nine o'clock in the case of Trafford), contrary to the Shops (Early Closing) Act, 1920. The following facts were proved or admitted: The appellants were the occupiers, under the Earl of Scarborough, of sites or pitches on the beach of Skegness, and on these sites or pitches they had caused to be erected a wooden building or stall. About 10 p.m. on Monday, July 18, 1921, a police sergeant saw the appellant Dennis at the wooden building or stall, whereon was a mechanical contrivance whereby a game called "Slippery Bears" was played. There were twelve poles, each having a teddy bear at the bottom, which was made to move up the pole by turning a handle. The competitor who first succeeded in getting his bear to the top of the pole was declared to be the winner and was handed a prize of chocolates or cigarettes. Each competitor had to pay an entrance fee of 3d., but only the winner received a prize, the value of the prize being far below the total of the amount received from the competitors. At about 10.15 p.m. on Saturday, July 16, 1921, a police constable saw the appellant Trafford at the wooden building or stall, whereon was a mechanical contrivance whereby a number of balls contained in a tub were blown up a spout by means of bellows. A number of people were congregated around the stall. Those who were desirous of competing paid to the appellant the sum of 2d. each and were each handed a net. With these nets the competitors endeavoured to catch the balls as they were blown out of the spout and the competitor who first caught three of such balls was declared to be the winner and was handed a prize of chocolates, cigarettes, or sweets, the remaining competitors, although having paid 2d. as entrance fee, receiving nothing, and the value of the prize being far below the total of the amount received from the competitors. The chocolates, cigarettes and sweets were displayed on the stalls and the winners selected their own prizes. The appellants carried on no other trade or business at the stalls. The police sergeant saw several such games played after payment of entrance fees and a prize of cigarettes handed to the winner on each occasion. The police sergeant did not himself attempt to buy any of the chocolates, cigarettes or sweets for cash paid direct, nor did he see any other person do so, or attempt to do so,

A but cigarettes were handed to the winning competitor as a prize at the conclusion of a game.

It was contended on behalf of the respondent that the stalls or buildings were a "shop" within the meaning of para. (a) of Part I of the order of the Secretary of State, dated April 24, 1917, as amended by subsequent orders, being Part I of the Schedule to the Shops (Early Closing) Act, 1920, and that, therefore, on the date in question such shop should have been closed for the serving of customers not later than eight o'clock in the evening (or nine o'clock in the case of Trafford), and that the delivery of prizes to the winning competitors, after payment of the entrance fee of 3d., constituted a serving of customers. It was contended on behalf of the appellants that the stalls or buildings were not such a "shop," as no retail trade or business was carried on there within the meaning of the Act of 1920, but there was merely a game of amusement.

The justices were of opinion that the stalls or buildings were a "shop" within the meaning of the Act of 1920, that the appellants were the occupiers thereof, and that they were not closed for the serving of customers not later than eight o'clock in the evening (or nine o'clock in the case of Trafford), and convicted the appellants and fined them 10s. each. The appellants now appealed.

D The Shops Act, 1912, s. 19 (1), provides :

"In this Act . . . the expression 'shop' includes any premises where any retail trade or business is carried on. The expression 'retail trade or business' includes the business of a barber or hairdresser, the sale of refreshments or intoxicating liquors, and retail sales by auction, but does not include the sale of programmes and catalogues and other similar sales at theatres and places of amusement . . ."

By para. 4 of Part I of the Schedule to the Shops (Early Closing) Act, 1920, "The expressions 'shop' and 'retail trade or business' . . . have the same meaning respectively as in the Shops Act, 1912."

F P. E. Sandlands for the appellants.
Norman Birkett for the respondent.

LORD TREVETHIN, C.J.—This case raises a question under the Shops Act, 1912, and the Shops (Early Closing) Act, 1920. Paragraph 1 (a) of Part I of the Schedule to the latter Act, as amended by subsequent orders, provides that :

G "Every shop shall be closed for the serving of customers not later than [9] o'clock in the evening."

By para. 4, we are referred to the Shops Act, 1912, for a definition of "shop." The facts as to the character of the stalls are the same in both cases, except as to the nature of the game played, which is not material, and I need deal only with those in the case of Dennis. The justices found that these premises were a shop within the meaning of the definition. The question is whether they were a shop. The justices do not give us reasons for their conclusion.

To my mind, the argument for the appellant is convincing, and I do not think that this place was a shop. It is true that it was a structure capable of being used as a shop, but there was no sale or retail trade or business carried on there.

I There was the business of an amusement caterer being carried on there, but being an amusement caterer is not being a shopkeeper, and I see no difference, except for its humble character, between this stall and a theatre. It is true that the theatre proprietor does not give prizes, but he caters for amusement. *Primâ facie*, a shop is a place where goods are sold by retail and stored for sale; it is not a place where something in the nature of gambling takes place. In the Irish case of *Wallace v. Dixon* (1), PIM, J., dealing with s. 19 of the Shops Act, 1912, said ([1917] 2 I.R. at p. 247) :

"In the first clause of s. 19 (the interpretation section) the word used is 'includes' and not 'means.' This is not a natural use of the word 'include,' and, so far as this court is concerned, the word 'mean' would have been of equal force. Why has it been used? It seems to me to point to the fact that the legislature meant to give an extended and unnatural meaning to the word 'shop,' a meaning that went far beyond the popular and recognised meaning of the word."

I cannot agree that that is so, though the clause would have been plainer had the word used been "means" instead of "includes." But the next clause in some degree explains its use, for it says that "The expression 'retail trade or business' includes the business of a barber or hairdresser," which explanation was necessary, because neither a barber nor a hairdresser would be carrying on a retail trade or business. The present case, in my opinion, is not within the Act, and this stall or booth is not a shop in which the appellant carried on a retail trade or business.

Therefore, the justices were wrong and the appeals must be allowed.

AVORY, J.—I am of the same opinion. The only difficulty that I have felt arises from the use in s. 19 of the Shop Act, 1912, the interpretation clause, of the word "includes." No doubt the ordinary meaning of such a clause is that the word to be interpreted is to have its natural meaning and also an extended meaning. But, even if that principle of interpretation be applied, counsel for the respondent has not satisfied me that the word "shop" in its natural and ordinary meaning should be extended to cover this particular structure.

The only case which in any way supports the decision of the justices is the Irish case of *Wallace v. Dixon* (1), where, in addition to the passage cited by my lord from the judgment of PIM, J., MADDEN, J., after quoting s. 19 of the Act of 1912, says ([1917] 2 I.R. at p. 247):

"The real question for our determination is the meaning to be attributed to the word 'retail.' I am of opinion that the word 'retail' is used in this section in contradistinction to 'wholesale,' and that every business in which a business is carried on which is 'retail' in this sense of the word is a 'shop' within the meaning of the Act."

It seems to be quite clear that the ordinary dictionary meaning of "shop" is a place where ordinary retail selling and the serving of customers takes place, and that the distinction between *Wallace v. Dixon* (1) and the present case is, that although in the former case no goods were stored on the premises, goods were bought and sold thereon by retail and customers were served. Therefore, the court held that the attendant who took orders was a shop assistant, and that a retail business was carried on. It is to be observed that, in construing any word in an Act of Parliament, unless there is a precise definition it is always necessary to look at the object of the Act, and, looking at the Act of 1912, we find that the first three sections are concerned with conditions of employment. The next group of sections (4 to 12) relates to the closing of shops. When one turns to the definition of "shop assistant" in s. 19 (1), we find that it means "any person wholly or mainly employed in a shop in connection with the serving of customers or the receipt of orders or the despatch of goods." When one looks at that definition, it seems clear that the persons employed at the place now in question were not shop assistants, and it cannot be said that customers were served there. Looking further in the same section at the interpretation of retail trade or business, which

"includes the business of a barber or hairdresser, the sale of refreshments or intoxicating liquors, and retail sales by auction, but does not include the sale of programmes and catalogues and other similar sales at theatres and places of amusement,"

- A I come to the conclusion that the legislature intended to exclude from the operation of the statute a place of amusement like those in question.

ROCHE, J.—I agree.

Appeals allowed.

- B Solicitors: *Miller & Smiths, for Clitherow & Son, Horncastle; Taylor, Jelf & Thomas, for Thimbleby & Son, Spilsby.*

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

C

MERCER v. SOUTH EASTERN AND CHATHAM RAIL. CO.'S MANAGING COMMITTEE

[KING'S BENCH DIVISION (Lush, J.), March 3, 6, 1922]

[Reported [1922] 2 K.B. 549; 92 L.J.K.B. 25; 127 L.T. 723; 38 T.L.R. 431]

Railway—Negligence—Level crossing—Practice as to locking wicket gate—
Departure from practice—Tacit invitation to pedestrian to cross railway
line—Injury to pedestrian—Liability of railway company.

- E The plaintiff was waiting for a train on the defendants' railway to pass a level crossing at the approach to which there was a small swing or wicket gate for pedestrians. It was the defendants' practice to keep the gate locked when trains were passing, and to open it only when it was safe to cross the line.
- F The plaintiff knew of this practice, but, on the occasion in question, the gate was unlocked owing to the negligence of a servant of the defendants. The plaintiff went through it and was knocked down and injured by a train as he was crossing the line.

- G **Held:** having regard to the defendants' known practice, the fact that the gate was unlocked was a tacit invitation to the plaintiff to cross the line, and, there being no evidence that he had not taken ordinary and reasonable care, the defendants were liable to him for the injuries he had suffered.

Dicta of WILLES, J., in *Indermaur v. Dames* (1) (1866), L.R. 1 C.P. at p. 288, applied.

Notes. As to level crossings, see 27 HALSBURY'S LAWS (2nd Edn.) 86–89, and for cases see 38 DIGEST 307 et seq.

- H Cases referred to :

- (1) *Indermaur v. Dames* (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur. N.S. 432; 14 W.R. 586; affirmed (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293, Ex.Ch.; 36 Digest (Repl.) 46, 246.
- I (2) *North Eastern Rail. Co. (Directors, etc.) v. Wanless* (1874), L.R. 7 H.L. 12; 43 L.J.Q.B. 185; 30 L.T. 275; 38 J.P. 420; 22 W.R. 561, H.L.; 38 Digest 312, 344.
- (3) *Davey v. London and South Western Rail. Co.* (1883), 12 Q.B.D. 70; 53 L.J.Q.B. 58; 49 L.T. 739; 48 J.P. 279, C.A.; 38 Digest 314, 354.
- (4) *Smith v. South Eastern Rail. Co.*, [1896] 1 Q.B. 178; 65 L.J.Q.B. 219; 73 L.T. 614; 60 J.P. 148; 44 W.R. 291; 12 T.L.R. 67; 40 Sol. Jo. 96, C.A.; 38 Digest 315, 357.

- (5) *Stubley v. London and North Western Rail. Co.* (1865), L.R. 1 Exch. 13; 4 H. & C. 83; 35 L.J.Ex. 3; 13 L.T. 376; 29 J.P. 808; 14 W.R. 133; sub nom. *Stubley v. Lancashire and Yorkshire Rail. Co.*, 11 Jur. N.S. 956; 38 Digest 312, 345. A

Action.

The plaintiff was a boilermaker aged twenty-one years. On Jan. 30, 1920, he, and a number of friends, dressed in running costume, were waiting for a train on the defendants' railway to pass the level crossing at Slades Green, Kent. At the approach for pedestrians to this level crossing there was a small swing or wicket gate which locked automatically from the signal box or was otherwise kept closed on the approach of trains. It was the invariable practice of the defendants' servants to keep the gate in question closed when trains were approaching and to open the gate for pedestrians to cross the line when the trains had passed the level crossing. The plaintiff being aware of the practice of the defendants' servants in keeping the gate closed when trains were passing, and finding that the gate on this occasion was unlocked, started to cross the line, and, not hearing the approaching train, was knocked down and injured. He alleged that the defendants were negligent in omitting to lock or otherwise fasten the gate. The plaintiff claimed damages for personal injuries by the negligence of the defendants or their servants. The defendants pleaded that there was contributory negligence on the part of the plaintiff. B

Harold Morris, K.C., and *F. Hinde* for the plaintiff.

Hollis Walker, K.C., and *Cecil Ince* for the defendants. C

Cur. adv. vult. D

Mar. 6. **LUSH, J.**—This case raises a question of some importance to railway companies. It is one of those cases that arise for decision from time to time, and which turn on the responsibility of railway companies for accidents at level crossings. The position is sometimes a difficult one, as is illustrated by the cases that were cited to me during the arguments. Those cases were *North Eastern Rail. Co. v. Wanless* (2) which went to the House of Lords, and *Davey v. London and South Western Rail. Co.* (3), and *Smith v. South Eastern Rail. Co.* (4), in the Court of Appeal, and *Stubley v. London and North Western Rail. Co.* (5) in the Court of Exchequer. E

The facts are scarcely in dispute. There was really only one fact with regard to which there was any controversy. It was said for the plaintiff that he had not passed through the wicket gate, but that he was on the roadway side of the gate at the time when the down train passed over the level crossing. On the other hand, it was said for defendants that the plaintiff had already passed through the wicket gate, and was standing on the railway side of the gate when the down train passed. [His LORDSHIP reviewed the evidence of the plaintiff and his companion and of the guard on the down train, held that the plaintiff was outside the wicket gate when the down train passed over the level crossing, and continued:] The position, therefore, was this. The plaintiff and his companions had constantly passed through the wicket gate before. The plaintiff said he had been through it two or three times a week. He and the others lived close by. They knew what the practice of the defendants was with regard to the closing of the gate. The main gate was always kept closed when there were carts or other vehicles waiting to go through, and then, if there was no train approaching, the main gate was opened for them by one of the defendants' servants. No inference, therefore, could be drawn from the fact that this main gate at this particular time was closed. There was no vehicle waiting to go through. The wicket gate, on the other hand, was worked from the signal-box. It was always locked if a train was approaching, and, if it was dangerous to go across the level crossing, it was locked by means of a bolt which was operated by the signalman. If there was no train expected, the wicket gate would be unlocked. F

A The defendants admit in substance that this was so. The admission does not, perhaps, go quite so far as the evidence for the plaintiff, but the fact, in my opinion, is that which I have stated, and that which the plaintiff's witnesses deposed to. If the gate at any time was unlocked when a train was on the point of passing through, it would be owing to neglect on the part of the signalman to obey the defendants' orders.

B Speaking generally, one may say that it was the invariable practice of the defendants to lock the gate when a train was on the point of passing along. The consequence is that to those who knew of the practice—and the plaintiff was one of those who did—the fact that the wicket gate was unlocked would result in there being a tacit invitation by the defendants to foot passengers to pass over the level crossing. That this was so was laid down in the cases to which I have

C already referred. It is not necessary that I should refer to them one by one, but the principle of law is this. As I say, an invitation may be inferred from the practice of the defendants, and, if the circumstances are such that an invitation would reasonably be inferred, then, if in truth it was dangerous for a man to pass over at a time when the gate was unlocked, there would be evidence of negligence on the part of the defendants on which a jury might act. The cases,

D of course, do not decide that I must, in deciding the facts, hold that, if a person crossing the line on foot does not take any care to see whether a train is approaching, he can in the circumstances recover damages, or, in other words, hold that he is entitled as a matter of law to shut his eyes and pay no heed to danger, however obvious it would be to an ordinarily careful person; they only decide

E that it is open to the jury, if the man is misled, to find a verdict for him, although he could have seen the train, if he had looked for it. He still must do what an ordinary prudent person would do in such circumstances, but the fact that he was misled must be taken into consideration in deciding whether he did what an ordinary prudent person would do in such circumstances.

F The negligence which is relied on in this case was only that of the man in charge of the signal box in unlocking the gate or leaving it unlocked when the up train was approaching. There was no negligence on the part of the engine driver. He whistled as he approached the crossing, and was not in any way to blame. The position, owing to the negligence of the signalman, was really this. An invitation was given to the plaintiff to cross the line when it was, in fact, owing to the negligence of the defendants, dangerous for him to do so, and the plaintiff, who acted on the invitation, was injured.

G In order to decide whether he has a cause of action, I have to apply the principle stated by WILLES, J., in the well-known case of *Indermaur v. Dames* (1), which was affirmed in the Exchequer Chamber. In that case, the court was dealing with the case of a visitor who went into a shop on business, but the principle is, in my opinion, precisely the same. The often cited passage in the learned judge's statement of the law is as follows (L.R. 1 C.P. at p. 288):

H "And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."

I Paraphrasing that passage so as to make it applicable to this case, the position may be stated thus: If the danger was so obvious that, even though the plaintiff was thrown off his guard by reason of the gate being unlocked, he ought to have known of it, and would have known of it if he had used ordinary and reasonable care, he cannot recover. If, on the other hand, it was not so obvious, if the

plaintiff can properly be said to have got in front of the up train without seeing that it was there because he was thrown off his guard by what the defendants' servants did, and he got in front of it while still using what was, in the circumstances, ordinary and reasonable care, he can recover. A

What is the true inference to be drawn from the facts as I have stated them? I should certainly hesitate to hold that, if a person, wishing to cross the level crossing, was to go through the gate and, merely because he found it unlocked, was to deliberately omit to look and see if the way was clear when there was nothing to prevent him from doing so—if, for example, he was to walk over the crossing reading a newspaper or with his eyes shut he could make the defendants liable, though he was misled, if he was run down by a train which he could easily have seen or heard. The defendants may have tacitly invited him to cross, but they did not invite him to leave his common sense behind him. But there are special circumstances in this case, owing to the position of the down train. The plaintiff could neither see nor hear the up train. He started to cross, followed by his companions. A few paces would bring him on to the up line. He had no time to save himself. He was knocked down and injured. His companion next to him nearly met with the same fate. I came to the conclusion on these facts that the plaintiff did get in front of the up train without seeing that it was there, because he was thrown off his guard by what the signalman did; that the danger was not an obvious one in the circumstances; and that he was injured while taking what was, in those circumstances, ordinary and reasonable care. B C D

The only real difficulty I have felt in arriving at this decision is that it does not appear whether the gate was unlocked when the down train was passing and remained unlocked or whether the man in charge of the signal box released the bolt as the down train was leaving the level crossing. The plaintiff could not throw any light on this question, and the signalman who could was not called by the defendants. It may be said that, if the gate was unlocked all the time, the plaintiff, as a reasonable man, ought to have inferred that this was no real invitation, but that something had gone wrong with the gate. I think that this would be too severe a burden to place on the plaintiff, and I do not think it right to assume facts in favour of the defendants when they could have proved them if they had been true. I think that there was a tacit invitation. E F

I wish to add this. It may seem a hardship on a railway company to deal with a case as one in which they are responsible for the omission to do something which they were under no legal obligation to do and which they only did in the ordinary course for the better protection of the public, but they ought to have contemplated that, if a self-imposed duty is ordinarily performed, those who know it will draw an inference if, at a given time, it is not performed, and, if they wish to protect themselves against that inference being drawn, they must do so either by giving notice or otherwise. The defendants did not do so, and they are liable for the consequences. For the reasons that I have stated, there must be judgment for the plaintiff with costs. G H

Judgment for the plaintiff.

Solicitors: *Bentley & Jenkins*, for *T. G. Baynes*, Dartford; *H. H. Groves*.

[Reported by *T. W. MORGAN*, Esq., Barrister-at-Law.]

A ADMIRALTY COMMISSIONERS v. VALERIA (OWNERS)

[HOUSE OF LORDS (Lord Buckmaster, Lord Dunedin, Lord Atkinson and Lord Carson), March 30, 1922]

[Reported [1922] 2 A.C. 242; 92 L.J.K.B. 42; 128 L.T.97;
16 Asp. M.L.C. 25]

B Shipping—Collision—Damages—Chartered ship—Detention for repair.

In 1917 the *R.*, which had been chartered by the Admiralty and was being used as a trading vessel for freight, was damaged by collision with the *V.*, the latter ship being solely to blame. The *R.* was detained for a week for repairs. In assessing the damages for such detention,

C Held: the measure of damages was the amount of the freight which the *R.* would have earned during the period of detention, plus working expenses, and not the sum of the actual out of pocket expenses including the cost of the hire of the *R.* during that period.

The Argentino (1) (1889), 14 App. Cas. 519, applied.

D The *Greta Holme* (2), [1897] A.C. 596; *The Mediana* (3), [1900] A.C. 113; and *The Marpessa* (4), [1907] A.C. 241, distinguished.

Notes. Considered: *The Chekiang*, [1925] P. 80; *Admiralty Comrs. v. Susquehanna (Owners)*, *The Susquehannig* [1926] All E.R. Rep. 124. Referred to: *Granby v. Bakewell U.D.C.* (1923), 87 J.P. 105; *The Edison*, [1933] All E.R. Rep. 144; *Strand Electric and Engineering Co. v. Brisford Entertainments, Ltd.*, [1952] 1 All E.R. 796.

E As to the measure of damages as a result of collision, see 30 HALSBURY'S LAWS (2nd Edn.) 855 et seq.; and for cases see 41 DIGEST 800 et seq.

Cases referred to:

F (1) *The Argentino* (1888), 13 P.D. 191; 58 L.J.P. 1; 59 L.T. 914; 37 W.R. 210; 6 Asp. M.L.C. 348, C.A.; affirmed sub nom. *Gracie (Owners) v. Argentino (Owners)*, *The Argentino* (1889), 14 App. Cas. 519; 59 L.J.P. 17; 61 L.T. 706; 6 Asp. M.L.C. 433, H.L.; 41 Digest 802, 6627.

(2) *No. 7 Steam Sand Pump Dredger (Owners) v. Greta Holme (Owners)*, *The Greta Holme*, [1897] A.C. 596; 66 L.J.P. 166; 77 L.T. 231; 13 T.L.R. 552; 8 Asp. M.L.C. 317, H.L.; 41 Digest 808, 6689.

G (3) *Mediana (Owners) v. Comet (Owners, etc.)*, *The Mediana*, [1900] A.C. 113; 69 L.J.P. 35; 82 L.T. 95; 48 W.R. 398; 16 T.L.R. 194; 44 Sol. Jo. 259; 9 Asp. M.L.C. 41, H.L.; 41 Digest 811, 6733.

(4) *Mersey Docks and Harbour Board v. Marpessa (Owners)*, *The Marpessa*, [1907] A.C. 241; 76 L.J.P. 128; 97 L.T. 1; 23 T.L.R. 572; 51 Sol. Jo. 530, H.L.; 41 Digest 808, 6690.

H Also referred to in argument:

The City of Peking v. Compagnie des Messageries Maritimes, *The City of Peking* (1890), 15 App. Cas. 438; 59 L.J.P.C. 88; 63 L.T. 722; 39 W.R. 177; 6 Asp. M.L.C. 572, P.C.; 41 Digest 805, 6657.

I Appeal by the Commissioners for executing the office of Lord High Admiral from an order of the Court of Appeal (BANKES, SCRUTTON and ATKIN, L.JJ.), reversing an order of ROWLATT, J., which confirmed an award made in favour of the appellants by an arbitrator in the form of a Special Case.

The appellants were the charterers by demise of the Dutch steamship *Rijsbergen*, which was damaged by collision with the respondents' steamship *Valeria*. In consequence of the collision, the *Rijsbergen* had to be repaired, and she was kept idle whilst under repair for a week. The question of liability for the collision and the assessment of damages therefor having been referred to arbitration, the arbitrator found that the *Valeria* was solely to blame for the collision. All the

items in the claim were eventually agreed except the question whether the appellant was entitled to recover as damages from the respondents the expenses they incurred in connection with the ship during the week when she was idle, including the hire which they had to pay to the owners of the ship in respect of such week. A

Dunlop, K.C. (the *Attorney-General* (*Sir Ernest Pollock*) with him), for the appellants. B

Raeburn, K.C., and *Dumas*, for the respondents.

LORD BUCKMASTER.—The question which is raised for determination on this appeal is simple and interesting. In 1917, the British Government hired from the Dutch Government a steamer known as the *Rijsbergen*, the rate of hire being £342 a day. In September, 1917, she was damaged by collision with the *Valeria*, and it has been found that for that collision the *Valeria* was solely to blame. The damage was capable of repair, the vessel was in fact repaired, and the voyage completed, but, owing to her injuries, she was detained from Sept. 20, 1917, to Sept. 29, 1917, and, in their claim for the damage caused by the collision, the appellants put down a sum in respect of her disability during that period of time. This sum was made up in the following way: They took the hire per day of the vessel which they had agreed to pay to the Dutch government, and added certain items for wages, thus bringing the total up to £366, which, multiplied by seven for the period of time between the two dates, which were not inclusive, amounted to a total sum of £2,562. The claim came before an arbitrator, and he held that the appellants were entitled to recover the full amount. C
ROWLATT, J., before whom the award came on appeal, supported this view, but the Court of Appeal have unanimously differed from his judgment, and from the Court of Appeal the matter has been brought before your Lordships' House. D

The appellants' contention is that, as the sum which they claim was the actual out-of-pocket expense to which they were put during the period of time for which the vessel was incapacitated, and they could not obtain anything from its use, that sum is the clear measure of their loss, and in support of this view they have referred to cases such as *The Greta Holme* (2), *The Mediana* (3), and *The Marpessa* (4). I think that it will be found on examination that these cases do not support the contention. It was laid down as long ago as 1889, in *The Argentino* (1), that, in assessing damages caused by a collision, a ship is to be considered merely as a thing by the use of which money may ordinarily be earned; and the only question is, to use the words of *BOWEN, L.J.*, in the Court of Appeal (13 P.D. at p. 201): E

"What is the use which the shipowner would, but for the accident, have had of his ship, and what . . . the shipowner, but for the accident, would have earned by the use of her?" F

The other cases which have been referred to by counsel are each and all of them cases in which the subject-matter of the suit was a vessel which, in the ordinary course, would have earned nothing at all, as, for example, a dredger or a light-ship; and it should be remembered that, until the decision in *The Greta Holme* (2), it had always been held that nothing but nominal damages were recoverable for an injury to such a craft on the ground that there was no other use to which she could be put, and that there was no actual out-of-pocket expense during the period for which she was incapacitated. *The Greta Holme* (2) altered those views, and established that the loss of the use of the vessel was a thing which was capable of being measured, even although the vessel was not capable of being let for hire in the ordinary way. G

In the present case, the facts which have been found are these: that this vessel had, in fact, made two voyages, and that, during those voyages, she had H

A earned a profit freight, over and above expenses, in the one case of £151 a day, and in the other of £134. It is important to remember that the finding is that those freights represent a profit balance, and, of course, in determining that profit, the actual amount of hire which was being paid under the charter was not included. It was the average of the sum of those two items, together with the ship's expenses, which the Court of Appeal allowed as to the damages in the present case. Although at first counsel for the appellants challenged the principle that the amount of what was to be earned could ever be made the true measure of the damages, in substance his objection to the figure was this, that the arbitrator had found that the amount which was being paid by the British government under the agreement by which the vessel was taken over was, in fact, a fair sum, and that it necessarily followed that the amount of value, tested by the freights which had been earned on the two voyages, must have been assessed by making a depreciation of the amount, due to the fact that this country was at war, and that ordinary market conditions would not have been regulating the trade.

In the first place, the answer to this is that no such finding was ever made by the arbitrator, and in the next place it has been pointed out quite fairly by counsel for the appellants that, if this matter went back to the arbitrator for reconsideration, he would not be able to show more than the fact that, if the vessel was once more let in a time charter, it would be possible to let her for a larger sum. The comparison with the hire in a time charter does not appear to me to be a fair means of considering this question. What has to be considered is this: What would this vessel have earned for the period of seven days during which she was incapacitated owing to the accident? That amount is the true measure of the damages which the vessel which was to blame is called on to pay, and it can only be ascertained by considering what she had earned under similar conditions. I desire particularly to emphasise that in each of the judgments of the lords justices in the Court of Appeal the case has been based on an assumption that the matter to be dealt with was an ordinary commercial venture, and that the standard of damages applicable was the standard proper in such a case. Having regard to the statement which I have made, I think that this assumption was correct, and, on that assumption, the conclusion at which the judges in the Court of Appeal arrived is, to my mind, one which cannot be controverted. For this reason I am of opinion that the appeal should fail.

G **LORD DUNEDIN.**—I concur. I agree with the lords justices in the Court of Appeal, but I cannot refrain from a slight criticism on the use of the phrase *restitutio in integrum*. It is a phrase which is properly applied when one wishes to express the condition which is imposed on a person seeking to rescind a contract. I do not think that it can be properly applied to questions of tort, and the illustration which I give is a very simple one. If by somebody's fault I lose my leg and am paid damages, can anyone in his senses say that I have had *restitutio in integrum*? The true method of expression, I think, is that, in calculating damages, one is to consider what is the pecuniary sum which will make good to the sufferer, as far as money can do so, the loss which he has suffered as a natural result of the wrong done to him. The loss which was suffered in this case was a loss of freight. I put this case in the course of the argument: Suppose a man had a house at a certain rent and sublet it at a smaller rent, if it were taken from him he would not get more, I take it, than the smaller rent which he had received; but, if he had shown that he had let it to some member of his family at a fanciful rent, then there would have to be an enquiry as to what rent he could have got in the open market. In this case, the whole question has been decided on the assumption that the freight here was a commercial freight. If that had got to be displaced, I think that it fell on the

appellants to displace it; they have not done so, and, as their counsel has very candidly said, even if they get a remit to the arbitrator they would not be able to do it. A

LORD ATKINSON and **LORD CARSON** concurred.

Appeal dismissed.

Solicitors: *Treasury Solicitor; Thomas Cooper & Co., for Hill, Dickinson & Co.,* B
Liverpool.

[*Reported by W. C. SANDFORD, Esq., Barrister-at-Law.*]

PENNINGTON v. RELIANCE MOTOR WORKS, LTD.

[KING'S BENCH DIVISION (McCardie, J.), May 23, 24, 1922]

[Reported [1923] 1 K.B. 127; 92 L.J.K.B. 202; 128 L.T. 384;
38 T.L.R. 670; 66 Sol. Jo. 667]

Lien—Work done—Motor car—Contract for new body—Unauthorised sub-contract—Re-delivery of car to contractors—Subsequent delivery of car by owner to sub-contractors for repair—Lien of sub-contractor against owner.

The plaintiff contracted with E. to put a new saloon body on his motor car. Without the plaintiff's authority, E. sub-contracted the work to the defendants, who carried out the work and delivered the car to E. The plaintiff paid E. who did not pay the defendants. Subsequently, the plaintiff sent the car to the defendants for some further repairs, which were carried out, and the defendants then claimed a lien on the car for the work they had done for E. E

Held: the plaintiff had never given E. any authority, express or implied, to create a lien in favour of the defendants, nor had there been proof of any custom of the trade, and, therefore, the defendants had no lien on the car. F

Further, even if there had been a lien, the defendant would have lost it when they parted with possession of the car to E.

Notes. Referred to: *Albemarle Supply Co. v. Hind* (1927), 43 T.L.R. 652.

As to a legal lien, see 24 HALSBURY'S LAWS (3rd Edn.) 143 et seq.; and for cases see 32 DIGEST 215 et seq. G

Cases referred to:

- (1) *Hiscox v. Greenwood* (1802), 4 Esp. 174, N.P.; 32 Digest 247, 316.
- (2) *Buxton v. Baugham* (1834), 6 C. & P. 674, N.P.; 32 Digest 220, 48.
- (3) *Keene v. Thomas*, [1905] 1 K.B. 136; 74 L.J.K.B. 21; 92 L.T. 19; 53 W.R. 386; 21 T.L.R. 2; 48 Sol. Jo. 815, D.C.; 32 Digest 247, 321.
- (4) *Green v. All Motors, Ltd.*, [1917] 1 K.B. 625; 68 L.J.K.B. 590; 116 L.T. 189, C.A.; 32 Digest 248, 322. H
- (5) *Singer Manufacturing Co. v. London and South Western Rail. Co.*, [1894] 1 Q.B. 833; 63 L.J.Q.B. 411; 70 L.T. 172; 42 W.R. 347; 10 T.L.R. 246; 38 Sol. Jo. 238; 10 R. 152, D.C.; 8 Digest (Repl.) 161, 1034.
- (6) *Cassils & Co. and Sassoon & Co. v. Holden Wood Bleaching Co., Ltd.* (1914), 84 L.J.K.B. 834; 112 L.T. 373, C.A.; 32 Digest 240, 245. I
- (7) *Jowitt & Sons v. Union Cold Storage Co.*, [1913] 3 K.B. 1; 82 L.J.K.B. 890; 108 L.T. 724; 29 T.L.R. 477; 57 Sol. Jo. 590; 18 Com. Cas. 185; 32 Digest 239, 232.
- (8) *Hatton v. Car Maintenance Co., Ltd.*, [1915] 1 Ch. 621; 84 L.J.Ch. 847; 110 L.T. 765; 30 T.L.R. 275; 58 Sol. Jo. 361; 32 Digest 249, 332.
- (9) *North Western Bank, Ltd. v. Poynter Son, and Macdonalds*, [1895] A.C. 56; 64 L.J.P.C. 27; 72 L.T. 93; 11 R. 125, H.L.; 37 Digest 7, 30.

A Action tried by McCARDIE, J.

In August, 1921, the plaintiff, Captain Lewis Theodore Marmion Pennington, arranged with one Eley to put a new saloon body on the chassis of his Rolls Royce motor car, the price agreed being £500. Eley thereupon made a bargain with the defendants, who were a firm of body builders, to carry out the work for the sum of £377, and delivered the car to them. The plaintiff gave Eley no authority to do this. The defendants duly carried out the work, and on Oct. 7 Eley recovered the car from them and delivered it to the plaintiff, who shortly afterwards paid Eley the £500. Eley, however, did not make any payment to the defendants. Later on, the plaintiff sent the car to the defendants for some further repairs, the cost of which amounted to £45. The defendants executed these repairs. But on Nov. 21 they informed the plaintiff, through their solicitors, that they would hold the car, not only in respect of the £45 for the repairs, but also in respect of the sum of £377, the cost of the building of the body. They did detain the car for some time, but subsequently delivered it to the plaintiff without prejudice. The plaintiff claimed to recover from the defendants the car or £2,000, its value, and damages for its detention. The defendants claimed a lien on the car for work done.

D *Neilson, K.C.*, and *J. B. Melville* for the plaintiff.

Disturnal, K.C., and *R. Storry Deans* for the defendants.

McCARDIE, J., stated the facts, and continued: Two points call for consideration. Could Eley, who had been paid in full, create against the plaintiff a lien on the car, or could he only create a lien as against himself. The plaintiff gave him no express authority to deliver the car to a third person, nor, in my view, can it be said that there was any implied authority. In *Hiscox v. Greenwood* (1), the court pointed out that a lien of this sort must be derived from legitimate authority; while *Burton v. Baugham* (2) illustrated the same rule. **ALDERSON, B.**, there said (6 C. & P. at p. 675):

F "If you trust your goods into a man's possession, and he makes a bargain about them without your authority, you are not bound by that bargain, and may reclaim the goods."

In my view, that must be the basic principle of these cases, and it is only when that principle is clearly appreciated that the principle laid down in *Keene v. Thomas* (3) can be understood. That case can only rest on the basis of implied authority, and it was followed by the Court of Appeal in *Green v. All Motors, Ltd.* (4), where the relevant facts were substantially similar. In that case, too, there was implied authority to send the motor car out for repairs. *Singer Manufacturing Co. v. London and South Western Rail. Co.* (5) was, in my opinion, an exceptional case, and on the border line, and I think that implied authority must be regarded as the true ratio of that case, and that it represents the extreme limit to which the principle of implied authority can be carried. There the bailee of a sewing machine deposited it at the cloak-room of a railway station and the railway company claimed a lien for their charges. It was held that they had such a lien against the owner of the machine.

I The last three cases, however, are exceptions to the general rule that, *prima facie*, a lien cannot be created against a man except by his express authority, and I doubt whether *Cassils & Co. v. Holden Wood Bleaching Co.* (6) has yet been fully appreciated. In view of the widespread practice of sub-contracting in this country, it is a decision of great importance to traders. It was there held that there was no implied authority on the part of the persons who received some calico from the plaintiffs to be bleached to create in favour of the defendants, to whom they sent the calico to be bleached, a lien which they could enforce against the owner of the goods. No right of lien, in my opinion, is created in favour of a sub-contractor as against the owner of goods deposited with a

contractor unless the sub-contractor can show either express or implied authority or can prove a custom of the trade. In the present case, I am of opinion that the plaintiff gave neither an express nor implied authority to Eley to create a lien in favour of the defendants, and there has been no proof of any custom of the trade. Therefore, the defence fails on that ground. A

[His LORDSHIP referred to *Jowitt & Sons v. Union Cold Storage Co.* (7), and continued:] Suppose, however, that the defendants did at one time have an enforceable lien against the plaintiff, it is clear, in my view, that they lost it by voluntarily giving up possession of the car to Eley free from the lien: *Hatton v. Car Maintenance Co., Ltd.* (8). I fully recognise the principle laid down in *North Western Bank, Ltd. v. Poynter* (9), which established an important principle in connection with re-delivery by bailee to bailor. According to the headnote ([1895] A.C. 56): B

"In the law of Scotland, as in the law of England, a pledgee may re-deliver the goods to the pledgor for a limited purpose without thereby losing his rights under the contract of pledge." C

That was clearly stated in the judgment of LORD HERSCHELL, L.C. If the defendants here had given up possession for a limited period, as, for example, in order that Eley might take the motor car out and bring it back, I should hold that they would not lose their right of lien, nor would they lose that right if Eley had obtained possession of the motor car by a trick or by fraud. But, although it has been alleged by the defendants that Eley recovered the car from them by trickery, I have formed the clear view that that allegation is quite unfounded, and I find that the defendants freely allowed him to take possession of the car in the belief that he would get payment from the plaintiff and would pay them as soon as he could. D

I hold, therefore, first, that the defendants never had a lien; and, secondly, that, if such a lien ever existed, it was lost by their renunciation of possession. In the result, the plaintiff succeeds, and there will be judgment for the return of the car to the plaintiff and for £25 damages for its detention. E

Judgment for plaintiff. F

Solicitors: *C. H. Nash; Lempriere & Hunter.*

[Reported by T. W. MORGAN, ESQ., Barrister-at-Law.]

A HENRY BUTT & CO., LTD. v. WESTON-SUPER-MARE
URBAN DISTRICT COUNCIL

[HOUSE OF LORDS (Viscount Haldane, Viscount Cave, Viscount Finlay, Lord Dunedin and Lord Shaw), January 17, 19, 20, February 21, 1922]

B [Reported [1922] 1 A.C. 340; 91 L.J.Ch. 305; 86 J.P. 113; 38 T.L.R. 406;
66 Sol. Jo. 332; 127 L.T. 34; 20 L.G.R. 397]

Highway—Damage—Excessive weight—Extraordinary traffic—Question of fact—Comparison with traffic commonly on road—Consideration of nature, as well as amount, of traffic—“Average expense” of repair—User of highway by traffic reasonable or necessary for user’s business—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23, as amended by Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12 (1) (b).

C The duty of a highway authority is to keep every highway under its control fit to accommodate the ordinary traffic which passes, or may be expected to pass, along it. In so doing they should have regard, not only to the requirements of the road in the past, but also to a reasonable forecast of those requirements in the future, including changes in the mode of carrying ordinary traffic. The purpose of s. 23 of the Highways and Locomotives (Amendment) Act, 1878 [now s. 62 of the Highways Act, 1959], was not to prevent unlawful user of the highway, but to provide for damage caused by legitimate and proper user resulting in extraordinary damage. Its aim was remedial and recuperative and intended to reach those who carried ordinary articles, but not in an ordinary manner, or on more than the ordinary number of occasions. Whether traffic put on a road is “extraordinary” within the section is a question of fact, and is to be determined by a comparison of the traffic in question with that which commonly comes on the road, or, per LORD HALDANE, on similar roads in the neighbourhood. The words “extraordinary traffic” are not to be interpreted simply by an ascertainment or consideration of the total amount of traffic carried by the road. The mode of traffic may make traffic extraordinary (e.g., the substitution of mechanical transport for horse-drawn vehicles), and the concentration of heavy weights by one mode of carriage may combine both elements in the section, namely, excessive weight and extraordinary traffic. Again, the category of “extraordinary” may be reached by the concentration of a heavy weight whereby destruction of the road is accomplished, although the volume of traffic may not in itself be extraordinary and could have been carried by a better distributed mode of conveyance without damage to the road. If the repair of the road requires an extraordinary expenditure on account either of the mode or of the mass of traffic by particular users in particular periods the conditions of liability set up by s. 23 are satisfied. The words “average expense” in the section must be construed as referring to the average in the case of neighbouring highways which are similar to the one in question, and not as laying down a rigid standard to be ascertained by that of the most strongly constructed road in the vicinity.

H The mere fact that the road in question is the only road which can be used for the particular traffic is not relevant for preventing s. 23 from being applicable. If a person, for the economic and effective carrying-on of his business, throws a new and heavy burden on a road, he is liable under the section, and the fact that he has acted reasonably from a business point of view does not relieve him from that obligation. The fact that such a person was not sued for, and did not pay, for damage done to a highway by his extraordinary traffic for a number of years does not result in that traffic ceasing to be extraordinary traffic. The practice of one person, the defendant in proceedings under s. 23, cannot by itself show that to put such a weight

on the road as he has put has become part of its ordinary user, but if, owing to the development of the district and the increase of traffic generally, the use of heavier traffic on the road in question becomes general, that use may become an ordinary use of the road.

Notes. Referred to: *Eastbourne County Borough v. Fuller & Sons* (1928), 93 J.P. 29.

As to extraordinary traffic repairs see 19 HALSBURY'S LAWS (3rd Edn.) 153-161; and for cases see 26 DIGEST (Repl.) 439 et seq. For Highways Act, 1959, see 39 HALSBURY'S STATUTES (2nd Edn.) 239.

Cases referred to:

- (1) *Barnsley British Co-operative Society, Ltd. v. Worsborough U.D.C.*, [1916] 1 A.C. 291; 85 L.J.K.B. 103; 113 L.T. 1121; 80 J.P. 114; 32 T.L.R. 41; 60 Sol. Jo. 25; 14 L.G.R. 122; 26 Digest (Repl.) 449, 1449.
- (2) *Hill v. Thomas*, [1893] 2 Q.B. 333; 62 L.J.M.C. 161; 69 L.T. 553; 57 J.P. 628; 42 W.R. 85; 9 T.L.R. 647; 4 R. 565, C.A.; 26 Digest (Repl.) 439, 1370.
- (3) *Geirionydd R.D.C. v. Green*, [1909] 2 K.B. 845; 78 L.J.K.B. 1039; 100 L.T. 418; 73 J.P. 137; 25 T.L.R. 282; 7 L.G.R. 308, C.A.; 26 Digest (Repl.) 431, 1372.
- (4) *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. A.-G.* [1915] A.C. 654; 84 L.J.K.B. 907; 112 L.T. 826; 79 J.P. 305; 31 T.L.R. 254; 59 Sol. Jo. 381; 13 L.G.R. 563, H.L.; 26 Digest (Repl.) 647, 2925.
- (5) *Whitebread v. Sevenoaks Highway Board*, [1892] 1 Q.B. 8; 61 L.J.M.C. 59; 65 L.T. 855; 56 J.P. 214, D.C.; 26 Digest (Repl.) 442, 1398.

Appeal by the defendants from an order of the Court of Appeal (SWINFEN-EADY, M.R., WARRINGTON and SCRUTTON, L.JJ.), reported [1919] 2 Ch. 1, affirming the decision of EVE, J. [1919] 1 Ch. 11.

The facts appear in their Lordships' opinions.

Upjohn, K.C. and *W. A. Jowitt* for the appellants.

Macmorran, K.C. and *Joshua Scholefield* for the respondents.

Their Lordships took time for consideration.

Feb. 21. The following opinions were read.

VISCOUNT HALDANE.—This was an action brought by the respondents, who are the local authority having control of highways within their district, to which I shall refer later, to recover from the appellants expenses for repairing damage to these roads caused by the haulage of lime, limestone, and coal by steam wagon and trailers over the roads. The action was brought under s. 23 of the Highways and Locomotives (Amendment) Act, 1878. This statute, by s. 28 and subsequent sections [repealed, Road Traffic Act, 1930], places certain restrictions upon the types and user of locomotives to be employed on highways. By s. 24 the statute enables unnecessary highways to be declared to be no longer repairable at the public expense. I refer to these sections merely as showing that it does not today follow from the principle that a highway authority is in general bound to keep its highways in such a state of repair as to accommodate all ordinary traffic, that it will remain in every instance bound to do so. But the most important section for the purposes of the litigation before us is s. 23. It enacts [see now Highways Act, 1959, s. 62] that:

“Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive

- A weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the court having cognisance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid. Provided that any person against whom
- B expenses are or may be recoverable under this section may enter into an agreement with such authority as is mentioned in this section for the payment to them of a composition in respect of such weight or traffic, and thereupon the persons so paying the same shall not be subject to any proceedings under this section."
- C These words appear to render it not unlawful for the person concerned to use the highway, subject to the provisions of the other sections to which I have referred, for traffic causing excessive weight, or extraordinary traffic, but on the condition of making compensation for damage done or payment of a composition. The damage is in this event *damnum absque injuria*, and the power to recover compensation for it is the creation of s. 23. In these proceedings
- D no case based on nuisance or on anything else than a claim for extraordinary expenses within the meaning of s. 23 is before us. By the Locomotives Act, 1898, it was provided by s. 12 that expenses under s. 23 of the Act of 1878 are not to be recoverable summarily, but are to be recovered, if exceeding £250, in the High Court [by s. 62 (2) of the Highways Act, 1959, the sums so recoverable shall be recoverable in the High Court, or, if the claim does not exceed £500, in the county court], and, further, that proceedings to recover them are to be commenced within twelve months from the time of the damage done [see proviso to s. 62 (2)].
- E

What took place in the present case was this. The claim of the respondents was made for extraordinary expenses alleged by them to have been incurred in repairing damage caused by excessive weight and extraordinary traffic of the

F appellants' vehicles during twelve months prior to the issue of the writ. The roads alleged to have been thus damaged were the Bristol Road, the Upper Church Road, the Arundel Road, and Park Place. What was said was that about August, 1913, the appellants began to use on the Bristol Road and the Arundel Road a steam wagon and trailer of unusual weight, and that in January, 1916, they used on the same roads a second wagon and trailers of the same kind. As to

G Upper Church Road and Park Place, it was alleged that in 1916 the appellants used the wagons and trailers of the same kind. As to Upper Church Road and Park Place, it was alleged that in 1916 the appellants used the wagons and trailers on these roads also. In all cases heavy loads of lime, coal and other materials were said to have been hauled in the vehicles. The writ was issued on Feb. 21, 1917. The action was tried before EVE, J., who held the appellants liable for

H £280 in respect of damage to the Bristol Road, the Upper Church Road, and Park Place, but dismissed the claim in respect of the Arundel Road. As to the damage for which the appellants were held liable, the learned judge reduced the claim in each case by the amount of expenditure which he attributed to reasons other than that of making good wear and tear caused by the appellants. He gave judgment, in the case of the Bristol Road for £30, in the case of the

I Upper Church Road for £210, and in the case of Park Place for £40. The claim to the Arundel Road he dismissed on the ground that no part of the expenditure which had to be made within a year prior to the commencement of the action was attributable to the action of the appellants. In the Court of Appeal this judgment was affirmed. The appellants do not appeal as regards the £40 awarded in respect of Park Place, and the only questions which were before your Lordships were those as to the Bristol Road and the Upper Church Road. The appeal came before this House in June, 1920. Your Lordships agreed in the view that

the findings of fact by EVE, J., were not sufficiently specific as to the character of the traffic and the roads themselves, and directed the appeal to stand over with a view to having the following further question of fact tried by the learned judge, the finding to be reported directly to this House for the purposes of the further hearing of the appeal:

"Was the traffic in controversy of such a nature as, having regard to the character and functions of the roads in question and all the circumstances of the case, was reasonably to be anticipated upon those roads?"

EVE, J., has now tried the question further and has reported in the form of a declaration that

"as to the Bristol Road prior to August, 1913, the said traffic in controversy was not reasonably to be anticipated, but considered in relation to the position of matters at the beginning of the year 1916 such traffic was at that time reasonably to be anticipated."

As to Upper Church Road the learned judge has reported that "the traffic in controversy ought not at any relevant time to have been reasonably anticipated."

The appeal before us relates only to the Bristol Road and to the Upper Church Road, and to a sum of £30 in respect of the former and to one of £210 in respect of the latter. The Bristol Road runs along the side of a hill from Weston-super-Mare towards Bristol. At one time it may have been the chief high road between these places, but long before 1913 it had been superseded for this purpose by the more convenient Locking Road lying to the south. After this latter road was freed from turnpike toll about 1882 the Bristol Road assumed a secondary position. Among the purposes for which it was used was the conveyance of stone and lime from the limestone quarries on the adjacent hillside. There was also a good deal of horse-drawn and light motor and bicycle traffic, but even in 1916 little heavy motor traffic excepting that of the appellants. The appellants owned a limestone quarry and kilns on the hillside, but it does not appear that the hillside generally is of the character of a quarrying area. The respondents also own certain quarries on it, from which they now obtain part of the stone used, not to any substantial extent today for building, but for the repair of their highways. The appellants, however, use their quarry more extensively. They burn lime and they carry this, together with stone, to the Great Western Railway station, which is situated at the south-west end of Weston-super-Mare, for transport. The quarry of the appellants is on the hillside above the Bristol Road; their practice is to carry the stone and burned lime from the quarry down the Bristol Road and the Upper Church and other roads, as to which there is no question now before us, to the railway station. Their vehicles also travel to a seaside quay, from which they carry coal for use at the quarry.

I am satisfied by the evidence that since 1913 there has been a material increase, not only in the amount of stuff carried, but in the size and weight of the vehicles, and that this increase has been mainly caused by the appellants. In 1913, which is, of course, outside the statutory period within which proceedings can be taken, the appellants began to use a steam wagon and trailer. Before that year they had transported their material in horse-drawn carts. In the year following the introduction of the steam wagon, the total amount carried by the appellants was raised to over 25,000 tons, nearly double the corresponding amount in the previous year. Out of this amount, nearly 7,000 tons were carried by steam. In 1915, 13,000 tons were so carried, and in the year ending on Mar. 31, 1916, when the total amount carried had fallen to about 23,000 tons, 15,000 were carried by steam. In January, 1916, the second steam wagon and trailer had been added by the appellants. Each of these sets of wagons and trailers, when loaded, weighs about twenty tons, a weight which is much greater than that of

A the old horse-drawn wagons when loaded. The question is whether they can do so, having regard to the character of the two roads in question, without coming within s. 23 of the Highways and Locomotives Act, 1878. The Bristol Road and the Upper Church Road, as I have said, are not the main highway out of Weston-super-Mare. They are roads chiefly traversed by people coming from and returning to the village of Milton, which lies to the east of that town, and by motor cars, taxicabs, and other conveyances which take residents and visitors to the houses on the hillside and to golf-links. Besides this, the main heavy traffic is the carriage of stone and lime. The Bristol Road had apparently become, down to 1908, little more than a country lane. In that year it was made up as a water-bound limestone road and was re-surfaced in 1912 and again in 1915. It was also tar-sprayed. But it does not appear to have been laid out for such heavy traffic as the appellants have brought upon it. The same thing is true of the Upper Church Road. I think that it is clear that the action of the appellants, during the twelve months preceding the issue of the respondents' writ, had led to the necessity for extra repairs by the latter, and to extra expense. The figures representing the amount of extraordinary expenditure necessitated by the effect on the roads of the traffic in controversy brought over them by the appellants may be taken to have been proved to amount to the £240 for which there has been judgment.

The relevant question about these facts arises in connection with the interpretation of s.23. Was the expense incurred by the respondents in repairing the two roads the consequence of the detriment to their structure caused by the concentrated weight of the appellants' traffic passing along them, and also an expense which was beyond the average cost to the respondents of repairing highways in the neighbourhood, and cost due to weight which was excessive or to traffic which was extraordinary, so as to amount to something beyond the average standard in the cases of these highways? It is not denied that the duty of the road authority is to keep every highway under its control fit to accommodate the ordinary traffic which passes or may ordinarily be expected to pass along it. Such ordinary traffic may change in course of time, and the road must be made and kept suitable to serve such changing requirements. But does it follow that traffic which is ordinary on some particular main or other road in the neighbourhood which has been made specially fit for it is necessarily to be taken as the ordinary traffic forming the standard in the case of a different kind of road near? I cannot think so. A country lane may be a highway and yet not a main road. The language of s. 23 itself recognises this. It can hardly have been the intention to compel the authority to put every country lane in such a condition as to be able to carry traffic which only a main road can bear. But, if so, the words "average expense" must be construed, in order to meet such a case, distributively, as referring to the average in the cases of neighbouring highways which are similar to the one in question, and not as laying down a rigid standard to be ascertained by that of the most strongly constructed road in the vicinity. What, for instance, might possibly be the test in the case of Locking Road, the de facto main road to Bristol, is not necessarily the test for another road leading towards Bristol which may have assumed in course of time a much less important character. The finding of fact of Eve, J., in answer to the questions your Lordships referred to him, shows that in the case of the Bristol Road no such heavy traffic as that in question was to be anticipated in 1913, although in 1916, in consequence of the action of the appellants, it was reasonably to be anticipated as likely to re-appear in point of fact. It is clear from the evidence that the only reason for the change of circumstances was the action of the appellants themselves, and it does not follow because they cannot be sued for expense which has had to be incurred in respect of any period prior to 1916, that, therefore, what they did then either gave them a right to continue to do it without paying for fresh damage caused to the road

or altered the nature of the regular and general traffic on the road. The traffic does not in such a case become ordinary traffic, and there appears to have been no other traffic of the kind. A

Even if the question of interpretation were one unaffected by authority, I should come to the conclusion that the expenses to which the respondents have been put in the cases of the Bristol and Upper Church Roads were extraordinary within the language used in the section. But I think that there are authorities which, in themselves, go far towards establishing this conclusion. I need refer only to two of these authorities. To begin with, this House, in *Barnsley British Co-operative Society, Ltd. v. Worsborough U.D.C.* (1), laid down that s. 23 means that the mere fact that the road in question is the only road which could possibly be used for the particular traffic is not relevant for the purpose of preventing the section from being applicable. The question whether the traffic is extraordinary has to be treated as one merely of fact, and the motive determining the person who uses it, and is sought to be charged under the statute, is unimportant and beside the point. This decision disposes of the argument, urged from the Bar in the present appeal, that the appellants had no way of getting their new vehicles to their destinations other than one along the highways in controversy. The circumstance does not stand in the way of their having to pay for the privilege. In *Hill v. Thomas* (2), *BOWEN, L.J.*, in delivering the considered judgment of the Court of Appeal (*LORD Esher, M.R.*, *KAY, L.J.*, and himself), decided that extraordinary traffic, in the sense of the words used, meant B C D

“a carriage of articles over the road, at either one or more times, which is so exceptional in the quality or quantity of articles carried, or in the mode or time of user of the road, as substantially to alter and increase the burden imposed by ordinary traffic on the road.” E

He pointed out that the relief was given in respect of exceptional user, and, therefore, in all cases in which the burden on the road was increased, as shown by the language of the statute in treating extraordinary traffic as meaning more than mere excessive weight, and the word “extraordinary” as applicable to what is unusual in amount. The purpose of the Act was not to prevent unlawful user. It was to provide for damage caused by legitimate and proper user, and this aim was remedial and recuperative, intended to reach those who carried ordinary articles, but not in the manner or on the limited number of occasions on which other people carried them, and so that a reason was constituted why such carriers should pay more than their neighbours. F G

I think that the words of s. 23 are so selected as to show the intention of the legislature to bring such traffic as that of the appellants within the principle of the section as soon as it is shown that it has caused extraordinary expense for repair to the road in question to fall on the road authority by reason of the excess of weight of such traffic over the average of that for roads in the neighbourhood similar to the road in question, or analogously to an extraordinary kind of traffic compared with that on such neighbouring roads. If this be so, the judgments in the courts below were right and the appeal should be dismissed with costs, these costs to include those of the second hearing before *EVE, J.* H

VISCOUNT FINLAY (read by *LORD SHAW OF DUNFERMLINE*).—This case raises a question upon s. 23 of the Highways and Locomotives (Amendment) Act, 1878. That section deals with the case of extraordinary expenses incurred in the repair of a highway in consequence of excessive weight passing over it, or extraordinary traffic upon it, and provides that the highway authority may recover such portion of the expenses incurred as arose from the damage caused by the excessive weight or extraordinary traffic. I

The appellants, *Henry Butt & Co., Ltd.*, are the owners of a quarry, situate near *Weston-super-Mare*, a little to the north of the *Bristol Road*. It is shown

A on the map used on the second hearing of this case, and is thereon described as Butt's quarry. Mr. Butt has been for some years in the habit of conveying coal, lime, and stone to and from his quarry in motor lorries. The routes along which this traffic has taken place have been—(i) on the Bristol Road between a point near Butt's quarry on the east and Knightstone Slip on the west, passing over the Bristol Road, St. Joseph's Road, Corporation Road, and Upper Church Road, and (ii) between the said point near Butt's quarry on the Bristol Road and the railway goods station shown near the foot of the same map, passing over the Bristol Road westward as far as the point where it is intercepted by the Arundel Road, and thence by the Arundel Road, Albert Quadrant, and Alfred Street to the railway goods station. On this appeal the controversy between the parties relates only to the Upper Bristol Road as far as the junction with Arundel Road and to Upper Church Road. All the other roads have for various reasons been eliminated.

The Upper Bristol Road formed at one time part of the main road of communication between Weston and Bristol. The traffic passed to and from the High Street in the vicinity of the post office, in the centre of Weston, along what is now known as Coombe Road, joining the present Bristol Road at a spot a little to the east of St. Joseph's Road shown on the map. In 1842 a new road was made, joining the Locking Road with the Bristol Road, near Ivy Lodge. This road was, until the year 1882, a turnpike road, but in that year it was freed from toll. In consequence of the existence of this new road the Bristol Road, west of Ivy Lodge, ceased to be part of the main channel of communication between Bristol and Weston, although there was still a good deal of local traffic upon it. The Coronation Road was made in 1904, and linked up the Bristol Road with Upper Church Road and the Knightstone slip. Down to August, 1913, Mr. Butt's traffic was carried on by means of carts and wagons drawn by horses. Its amount was very considerable. In August, 1913, Mr. Butt began to use motor traffic. He used a steam wagon and trailer, the combined weight of which, when laden, was twenty tons. In January, 1916, he put a second steam wagon and trailer upon these roads. No complaint has been made of the structure of these vehicles; they were the best of their kind. Eve, J., found that beyond question the steam wagon traffic, when first put upon this road, was exceptional and extraordinary. It was a new departure, and it was attended with serious consequences to the road. The concentration of weight in the wagon and trailer did a great deal of damage, which would not have occurred if the same weight had been carried as before, distributed over a number of carts and wagons. The surface of the road was broken by this new traffic, and when the surface was once broken, a great deal of further mischief was done, even by the ordinary traffic, which would have done no damage beyond fair wear and tear if the surface over which it passed had been unbroken.

H The writ was issued on Feb. 21, 1917. The plaintiffs were the Weston-super-Mare Urban District Council, who are now the respondents, and their claim was for the recovery of the extra expense of repair in consequence of the damage done by the excessive weight of the defendant's laden wagons and trailers. The plaintiffs could recover only in respect of damage done during the twelve months preceding the issue of the writ, namely, Feb. 21, 1916 to Feb. 21, 1917, in consequence of the provisions of s. 12 of the Locomotives Act, 1898, and it was strenuously contended for the appellant, Mr. Butt, that by the commencement of that period traffic of this description could no longer be regarded as of an extraordinary nature in respect of excessive weight. It was urged that since 1913, when a steam wagon was first used upon this road, such traffic had become ordinary and normal. Eve, J., gave judgment in favour of the plaintiffs as regards the Bristol Road and the Upper Church Road, and he was affirmed by the Court of Appeal on Mar. 25, 1919. An appeal was brought to this House, and your

Lordships on the first hearing of this case made an order dated June 17, 1920, A that the case should be remitted to EVE, J., to report to the House on the question whether the traffic in controversy was of such a nature as, having regard to the character and functions of the roads in question and all the circumstances of the case, was reasonably to be anticipated upon these roads. EVE, J., accordingly heard further evidence bearing upon this question and delivered a supplementary judgment on June 5, 1921. He found that the traffic in question could not have B been reasonably anticipated prior to August, 1913, but that in relation to the position of matters at the beginning of the year 1916 such traffic was at that time reasonably to be anticipated upon the Bristol Road. With regard to the other road now in question, the Upper Church Road, he found that it was not possible to hold that the traffic in controversy ought at any time to have been C reasonably anticipated upon this road. The learned judge's reasons for holding that such traffic should, in February, 1916, have been anticipated on the Bristol Road, are stated by him as follows :

"By the end of 1915 it must, I think, have been reasonably clear to the plaintiff authority that Butt's mechanically propelled traffic would not be discontinued. An examination of the respective weights drawn over the D Bristol Road by tractor and horse for the three years from Mar. 31, 1913, to Mar. 31, 1916, demonstrates the extent to which the one mode of transport had superseded the other. Moreover, Butt's stud of horses had been dispersed or commandeered [during the war of 1914-18]; efforts had been made on E the part of the townspeople to induce him to abandon the tractor method, but, so far from yielding to this pressure, he was on the point of introducing his second wagon and trailer. If, therefore, the question has to be considered in relation to the position of matters at the beginning of 1916 the answer is that the traffic was at that time reasonably to be expected on the Bristol Road."

The finding of the learned judge, therefore, has relation solely to what Mr. Butt's course of action, with regard to this traffic, was likely to be in the year F in question. There is no finding that the existence of such traffic upon the road might have been expected in consequence of the development of traffic generally, and an examination of the evidence shows that no such finding would have been warranted. In one of the plans put in on the first hearing a number of quarries G are shown in this neighbourhood, but the evidence is clear that all of them had been discontinued for many years prior to 1913 except the defendant's quarry and two quarries belonging to the plaintiffs in the action, the Weston District Council, the traffic to and from which latter did not pass along either the Bristol Road or the Upper Church Road. The evidence, when analysed, comes merely to this, that Mr. Butt found that he was able to carry on his H business more economically by using motor transport, and for this reason continued the practice which he had begun in 1913. A direction was given by this House in its order of June 17, 1920, remitting the case to EVE, J., that in determining whether the traffic was to be reasonably anticipated on these roads, regard should be had to the character and functions of the roads in question. On this point the learned judge makes the following observations in his supplementary judgment of June 15, 1921 :

"Moreover, in connection with this point as to the functions of the roads, I and throughout the inquiry, it is to be borne in mind that Weston lies quite out of the way of any through traffic between manufacturing or business centres—that the roads are not in any sense trunk roads, but constructed almost exclusively for local requirements, and further that the town is solely a health and pleasure resort without a single factory of any importance, and a place in which the passage of heavy mechanically propelled traffic must necessarily be of a very intermittent and occasional nature."

- A Either excessive weight brought upon a highway or extraordinary traffic thereon may amount to a nuisance which would be indictable or actionable at the suit of those in whom the highway is vested, or of any person sustaining special damage. But in order to fall within the ambit of s. 23 of the Act of 1878 it is not necessary that there should have been any wrongful act on the part of the persons responsible for the excessive weight or for the extraordinary traffic. As
- B BOWEN, L.J., said in *Hill v. Thomas* (2) in delivering the judgment of the Court of Appeal,

"the object of the section is not to prohibit extraordinary traffic, but to lay the extra expense of damage done by such traffic to the road upon the right shoulders, namely, upon those who caused the damage and to whose benefit it enured."

- C The section does not make such use of the road wrongful, but prescribes that those responsible are to pay for the repairs rendered necessary by the damage resulting from what they did. The judgment in *Hill v. Thomas* (2) was the judgment of the whole court, consisting of LORD ESHER, BOWEN, L.J., and KAY, L.J. It may be regarded as classical, and leaves very little to be said upon the law on the subject. The present is not a case of "extraordinary traffic" but of
- D "excessive weight" within the meaning of the section. The damage to the roads in the present case was the result of the excessive weight of each motor with its load and its trailer; it was not the result of the multiplication upon the road of the number of vehicles. Neither the Bristol Road nor the Upper Church Road were intended for such traffic, and such traffic had not become part of
- E the ordinary use of either of these roads. The practice of one person, the defendant, cannot by itself show that to put such weight upon the road had become part of its ordinary user. If any person introduces such novelties upon the road he must be prepared to pay for the repairs to make good the damage done, and the continuance of such traffic upon the road by him and by him alone will not make the traffic ordinary so as to put an end to his liability to pay for
- F the cost of repairs which such user renders necessary. On the other hand, if, owing to the development of the district and the increase of traffic generally, the use of such motor lorries upon a particular road becomes general, their employment may become an ordinary use of the road, and this may make it impossible to say that such motors with their loads make a case of excessive weight within the meaning of the statute. It is a question of fact in each
- G particular case. But there is no evidence to show that any such change had occurred here, and I think that the concurrent findings of the courts below were manifestly right.

- A great deal was said on behalf of the appellants as to "the march of the times" and the great extension of motor traffic throughout the country generally. This, no doubt, is one element which may be taken into account in seeing whether
- H any particular case falls within the provisions of the section. But the question ultimately resolves itself into this: Has the weight charged as excessive become part of the ordinary and general user of the particular road in question? If anyone wishes to use a country road for the passage of heavy motor lorries which it never has borne and it is not fit to bear, he is liable to contribute to the cost of repairs under this section, apart altogether from the question whether he has
- I been guilty of the commission of a nuisance at common law, and a mere continuance of such user by the person who began it cannot by itself make it a part of the ordinary user of the road. In my opinion this appeal should be dismissed with costs.

VISCOUNT CAVE.—I have arrived at the same conclusion. It is established by the authorities, and particularly by *Hill v. Thomas* (2) and *Geirionydd R.D.C. v. Green* (3), in the Court of Appeal and by the *Barnsley Case* (1) in this House,

that the question whether traffic put upon a road is "extraordinary" within the meaning of s. 23 of the Highways and Locomotives (Amendment) Act, 1878, is a question of fact, and is to be determined by a comparison of the traffic in question with that which then commonly comes upon the road. A

In the present case the facts are beyond dispute. Eve, J., in his first judgment found that before August, 1913 (on which date the appellants began to use tractors upon the roads), the Bristol Road, in addition to being used for the cartage of stone and lime in horse-drawn carts and wagons of the maximum weight of three tons or thereabouts, was B

"traversed by persons coming from and returning to the neighbouring village of Milton, by market gardeners and others bringing produce into the town, by charabancs, motor cars, taxicabs, and other conveyances taking residents and visitors to the house situate on the hill and to the golf links, for drives into the surrounding country and by tradespeople serving the said houses." C

These terms aptly describe the local traffic natural to a hill road adjoining a residential town. With this description may be contrasted the results of a census of the traffic over the road which was taken for a period of twenty-three weeks in the summer and autumn of 1916, and which showed that during that period the appellants' steam tractors and trailers made 3,213 journeys over the road and carried 26,415 tons in weight, or an average of 1,148 tons per week, the average of other mechanically drawn traffic being nine tons per week. The figures for the Upper Church Road are not less striking; and there really can be no doubt that (to use the learned judge's expression) the "frequent passage of concentrated weight" to which the roads were so subjected by the appellants, was extraordinary traffic and caused extraordinary expense to the district council within the meaning of the section. On the assumption that liability is established, no question is raised as to the amounts awarded by the learned judge. D E

But counsel for the appellants raises two points. First, he says that the damage (if any) was caused, not by the increased weight of lime and other material carried by the appellants over the roads in question after the year 1913, but by the substitution of mechanical for horse traction, or, in other words, that the change was not in the volume of material hauled, but in the mode of haulage; and that a mere change in mode of transporting an existing volume of traffic does not constitute extraordinary traffic if the new method is that which is being generally adopted for traffic of that character and the vehicles used are of up-to-date construction. The assumptions of fact on which this argument rests are not fully borne out by the evidence, as the amounts of lime, &c., carried over the roads after August, 1913, was greatly in excess of that previously carried; but it may well be that, if the increased amount had been carried as before in horse-drawn carts, the damage complained of would not have occurred. Further, it is a fact referred to in the case, and of which your Lordships might well take judicial notice, that the practice of using mechanical traction for materials of this character on suitable roads has rapidly grown in recent years. But even if all this be assumed, it provides no answer to the respondents' case. It remains true that the appellants for the economic and effective carrying-on of their business have altered their mode of traction as to throw a new and heavy burden upon the roads; and the mere fact that in doing so they have acted reasonably from a business point of view, does not relieve them from the obligation of paying for the damage caused. If, as was held in the *Barnsley Case* (1), the plea that the diversion of traffic to an unsuitable road is absolutely necessary for the purposes of the author of the traffic is wholly irrelevant to the question whether the traffic is extraordinary, the same principle must apply to the plea that a change in the mode of traction was made reasonably and in accordance with the practice on other and more suitable roads. F G H I

Secondly, counsel for the appellants contends that, even if the traffic complained of was extraordinary in 1913, when it commenced, it had become, by its mere

- A repetition, ordinary in 1916-17, the year to which this claim relates; and he relies, as regards the Bristol Road, on the finding of Eve, J., that, having regard to the fact that during the years 1913 to 1916 the appellants had persisted, notwithstanding the protests of the inhabitants of Weston, in the use of mechanical haulage on the roads, such traffic was, at the beginning of the year 1916-17, reasonably to be expected to continue. I think this argument wholly untenable. If in each of the
- B years 1913-14, 1914-15 and 1915-16, the appellants caused injury to the roads by extraordinary traffic, they came under a liability to pay for the damage so caused; and the fact that they were not sued for and did not pay for such damage, and had shown an intention of continuing to cause it, did not make the traffic ordinary traffic or traffic to be reasonably expected on the roads in the sense in which that expression was used by LORD ATKINSON in *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. A.-G.* (4), No doubt, if the general and public traffic on a road changes in character—that which was once exceptional may become ordinary—but the fact that one user of the road continues for a short period, and in defiance of protests, to damage it by extraordinary traffic without being called to account is not sufficient to alter the ordinary character and functions of the road. The decisions in *Whitebread v. Sevenoaks Highway Board* (5), and in the *Barnsley Case* (1) appear to me to proceed on this footing. I agree that this appeal fails and should be dismissed.

LORD SHAW.—I am authorised by my noble and learned friend, **LORD DUNEDIN**, to say that he concurs with the opinion which I now proceed to read.

- E There are two questions in this appeal. The one is a question of law, namely, what is the proper construction to be put upon certain words occurring in s. 23 of the Highways and Locomotives (Amendment) Act, 1878. The second is a question of fact, and is whether the circumstances disclosed in evidence bring the expenses incurred in the repairing of the highway within the category of "extraordinary expenses," caused by the appellants and falling within the category set out in the section. I propose to deal with these questions in their order. [His
- F LORDSHIP read s. 23.] It must be observed, in the first place, upon this section that it is a section to provide for reimbursement of expenses actually incurred. The importance of that in the present case is rather singular, because, so far as recovery or reimbursement is concerned that is conditioned by s. 12 (1) (b) of the Locomotives Act, 1898, which provides :

- G "Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which damage has been done . . ."

- It was explained to the House, and was not questioned, that, although much damage had been done in and from the material year 1913, the repair of which would in ordinary circumstances have been undertaken in three years, yet the difficulty of
- H obtaining labour during the war [of 1914-18] had caused much postponement of necessary work. In this way the sums recoverable under the present action form but a limited portion of the extraordinary expenses actually incurred, because, although the damage was continuous, say, from the year 1913 onwards, it is only for the damage done within the period of one year prior to the action that reimbursement can be claimed, that is to say, from Feb. 21, 1916. In the second place,
- I while this action provides for reimbursement of extraordinary expenses, the nature of this expense is strictly limited by their having been incurred "by reason of the damage caused by excessive weight passing along the roads or extraordinary traffic thereon." These two reasons may, of course, be read disjunctively, and individual cases of the passing along a road of a single crushing weight might fall under the first reason, while an enormous repetition of fairly heavy traffic causing destruction of the road might fall within the second reason. But I think that the two reasons are not necessarily disjunctive, and that in point of fact the present case illustrates

very clearly how this is so. The individual weights carried in the present case are certainly heavy—the loaded steel tractor weighing twelve tons and the loaded trailer weighing eight tons; but, of course, such carriage might not of itself constitute traffic which was reckoned over the season or over the year extraordinary in volume. I only mention this point in order to put on one side an argument for the appellants which seems to indicate that the interpretation of extraordinary traffic must be confined simply to an ascertainment or consideration of the total amount carried. It is not so. The mode of carriage may make the traffic extraordinary; and the concentration of heavy weight per one mode of carriage may, indeed, combine both elements in the section, namely, excessive weight and extraordinary traffic, while, again, the category of extraordinary might quite well be reached by the concentration of a heavy weight whereby destruction of the road is accomplished, although the volume of traffic might not in itself be extraordinary and could have been carried by a better distributed mode of conveyance without damage to the road. In the third place, on this construction, one has to keep in view, and this, in my humble opinion, is the kernel of the question, the point of view of the road itself. The section provides for reimbursement of expense put upon the road. The test is: Did the road require this expense, on account either of the mode or the mass of traffic by particular users in particular periods? If the road did require such expense for such reason, then the conditions of liability set up by the statute are satisfied. It is another way of stating the case from this point of view to ask: Was the tear and wear of the road within the category of ordinary tear and wear or of extraordinary damage?

In the fourth place, this distinction between ordinary and extraordinary may be said very properly to be one of fact, but each of the contrasted items may have a legal aspect. I have already given my view of the legal considerations applicable to the term extraordinary. As to the term "ordinary," I do not think that that is finally settled by a mere statement of the accounts of expenditure incurred in previous years. Those years may, by neglect or by necessity, have been truly insufficient for the requirements of the district and traffic in the past, and it seems, in my view, to be a safe legal position that the ordinary expenditure—which is to form a datum of comparison with extraordinary expenditure—is that expenditure which would have been reasonably sufficient for the requirements in the past. In most cases the road authorities would have acted upon this footing, and, if so, the actual past expenditure would clear the issue. But, further, I look upon the estimate of ordinary expenditure as properly being grounded not only on the requirements of the road in the past, but also on a reasonable forecast for the future, including the changes in the modes of carriage of ordinary traffic in the immediate future. To be blind to these changes and to decline to march with the times, cannot be sound administration, and, in my humble opinion, "ordinary" expenditure on roads ought to include a provision sufficiently enlightened to cope with the new and more onerous requirements of newer times and methods. This last consideration, however, must be a general one. It must not be confused with provision for particular traffic, which it would not be reasonable to hold as merely a sample of the new general traffic on the particular road. A fortiori it would not be legitimate to introduce general traffic on roads in general as a datum of comparison. The statute speaks, if I may repeat, from the point of view of the particular road to which the comparison of extraordinary with ordinary is directed. Roads differ and are differently classified; and the particular road is that which in its contour dimensions and make has, on the whole, and in the past suited the needs of the locus through which it runs. While, however, my Lords, these appear to me to be the legal considerations, applicable to the construction of the section, it is, of course, manifest that they raise, in particular instances, considerations, estimates, and questions which are essentially those of fact.

Finally, on the construction of the statute, I am, of course, of opinion that the

- A "extraordinary expenses" incurred cannot be run up against the private user so as to include more than the cost of restoration of the road into a state substantially equal to that in which it stood prior to his excessive wear and tear. The statute, in short, provides for reimbursement, but for reimbursement to the extent of restoration. In connection with this matter, however, it is to be observed that road authorities are, on the other hand, not limited when they are engaged
- B or proposed to be engaged on the job of restoration in their operations. They may, very naturally and properly, extend the scope of these so as to accomplish substantial improvement. This in no way carries forward the responsibility of the private user for these; but, upon the other hand, it lays upon the court, failing agreement between the parties, the duty of allocation as between restoration and improvement. It is one of the satisfactions of this case that EYE, J., has proceeded
- C upon these principles with the most careful and accurate discrimination.

There is nothing whatsoever novel in any views of the law here set forth, although they have been articulated, in deference to the detailed and elaborate argument presented to the House. On the contrary, and, in particular, I think they are in conformity with the principles set forth by LORD BOWEN in *Hill v. Thomas* (2)—an opinion which is of the first rank in authority and helpfulness. From that case

D down to the *Barnsley Case* (1), the authorities are really all one way. The distinction attempted in the present appeal—a distinction grounded upon the fact that this was a case in which the change was merely in the mode of user of the road—is, as it actually happens, met in terms in the course of the leading sentence in LORD BOWEN's judgment, where he says :

- E "Extraordinary traffic is really a carriage of articles over the road at either one or more times, which is so exceptional in the quality or quantity of articles carried, or in the mode or time of user of the road as substantially to alter and increase the burden imposed by ordinary traffic on the road, and to cause damage and expense thereby beyond what is common."

- I need not give or repeat any analysis of these authorities, because the sentence
- F which I have just quoted still appears to me very compendiously to express the law on the subject. The facts of this case have been already resumed by your Lordships. I do not have any doubt that they have been correctly apprehended by the learned judge who tried the cause. I say so after having given an attentive consideration to the evidence and to the results of his thorough investigation as set forth by him. But I desire to call attention to his mode of gathering together
- G the legal position and putting it usefully into the form of an issue to test the facts. The language he employs is this :

- "Whether at the time of the introduction of the means of transporting this concentrated weight there was any existing traffic imposing a burden on the road comparable with it in quantity or frequency [(to this I would add 'or concentration' which is manifestly what the learned judge also means).] If
- H there was, it may well be that the new departure, although it increases the burden on the road, does not alter it, and it is, therefore, only in the nature of increased ordinary traffic; if, on the other hand, there was not any such pre-existing traffic, then the innovation is not ordinary but extraordinary traffic on the road."

- I The issue so stated and the comment upon it were firmly challenged in the Court of Appeal and in this House. The learned judges of the Court of Appeal, however, approved both issue and comment, and I think the Court of Appeal was right. I agree.

Appeal dismissed.

Solicitors : *Joynton-Hicks, Hunt, Cardew & McDonald; Mead & Co., for William Smith & Sons, Weston-super-Mare.*

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

WHITE, CHILD AND BENEY, LTD. v. SIMMONS. SAME v. EAGLE STAR AND BRITISH DOMINIONS INSURANCE CO.

[COURT OF APPEAL (Bankes, Warrington and Atkin, L.JJ.), May 3, 4, 5, 1922]

[Reported 127 L.T. 571; 38 T.L.R. 616]

Insurance—Loss—Insurance against loss caused by usurped power—No claim to attach to policy for loss by confiscation by government—Revolution—Insured property seized by provisional government—Material date for deciding whether loss caused by usurped power or by confiscation—Date of loss.

By policies of insurance dated Jan. 24, 1917, and April 27, 1917, the defendants insured the plaintiffs, in each case for the period of one year, against the loss of money and bonds deposited by the plaintiffs with a bank at Petrograd "directly caused by . . . rioters, civil commotion, war, civil war, revolutions, rebellions, military or usurped power." The policies further provided: "No claim to attach hereto . . . for confiscation or destruction by the government of the country in which the property is situated." On Dec. 14, 1917, banks in Russia were purported to be nationalised by a decree of the Central Executive Committee of the Provisional Workers' and Peasants' Government, and on Dec. 27 the bank wherein the insured property was deposited was entered by soldiers and sailors and the property was seized.

Held: the two provisions in the policies set out above were mutually exclusive; in considering whether the clause excluding claims for confiscation by the government of Russia applied the material date was when the loss occurred, not the dates of the policies; at the date of the loss the provisional government had been recognised by the British government as the de facto government of Russia; and, therefore, the loss was due to confiscation by the government and not to usurped power, and the plaintiffs were not entitled to recover under the policies in respect of it.

Evidence—Foreign government—Date of coming into existence—Determination by court, not Foreign Office.

Per BANKES, L.J.: It does not seem to me that the question when a foreign government came into existence as a government is a matter for the Foreign Office to determine. That question must depend on the facts before the court, and on them the court must draw its own conclusion.

Notes. Considered: *Luigi Monta of Genou v. Cechofracht Co.*, [1956] 2 All E.R. 769. Referred to: *Bank of Ethiopia v. National Bank of Egypt and Liguori*, [1937] 3 All E.R. 8; *Banco de Bilbao v. Rey*, [1938] 2 All E.R. 253.

Case referred to:

- (1) *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.*, [1921] 3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 37 T.L.R. 777; 65 Sol. Jo. 604, C.A.; 11 Digest (Repl.) 325, 19.

Appeal from an order of ROCHE, J., in two actions tried by him in the Commercial Court.

The actions were brought on policies of insurance, dated Jan. 24, 1917, and April 27, 1917, insuring in each case for a period of one year property of the insured, namely, moneys and Russian Treasury Bonds deposited by the insured at a bank at Petrograd, and seized by the Soviet government in December, 1917, against loss or damage "directly caused by fire, rioters, civil commotion, war, civil war, revolutions, rebellions, military or usurped power." The policies further provided: "No claim to attach hereto for delay, deterioration and/or loss of market, or for confiscation or destruction by the government of the country in which the property is situated." ROCHE, J., gave judgment for the plaintiffs, and the defendants appealed.

- A R. A. Wright, K.C. and H. Cloughton Scott for the defendants.
F. D. MacKinnon, K.C., Charles Doughty, and F. W. Beney for the plaintiffs.

BANKES, L.J., having referred to the policy of insurance, said: It is argued that the part of the clause which refers to confiscation by the government of the country is an exception to the earlier part of the clause. I cannot so read the clause. It appears to me that the clause is dealing with two sets of acts which are set in contrast. The contrast is between the acts of the government of the country and the acts of rioters or acts done during civil commotion, war, civil war, rebellions, and so forth, and the effect of that part of the clause is to exclude altogether from the scope of the policy acts of confiscation or destruction by the government and to include only the other class of acts, namely, acts caused by fire, riots, civil commotion, and so forth.

C It is, therefore, necessary to decide whether the acts causing the loss fell within one class or the other, and the main question is whether the acts complained of were the acts of the government of the country in which the property was situated or whether they were caused by civil commotion or revolution or usurped power. It was contended on behalf of the assured that the word "government" in the policy meant the government in existence at the date of the policy. ROCHE, J., refused to accept that contention, and, in my opinion, he was right in so refusing. It seems to me that the government contemplated in the clause must be the government in existence at the time when the acts complained of were committed. The decree which caused the loss here was a decree which was issued on Dec. 27, 1917, new style (Dec. 14 old style). The decree purported to be issued by a body which called itself the Central Executive Committee, and the decree was published in the Gazette of the Provisional Workers' and Peasants' Government. It declared that banking was a State monopoly, and that all banks in the form of companies limited by shares, should be united with the State bank. As a result of that decree the bank in which the bonds were deposited was forcibly entered and taken possession of by armed men under the authority of that decree, and all the Treasury bonds then in the custody of the bank were forcibly removed from the possession and control of the bank. ROCHE, J., has decided, and, I think, rightly decided, that the effect of the decree and the action of the armed men acting under the authority of that decree, constituted a loss of the bonds within the meaning of the policy.

G Then the question arises whether the act complained of was an act of government or an act of a usurped power within the meaning of the policy. The question of the view that should be taken of the position of matters in Russia at or about the material time in December, 1917, and in reference to the action of what are generally spoken of as the Soviet authorities, has recently been considered in this court in *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (1), and so far as this court came to any decision on that point, H its decision would be binding on this court in this case. Of course, the decision in *Sagor's Case* (1) was a decision only on the facts as they were laid before the court in that case, and if different or additional facts have been laid before the court in this case it would be open to this court to distinguish this case from *Sagor's Case* (1). ROCHE, J., in a most careful judgment, came to the conclusion that the facts laid before him in the present case were so substantially different I from those laid before the court in *Sagor's Case* (1), that he was justified in arriving at a different conclusion from that arrived by this court in *Sagor's Case* (1). He, accordingly, came to the conclusion that the insurance company had failed to establish that the act of the armed men in seizing the bank and the bonds in the custody of the bank on Dec. 27, 1917, was the act of a government within the meaning of the clause in question in the policy.

The question before the court in *Sagor's Case* (1) had reference to property in certain timber. The plaintiffs claimed that they were the owners of certain

timber in Russia before June, 1918, and they claimed a declaration that they were entitled to that timber which had been shipped from Russia to England and was claimed by the defendants in that action as their property. The defendants claimed it on the ground that they had bought it from the then Russian government and that that government had the right to sell it to them because timber had been nationalised under a valid decree of the then Russian government. The decree in question was issued in June, 1918, and it purported to be a decree of the Council of the Commissaries for the People. By that decree all industrial and commercial establishments mentioned in the schedule, with their capital and assets, were declared the property of the Russian Socialist Federal Republic. The list mentioned in the schedule included the plaintiffs' timber establishment, and the sale to the defendants in that case, by a person claiming to be the representative of the Russian Socialist Federal Republic, was made in August, 1920. In March, 1921, the trade agreement between the government of this country and the government of the Russian Socialist Federal Republic was made. By cl. 10 of that agreement the Russian Soviet government undertook to make no claim to dispose in any way of the funds or other property of the late Imperial and the provisional Russian government in the United Kingdom. So far as this agreement was concerned three Russian governments were referred to: the late Imperial government, the provisional Russian government, and the Soviet government. After that agreement was made the question was raised whether the government of this country recognised the Soviet government as the de facto government of Russia as then existing; and in the *Sagor Case* (1) this court had before it certain information derived from the Foreign Office in two letters of April 22, 1921, and May 4, 1921, from the Foreign Office addressed to different firms of solicitors. In the letter dated April 22, 1921, the Foreign Office stated that the

"provisional government (which is the one referred to in the trade agreement, generally known as Kerensky's government) came into power on Mar. 14, 1917. The executive authority of that government was seized by a military revolutionary committee on Nov. 7, 1917, and turned over to the All Russia Congress of Workmen, Soldiers' and Peasants' deputies on the following day. The Constituent Assembly, however, remained in session until Dec. 13, 1917, when it was dispersed by the Soviet authorities."

In the letter of May 4, 1921, the Foreign Office stated that His Majesty's government recognised the Soviet government of Russia as the de facto government of that country on Mar. 16, 1921.

In those circumstances, and on that information, one of the questions which this court decided in *Sagor's Case* (1) was whether the Soviet government, with whom the government of this country made a trading agreement in March, 1921, and which it recognised as the de facto government of Russia on that date, was or was not the de facto government of Russia at all material dates for the purposes of the *Sagor Case* (1), which covered a period to some date before the date of the decree in June, 1918, which nationalised the timber factories. In that case I said in the course of my judgment ([1921] 3 K.B. at p. 544):

"From the letter from the Foreign Office of April 22, 1921, it appears that the Soviet authorities dispersed the then Constituent Assembly on Dec. 13, 1917, from which date I think it must be accepted that the Soviet government assumed the position of the sovereign government and purported to act as such."

I, therefore, think that on the facts then before the court, the court did decide in *Sagor's Case* (1) that the body which dispersed the Constituent Assembly on Dec. 13, 1917, was the same body as that which His Majesty's government recognised as the de facto government in March, 1921. ROCHF, J., had before

A him in this case some further information than that before the court in that case, and if this fuller information had been before us in *Sagor's Case* (1), I might have expressed my conclusion in rather different language. But I should have arrived at the same conclusion after the further consideration which I have been able to give to the matter.

B The further information which ROCHE, J., had before him in this case consisted of correspondence addressed to the Foreign Office by the solicitors for the assured in these two cases, in which, proceeding from the point which was dealt with in *Sagor's Case* (1), the solicitors desired to obtain from the Foreign Office an expression of opinion on the question when the Soviet government came into actual existence as the government which was recognised as the de facto government by the government of this country. The Foreign Office, not unnaturally, C as I think, felt themselves unable to give that information. But the Foreign Office did one thing. They set out in tabular form a statement of the material events in Russia as known to the Foreign Office, from which the court could draw its own inference with regard to the date when the government now recognised could be said to have come into existence. ROCHE, J., not satisfied with that, caused a further letter to be addressed to the Foreign Office, and D that letter elicited further very material information, which clears up certain difficulties which are apparent owing to the different styles or titles under which some of the decrees have been issued.

It does not seem to me that the sources of information with regard to the time when a particular foreign government came into existence as a government is a matter for the Foreign Office to determine. That question must depend E on the particular facts before the court, and on them the court must draw its own conclusion. ROCHE, J., felt himself unable to decide when the Soviet government came into existence, partly because the Foreign Office are unable to express any opinion on that question. That does not seem to me a true ground on which to base an opinion. In what is described as an annexe to the Foreign F Office letter of June 10, 1921, which gives a full account of the material events as known to the Foreign Office, it appears that a republic was proclaimed by the provisional government in September, 1917; that the Bolshevik coup d'état in Petrograd took place on Nov. 7, 1917; and that on Nov. 13, 1917, the defeat of Kerensky's forces and the flight of Kerensky occurred. On Nov. 4, 1917, the decree stipulating that the legislative power lay with the Commissaries of the G People until the meeting of the Constituent Assembly was published. In a further letter from the Foreign Office to ROCHE, J., it is stated that the decree dissolving the Constituent Assembly issued on Jan. 19, 1918, emanated from the Central Executive Committee of the Soviets. This body, so far as the Foreign Office could ascertain, provisionally elected Commissaries of the People during the interval between the seizure of power by the Bolsheviks on Nov. 7, 1917, H and the passing of the new constitution in July, 1918, which formally vested this power in the Central Executive Committee. It seems from that information that the body which was exercising the executive authority in Petrograd from Nov. 14, 1917, until Jan. 19, 1918, was the Central Executive Committee of the Soviets.

I I have pointed out already that the decree of December, 1917, nationalising the banks and causing this loss was passed at the meeting of the Central Executive Committee in December, 1917, and I have pointed out also that the degree which this court in *Sagor's Case* (1), held to be a decree of a Soviet government, was a decree of the Council of Commissaries. That council, according to the last Foreign Office statement, is the council which was elected provisionally by this same Central Executive Committee. That seems to identify the body which on Nov. 14, 1917, purported to act as the government of Russia, exercising full executive authority or claiming to exercise full authority and stipulating

that the legislative power lay with Commissaries of the People until the meeting of the Constituent Assembly. ROCHE, J., appears to have assumed that this Constituent Assembly was to be the de jure government of the country, and on the further information before him he appears to have come to the conclusion that this court was insufficiently informed when it treated the dispersal of the Constituent Assembly on Dec. 13, 1917, as the final dispersal of the government as represented by the Constituent Assembly. It now appears that that dispersal on Dec. 13 was not the final dispersal of the Constituent Assembly, because another Constituent Assembly was summoned, and that assembly was not finally dissolved until Jan. 19, 1918. But there is no evidence to show that this Constituent Assembly was intended to be, when assembled, the government of the country within the meaning of the clause in the policy. In the absence of any evidence to the contrary I should assume that it was intended to be something quite different from the government of the country, namely, an assembly which was to decide what the future government of the country was to be, and that pending the decision of the Constituent Assembly the question would be whether or not there was a government at all during that period, and, if there was, what that government was? It seems to me that there was a government, considered in the sense of a person or a body of persons exercising full executive and legislative power in the country, within the meaning of the policy. The government, which is now known as the Soviet government, has been recognised by His Majesty's government as the de facto government of Russia. It appears to me that that Soviet government which has been recognised was in existence as a government in Russia on Dec. 27, 1917. It is identically the same government, and if it has been recognised by the government of this country as the de facto government of Russia, its acts must be recognised by the courts of this country as the acts of the recognised authority and government of the country at the time in question.

I have, therefore, arrived at the conclusion that the fresh facts which were before ROCHE, J., do not justify or call for any other conclusion than that which this court arrived at in *Sagor's Case* (1). The decision in that case carried back the authority of the de facto Soviet government as recognised by the government of this country to a date anterior to the material dates in this case. It is probable that if these further facts had been before us in *Sagor's Case* (1), my language, and possibly the language of the other lords justices, might have taken a different form; but the evidence in this case, so far from leading me to think that the conclusion arrived at by this court in *Sagor's Case* (1) is not correct, confirms me in the view that it was one and the same authority that was acting as the government in Russian from Nov. 15, 1917, to Jan. 19, 1918, and covering the material time in this case. I cannot, therefore, agree with the conclusion arrived at by ROCHE, J. The act causing the loss in this case was an act of confiscation by the government of the country, and was not the act of a usurping authority. In my opinion, the appeal succeeds and must be allowed with costs.

WARRINGTON, L.J.—I am of the same opinion. For the purposes of our judgment the two policies of insurance on the construction of which the question arises for our decision are substantially identical. The learned judge below, in construing the material clauses, dealt with two contentions raised by the assured. The first contention was that the expression "the government of the country in which the property is situated," means the government of that country in power at the date of the policy. In my opinion, the learned judge was right in refusing to accept that view of the construction of the policy. It seems to me that the material date to be considered is the date of the loss happening as the result of the acts of government therein mentioned; such acts of government being the acts of the executive body occupying the position of government at the time the acts in question were committed.

A With regard to the second contention raised before him, the learned judge appears to have taken the view that the clause beginning "No claim to attach" is an exception to the preceding clause. I agree with BANKES, L.J., that that is not the true construction. It appears to me that the policy divides the acts with which it is concerned into two classes, namely, (i) which would give rise to a claim, and (ii) which would not give rise to a claim under the policy.

B Therefore, the question for our decision is whether the alleged loss in this case arises by reason of confiscation or destruction by the government of the country in which the property is situated. In my opinion, РОСНЕ, J., was right in holding that there was a loss within the meaning of the policy, but the question then arises whether or not that loss happened in such circumstances that a claim in respect of it is barred by the clause which provides that no claim is to attach

C under the policy "for confiscation or destruction by the government of the country in which the property is situated."

The loss clearly arises, not from the physical acts of the soldiers and sailors who entered the bank on Dec. 27 and 28, 1917, and the following days, but from the decree of what we may call the Soviet authorities without prejudice, and the subsequent decrees and administrative acts made and committed by them.

D Were those decrees and administrative acts the decrees and administrative acts of the government of the country? In *Sagor's Case* (1), it was proved that the then government of Russia had been recognised as the de facto government of Russia, and it was held as a matter of law that the acts of such a government could not be questioned in the courts of this country, although they might have been committed prior to the actual date of the recognition of such de facto government by the government of this country. It was also held on the facts that the government which had been recognised by the government of this country was identical with the government which had published a decree in June, 1918. It followed from that that the government which was recognised was in existence some time before the date in June, 1918, in which the decree referred to was published, and the only information then before the court with regard to the date of the beginning of that government was that on Dec. 13, 1917, that government had dispersed the Constituent Assembly. It follows, therefore, I think, that the court in that case held that the government in Russia which was recognised by the government of this country, began to exist not later than Dec. 13, 1917.

F

The question now arises, whether there is evidence before us which precludes us from arriving at the conclusion that this recognised government was in existence as early as Dec. 13, 1917. I agree with BANKES, L.J., that the further facts disclosed by the Foreign Office communication tend to confirm such a conclusion. There is, further, the evidence of the two Russian lawyers, from which it clearly appears that they regard the decree, under which the acts causing the loss were committed, as an operative decree of a government exercising full executive power in Russia. Therefore, it seems to me, that the evidence before us, so far from displacing the view at which we arrived in *Sagor's Case* (1) that the recognised government of that country existed not later than Dec. 13, 1917, and it is clear that it was the government of the country in which the property was situated at the time of the loss. The appeal should, therefore,

H

I be allowed.

ATKIN, L.J.—The principle question is what is meant by the "government of the country"? Counsel for the plaintiffs contends that that means the government of the country at the date of the policy. I do not agree with that view. It was intended that there should be an express exception of the acts of the government either by confiscation or destruction, and the question is whether the authority which caused the confiscation or destruction was the government of the country in which the property was situated at the time the act causing

the loss was committed. It was argued that the clause in question applied to the government of the country in which the property was situated, and that unless it could be said that the government that caused the act complained of was the government of the country at the time the policy was taken out, no other government could be brought within the clause. I cannot accept that argument. The policy contemplated acts of war and acts of revolution, and it is conceivable that as the result of acts of war or acts of revolution the government, established by such war or by such revolution, might rule over a different area of country from that which it ruled over before the revolution or the war. I think the question is whether the government causing the act complained of to be done was the government actually exercising sovereign powers over the territory in which the subject-matter of the insurance was situated at the time when the act complained of was done.

There is also the question whether the acts causing the loss were the acts of the government of the country in which the property was situated. In my opinion, this court is bound by the decision in *Sagor's Case* (1). In that case it was held that the Soviet government was recognised as the de facto government of Russia by the British government in 1921. That decision was arrived at by reason of a letter from the Foreign Office. In this case that letter has been explained. ROCHE, J., in this case sought to obtain from the Foreign Office a statement with regard to the precise date at which the existing Soviet authority came into being as a government. But the Foreign Office did not answer that question. On the evidence before us it appears to me to be plain that the government which has now been recognised by the British government was exercising the functions of government over the country in which the insured property was situated at the material dates in this case. The evidence is that that government or authority was exercising, and exercising effectively, the executive functions of government during the whole of December, 1917. The acts complained of in this case were the acts of the government of the country in which the property was situated at the time of the loss. Therefore, the plaintiffs' claim is excluded by the clause referred to.

Appeal allowed.

Solicitors: *Simmons & Simmons; Budd, Johnson, Jecks & Colclough.*

[Reported by W. C. SANDFORD, ESQ., Barrister-at-Law.]

A PALGRAVE, BROWN & SON, LTD. v. TURID (OWNERS)

[HOUSE OF LORDS (Viscount Birkenhead, L.C., Lord Atkinson, Lord Sumner, Lord Parmoor and Lord Buckmaster), February 2, 3, 27, 1922]

[Reported [1922] 1 A.C. 397; 91 L.J.P. 81; 127 L.T. 42; 38 T.L.R. 423; 66 Sol. Jo. 349; 15 Asp. M.L.C. 538; 27 Com. Cas. 216]

B Custom—Usage—Evidence of—Written instrument—Repugnancy—Charterparty—Usage as to unloading of timber.

By a charterparty dated Oct. 1, 1914, it was provided that the steamship *T.* should load a cargo of timber at Soroka for carriage to Yarmouth, and deliver there "as ordered, or so near thereunto as she may safely get, always afloat," and that the cargo should be "taken from alongside the steamer at charterers' risk and expense as customary." The *T.* was ordered to discharge at a part of the quay occupied by the charterers, to which, to remain afloat, she was unable to get nearer than 13 ft., and the cargo was there discharged on the quay over stagings slung from the ship's side to the quay, the stevedore's men working in two gangs, one carrying the timber to the ship's rail, and the other carrying it ashore and stacking it 10 ft. from the quayside. It was proved that there was a custom of the port of Yarmouth that the whole of this work should be done at the cost of the ship. On a claim by the shipowners to recover from the charterers the cost of erecting the stagings and conveying the timber over them,

E Held: the test to be applied to ascertain whether the custom was inconsistent with the terms of the charterparty was that prescribed by LORD CAMPBELL, C.J., in *Humfrey v. Dale* (1) (1857), 7 E. & B. at p. 275, namely, whether the custom, if expressed in the charter, would make it insensible or inconsistent; applying that test, the custom was inconsistent with the tenor of the language of the charter, for to reconcile the custom and the charter it must be held that the timber stacked 23 ft. from the ship's rail was "alongside the steamer" and that taking the timber from the stacks was taking it "from alongside the steamer," a conclusion to which the House could not come; and, therefore, consideration of the custom was not admissible and the shipowners were entitled to succeed under the terms of the charterparty.

F *Holman v. Wade* (2) (1877), *The Times*, May 11, approved and applied. Decision of Court of Appeal, [1921] P. 146, affirmed.

G Notes. Applied: *Mowbray, Robinson v. Rosser* (1922), 91 L.J.K.B. 524. Followed: *Hillas v. Rederi Akt. Acolns* (1926), 43 T.L.R. 67. Considered: *Dampsselskab Suendborg v. L.M. & S. Rail. Co.* (1929), 141 L.T. 521; *Smith, Hogg & Co. v. Bamberger & Sons*, [1929] 1 K.B. 150; *Temple Steamship Co. v. Vsesojuznoje Objedineni Sovfracht* (1944), 170 L.T. 378. Considered: *London Export Corp. v. Jubilee Coffee Roasting Co.*, [1958] 2 All E.R. 411. Referred to: *Akt. Dampsski-Bsselskabet Primula v. Horsley* (1923), 40 T.L.R. 11; *The Rensfjell, The Ornesfjell, The Uppland, The Fritisff, The Svein Jarl* (1924), 131 L.T. 764; *Akt. Dampskibs Steinstad v. Pearson* (1927), 137 L.T. 533; *Dalglish Steam Shipping Co. v. Williamson & Son, Ltd.* (1935), 79 Sol. Jo. 453.

I As to the admission of evidence of usage see 11 HALSBURY'S LAWS (3rd Edn.) 191 et seq.; and for cases see 17 DIGEST (Repl.) 36 et seq. See also sub-title SHIPPING, 30 HALSBURY'S LAWS (2nd Edn.) 336, 369, 532-536; and cases there cited.

Cases referred to:

(1) *Humfrey v. Dale* (1857), 7 E. & B. 266; 26 L.J.Q.B. 137; 28 L.T.O.S. 284; 3 Jur. N.S. 213; 5 W.R. 466; 119 E.R. 1246; affirmed (1858), E.B. & E. 1004; 6 W.R. 854; 120 E.R. 783; 27 L.J.Q.B. 390; 31 L.T.O.S. 328; 5 Jur. N.S. 191, Ex.Ch.; 17 Digest (Repl.) 47, 552.

(2) *Holman v. Wade* (1877), *Times*, May 11, C.A.; 41 Digest 611, 4392.

- (3) *The Nifa*, [1892] P. 411; 62 L.J.P. 12; 69 L.T. 56; 7 Asp. M.L.C. 324; A
1 R. 540; 41 Digest 536, 3635.
- (4) *Aktieselskab Helios v. Ekman & Co.*, [1897] 2 Q.B. 83; 66 L.J.Q.B. 538;
76 L.T. 537; 8 Asp. M.L.C. 244; 2 Com. Cas. 163, C.A.; 41 Digest 466,
2974.
- (5) *Southwell v. Bowditch* (1876), 1 C.P.D. 374; 45 L.J.Q.B. 630; 35 L.T. 196;
24 W.R. 838, C.A.; 1 Digest 636, 2583. B
- (6) *Stephens v. Wintringham* (1898), 3 Com. Cas. 169; 41 Digest 610, 4379.
- (7) *Hayton v. Irwin* (1879), 5 C.P.D. 130; 41 L.T. 666; 28 W.R. 665; 4 Asp.
M.L.C. 212, C.A.; 41 Digest 611, 4393.
- (8) *Glasgow Navigation Co., Ltd. v. Howard Bros. & Co.* (1910), 102 L.T. 172;
26 T.L.R. 247; 11 Asp. M.L.C. 376; 15 Com. Cas. 88; 41 Digest 617, 4472.
- (9) *Northmoore Steamship Co. v. Harland v. Wolff, Ltd.*, [1903] 2 I.R. 657; C
41 Digest 616, p.

Appeal by the defendants from an order of the Court of Appeal (LORD STERNDALÉ, M.R., WARRINGTON and SCRUTTON, L.JJ.), reported, [1921] P. 146.

The defendants, timber merchants carrying on business at Great Yarmouth, chartered the plaintiffs' steamship *Turid* to carry a cargo of timber to Great Yarmouth. By the charterparty which was dated Oct. 1, 1914, it was agreed that the steamship should proceed to Soroka and there load, always afloat, from the agents of the charterers, a full and complete cargo of mill-sawn deals, battens, boards, and ends, and, being so loaded, should therewith proceed to Great Yarmouth as ordered, or so near thereunto as she might safely get, and deliver the same, always afloat, on being paid freight as specified. By cl. 3 it was provided: E
"the cargo to be loaded and discharged with customary steamship dispatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports. . . . The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary."

The *Turid* arrived at Great Yarmouth with the cargo consisting of 576 standards on Nov. 8, 1914. Her draught was such that to be afloat she could not come nearer than 13 ft. from the quay at which she was to discharge. To discharge the cargo a staging was erected between the ship's side and the edge of the quay abreast of the several holds, constructed of baulks of timber carried from the quay to the ship's side with planks resting upon the baulks. This method of discharge was in accordance with a custom of the port of Yarmouth, which was proved to be that a wooden staging should be erected between the ship about to discharge and the quay; that stevedores employed by the shipowners should carry the cargo from the ship's rail over the staging and dump it at not less than 10 ft. from the quay side; and that the cost of so discharging the cargo and erecting the staging should be borne by the shipowners. The plaintiffs said that, if the alleged custom existed, it was inconsistent with an express term of the charterparty which required the charterers to take the cargo from alongside at their own risk and expense, and was not admissible to vary such an express term. The shipowners claimed the cost incurred by them in erecting the staging and having the timber carried across it and deposited on the quay in the manner stated. The Court of Appeal held that the custom was inconsistent with the terms of the charterparty, and that the shipowners were entitled to recover the cost of discharge over and above the rate for delivery at the ship's rail. The charterers appealed. F
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F. W. Mackinnon, K.C. and *E. A. Harney, K.C.* for the charterers.

Raeburn, K.C. and *Trapnell* for the shipowners were not called upon to argue.

The House took time for consideration.

Feb. 27. The following opinions were read.

A **VISCOUNT BIRKENHEAD, L.C.**—The amount in dispute in this case is very small, £46 17s., but the main, if not, indeed the only, point for decision is of some importance and requires careful consideration. It may be shortly stated: Whether the proved custom of the port of Great Yarmouth touching the discharge and delivery there of a cargo of timber, such as that in fact carried by the steamer *Turid*, is inconsistent with the contract in writing binding on the parties to this appeal and dealing with the same matter, or is only explanatory of the terms of this contract.

B The facts are few and simple. By a charterparty dated Oct. 1, 1914, it was agreed that the owners of the *Turid* should load on that ship at Soroka a cargo of deals, battens, boards, and short ends, and thence carry the same for the appellants to Great Yarmouth as ordered, or so near thereunto as she might safely get, and deliver the said cargo to the appellants, always afloat, on being paid the freight therein mentioned in full and all port charges and pilotage. Clause 3 of the charterparty runs as follows:

C "The cargo to be loaded and discharged with customary steamship dispatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used) in both loading and discharging excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at £25 per day, and pro rata for any part thereof. . . . The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary."

D The *Turid* arrived at Great Yarmouth on Sunday, Nov. 8, 1914, and was berthed about 12 ft. from the appellants' quay, but her draught was such that while afloat she could not be brought into a position in which her bulwarks would be nearer than 13 ft. out from this quay. To discharge her cargo a staging was necessary between the ship's side and the quay abreast of her several holds in order to bridge over the separating space. This staging was constructed with baulks of timber carried from the quay to the ship's side at a level of 4 ft. or 5 ft. below the bulwarks, with planks resting upon these baulks. The cargo was discharged in this way under directions given by the stevedores. The charterers refused to pay the extra cost of erecting the staging, amounting to £46 17s., whereupon the owners of the *Turid* instituted a suit in the county court of Norfolk holden at Great Yarmouth to recover this sum as damages for breach of the charterparty, or, alternatively, as money paid at the charterers' request. In the statement of claim it was averred that the *Turid* was always ready and willing to deliver her cargo alongside in accordance with the charterparty; that the charterers refused to accept delivery alongside as so provided, but compelled the owners of the ship to place the cargo on the charterers' quay, to which access could only be obtained by carrying the cargo over a wooden staging, which it became necessary to erect and which they did erect accordingly between the steamer and the quay in order to take delivery; that the shipowners under protest carried the cargo from alongside their vessel over this staging and stacked the same on the charterers' quay as directed by the latter.

E The real defence pleaded in answer to this claim was that by cl. 3 of the charterparty it was agreed that the *Turid* should be discharged according to the custom of the port, and that the cargo should be taken from alongside the steamer at charterers' risk and expense as customary; that it was the custom of the port of Great Yarmouth that a wooden staging should be erected between the ship about to discharge and the quay, and that stevedores employed by the ship-brokers, as agents for and on behalf of the shipowners, should carry the cargo from the ship's rail over the said wooden staging and dump the same at a place not less than 10 ft. from the quay's edge; that the cost of thus discharging the

cargo and erecting this staging should be borne by the shipowners; and that the cargo of the *Turid* was discharged according to this custom. To this defence a reply was filed which, after denying that the custom relied on existed, and also denying that the cargo of the *Turid* was discharged in accordance with it, alleged that the custom was inconsistent with the express terms of the contract between the parties, which required the charterers to take the cargo from alongside the steamer at their own risk and expense, and that it was not admissible to vary them.

The case was tried before JUDGE MULLIGAN, the learned county court judge. Evidence was tendered to prove the custom relied on; it was objected to by counsel for the shipowners, but was admitted subject to objection. Several authorities were cited to the learned judge, including *Holman v. Wade* (2). He held that the custom as pleaded flatly contradicted the express terms of the charterparty, viz., (i) that the cargo was to be brought to and taken from alongside the steamer at the charterers' risk and expense as customary; (ii) that the words "as customary" related to the means of doing the work and not to the expense of doing it, the incidence of the expense having been fixed by the preceding words; and (iii) that the evidence of the custom was not admissible. The learned judge, therefore, gave judgment for the shipowners. On Dec. 23, 1919, the charterers gave notice of appeal to the Divisional Admiralty Court. The appeal was heard by the President and HILL, J., who differed in opinion. The President, after an elaborate review of the relevant authorities, was of opinion that the custom pleaded was inconsistent with the charterparty, and HILL, J., was of opinion that it was not so, and said that, if he had not felt himself bound by *Holman v. Wade* (2) he would have decided in favour of the charterers. The appeal was accordingly dismissed. The charterers then appealed to the Court of Appeal. The case was heard on Jan. 17, 1921, by a court composed of the Master of the Rolls and WARRINGTON and SCRUTTON, L.JJ. The Master of the Rolls, in delivering judgment, said:

"In my judgment the case is governed by the decision to which we have been referred in *Holman v. Wade* (2), and, that being so, I do not think it necessary, or indeed advisable, to express any opinion of my own as to what my decision might have been if I had not thought the case to be governed by this authority."

He points out that the two learned judges in the Divisional Court differed in the manner already stated, and then adds:

"There is a great deal to be said on both sides, and I do not think it necessary or right to express any opinion upon it."

He then utters a regret, which everyone must feel who has to deal with *Holman v. Wade* (2), that it is not well and fully reported. He points out that no opinion was ever delivered about it by the Court of Appeal in England, but that it has often been cited in courts of first instance, and, so far as he was aware, no disapproval of it had ever been expressed. He then states the facts of that case as disclosed in the pleadings, and points out that the custom relied on in the defence was stated in the followings words:

"It is the customary and recognised mode of discharge of the Victoria Docks at Hull for ships laden with timber to discharge their cargo upon the quay alongside and to continue the discharge as long as there is quay space vacant for the discharge thereof, and the cargo is then taken from alongside by the consignees thereof,"

which, though strangely expressed, he thought meant that when the cargoes had been discharged upon the quay, but not till then, had the vessel been discharged "alongside," and that the consignees, taking it thence, were taking it from "alongside." He says it would appear as though the custom put to the

A jury was not exactly in the terms pleaded, because from the associate's certificate it appeared that

"the jury found that according to the terms of the charterparty (apart from the question of usage or custom) the cargo was not to be taken by the shipowners from the ship's rail by means of a stage supplied by him to the quay and there stacked by and at the risk and expense of the shipowners; that was to be done by and at the risk and expense of the merchants."

The jury also found that "the alleged usage of custom was proved to their satisfaction." Upon these findings MANISTY, J., he says, entered judgment for the plaintiff on the ground that the custom was inconsistent with the charterparty, and his decision was affirmed by the Court of Appeal. The Master of the Rolls concludes his judgment by saying that in his opinion the case before them could not be distinguished from *Holman v. Wade* (2), and that, therefore, the appeal failed and should be dismissed with costs. The Court of Appeal which affirmed MANISTY, J., was composed of LORD COLERIDGE, LORD BRAMWELL, and BRETT, L.J. The judgment was delivered by LORD BRAMWELL, who stated that both LORD COLERIDGE and BRETT, L.J., concurred with him.

WARRINGTON, L.J., in delivering judgment, said :

"I am of the same opinion. I think we are bound by the decision in *Holman v. Wade* (2). It is quite true that the report of *Holman v. Wade* (2) is a somewhat unsatisfactory one, and the rest of the materials for considering the case are afforded only by the record. But this, at all events, is clear both from the report and from the record that the question between the parties was, who was to pay for the expenses of the process by which, according to the alleged custom, the cargo was to be discharged? The shipowner said 'By the terms of the contract you, the charterers, are to pay the expenses of discharging from alongside.' The charterers said, 'By the custom which we have proved you, the shipowner, are not only to perform the operation of landing the cargo in the way we say the custom prescribes, but you must pay the expenses of it.' The ultimate decision was that that part of the custom, at all events, which was said to throw the expense upon the shipowner was inconsistent with the terms of the contract, which provided that the cargo should be taken from alongside the ship at the risk and expense of the charterers."

The learned lord justice then expressed the opinion that in *The Nifa* (3), and in *Aktieselskab Helios v. Ekman & Co.* (4), the view taken by LORD ESHER was that the mode of discharge was to be regulated by the custom, and that the payment of the expense was an absolute obligation thrown by the contract on the charterers, and, therefore, was not capable of being thrown upon the shipowner by any such custom as is alleged. On the whole, however, for the reasons given by the Master of the Rolls, he was of opinion that they were bound by *Holman v. Wade* (2), and held that the appeal should be dismissed. SCRUTTON, L.J., found great difficulty in holding himself bound by a decision in a case about which they knew so little as they did about *Holman v. Wade* (2), but ultimately came to the conclusion—not without considerable doubt—that they were bound by it, and held that the appeal should be dismissed.

The words of the charterparty in the present case are "taken from alongside the steamer at charterers' risk and expense." I am, myself, of opinion that the word "alongside," if it does not suggest actual contact, does at all events suggest close contiguity, and not the less so because the ordinary obligation of the shipowner is admittedly only to deliver to the consignee the cargo his ship carries at ship's rail. A contract which requires delivery elsewhere extends this legal obligation. It will be observed that the custom proved in this case does not

refer at all to the extent of the distance which may separate the ship from the quay. A vessel with a greater draught than the *Turid* might, in order to keep always afloat, have to be berthed at over 8 yds. distance from the quay instead of, as in this case, about 4 yds. from it. There was no evidence given upon this point. All that was proved is that the *Turid* could not get nearer to the quay if she was to keep always afloat, as the charterparty provided. The custom relied upon was proved by two witnesses examined on behalf of the appellants. Their evidence, as given in the note of the learned county court judge, was as follows:

"William Summers Wharton, manager of defendant company [the charterers] was then sworn, and said: It was the custom to erect a wooden staging between the ship and the quay, and for stevedores to be employed by the shipbrokers to carry the cargo for the shipowners from the ship's rail over the wooden staging, and to put it down 10 or 12 ft. from the edge of the quay. This was all done at the cost of the shipowners. That had been the practice for the thirty-three years he had been in the trade. William Brown, shipbroker, with thirty years' experience of Yarmouth, and Richard Jewson, President of the Timber Trade Federation, with thirty-six years' experience of the timber trade at Yarmouth, gave evidence to the same effect as Wharton. They were not cross-examined."

HILL, J., when giving judgment, said, when dealing with this evidence:

"The method of discharging was that a staging was slung from the ship's side abreast of each of the three holds, and the stevedore's men, working in two gangs, carried the timber from the ship's deck and holds across the staging and on to the quay, and stacked it on the quay, leaving a space of 10 to 12 ft. between the edge of the quay and the outer edge of the stack. One gang broke out the timber and carried it to the ship's rail, the other received it on the staging and carried it to the place of stacking on the quay, and there stacked it. The contention of the charterers was that, by the custom of the port of Yarmouth, the whole of this work was done by and at the expense of the shipowners; the contention of the shipowners was that the custom was inconsistent with the express terms of the charterparty and that their obligation was to deliver at the ship's side, and that the work of the first gang was ship's work, but the work of the second gang, including the erection of the staging, was charterers' work. The amount in dispute was the difference between the cost of the whole of the work and the cost for delivery at the ship's rail."

In *Humfrey v. Dale* (1) LORD CAMPBELL, C.J., states the rule of law as to the admission of evidence of a custom to contradict or qualify the tenor of the terms of a written contract. He says (7 E. & B. at p. 273):

"Neither collateral evidence nor the evidence of a usage of trade is receivable to prove anything which contradicts the tenor of a written contract."

And he says (*ibid* at p. 274):

"Whether this evidence be treated as explanatory of the language used or as adding a tacitly implied incident to the contract beyond those which are expressed is not material. In either point of view it will be admissible unless it labours under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument."

(Of these words, "or as adding a tacitly implied incident to the contract," more presently.) On the following page he apparently suggests a test by which the repugnancy or non-repugnancy of the something sought to be introduced may be determined. He says (*ibid*. at p. 275):

A "To fall within the exception of repugnancy the incident must be such as if expressed in the written contract would make it insensible or inconsistent."

I shall endeavour presently to apply this test, for I accept and agree with it. *Humfrey v. Dale* (1) went to the Exchequer Chamber and was argued before seven learned judges, of whom four, COCKBURN, C.J., POLLOCK, C.B., WILLIAMS, J., and CROWDER, J., affirmed the judgment of the Queen's Bench that the evidence of custom tendered was admissible, and three, WILLES, J., MARTIN, B., and CHANNELL, B., were of a contrary opinion. None of these learned judges, however, seemed to disapprove of LORD CAMPBELL's statement of the principle or of the test suggested by him to determine the question of repugnancy. They differed as to the result of the application of those principles to the facts of the particular case, which was not a case touching ships or charterparties. In *Southwell v. Bowditch* (5) JESSEL, M.R., whose judgment is much more fully reported in 45 L.J.Q.B. 630, said that the difference of opinion in *Humfrey v. Dale* (1) depended on this—the Statute of Frauds required a contract in writing, and, of course, usage could not be contradictory to the contract or it would not be binding. It must be explanatory of the contract, and the point upon which the judges differed was whether the usage was explanatory or contradictory. They all agreed that, if explanatory, it might be admitted; if contradictory, it could not be admitted. He then proceeds:

E "The real point, as I have said before, was whether in that particular instance the usage was contradictory or explanatory. I know some of the judges attempted to get over the difficulty by saying it was additional; but addition, if pure addition, is not explanation. It is a new contract, and therefore a pure addition would require to be in writing; but, again, there could have been no difficulty in saying this, that though, in an action upon the written contract, the mercantile usage might not be admissible for the purposes of contradicting the contract because it would be additional, the contract implied by usage might still be available for the purpose of charging the defendant."

F Let me now apply the test suggested by LORD CAMPBELL, and write in after the words "as customary" in the charterparty words describing the custom relied on in this case. The clause in the charterparty will then run somewhat thus:

G "The cargo to be taken from alongside the steamer at charterers' risk and expense as customary; that is to say, at the shipowners' risk and expense to be carried from the rail of the vessel, over a wooden staging bridging the distance between the ship's rail and the quay constructed at the risk and expense of the shipowners, and dumped at a place on the quay not less than three yards from its edge."

H These added words seem to me to be absolutely inconsistent with the tenor of the language of the charterparty. Whatever may be the locality indicated by the words "alongside the steamer always afloat," it can hardly be a spot on dry land, in this instance about 8 yds. away from the ship's rail and about 3½ yds. from the water on which she floats. The operation of taking the cargo from "alongside the steamer" is, according to the charterparty, to be conducted at the risk and expense of the charterers; but according to the custom nothing is to be done at the risk and expense of the charterers unless it be the taking away of the timber from the place at which it is dumped upon the quay. Therefore, the taking of it from that dump must be the removal of it from "alongside the steamer" within the meaning of the custom. The risk and expense of bringing it there is to be borne by the shipowner just as in the ordinary case would be the risk and expense of bringing it to the ship's rail. To satisfy the condition in the charterparty as to this risk and expense one must, in order to reconcile it with the custom proved, hold that the dump on the quay about 8 yds. away

from the rail of the ship is the "alongside the steamer," and that the taking of the cargo away from the dump is the taking of it "from alongside the steamer" within the meaning of the charterparty. I cannot reach such a conclusion. A

With one exception, namely, *Stephens v. Wintringham* (6) the cases cited on behalf of the charterers on the hearing of this appeal support the case of the ship-owners rather than that of the charterers. The other cases cited are easily distinguishable from the present case. The first of the former class is *The Nifa* (3), the second is *Hayton v. Irwin* (7). In *The Nifa* (3) the charterparty provided that her cargo, composed of deals, should be brought to and taken from alongside the ship at the merchant's risk and expense where she could lie always afloat, and, further, that, being so loaded, therewith she should proceed to Yarmouth or so near thereto as she could safely get and deliver the same always afloat. The following additional clause was then written in: "The cargo to be supplied as fast as the steamer can load and stow same." On arrival at Yarmouth the ship was moored 15 ft. from the edge of the quay, which was as near to it as she could always lie afloat, and in consequence of this 9d. per standard extra cost was incurred in the discharge of the cargo. In an action brought by the shipowner to recover this extra cost the county court judge admitted evidence of a custom that the shipowners must deliver on the quay, and, therefore, should bear the extra cost of bringing the timber from the ship's rail to the quay. The shipowner appealed to the Admiralty Division. The appeal was heard by SIR FRANCIS JEUNE, P., and A. L. SMITH, J. They held on the authority of *Holman v. Wade* (2) and *Hayton v. Irwin* (7) that evidence of the custom was not admissible, as it was inconsistent with the written contract. In *Hayton v. Irwin* (7) by the terms of the charterparty the vessel was to deliver the cargo at Hamburg or as near thereto as she could safely get, to discharge as customary, the cargo to be brought to and taken from alongside the ship at the merchant's risk and expense. The draught of the vessel with the cargo on board would not allow her to proceed to Hamburg. The point nearest to Hamburg which she could reach was Stade. The merchants refused to take delivery of any part of the cargo there. In order to lighten the vessel part of the cargo was discharged into lighters at Stade and was sent in them to Hamburg. The shipowner sued the charterer to recover the lighterage expenses, and the case was heard on appeal by BRAMWELL, BRETT, and COTTON, L.JJ., who held (confirming the decision of GROVE, J.) that the defence alleging that by the custom of the port of Hamburg the defendant was not bound to take delivery elsewhere than at Hamburg was bad on demurrer inasmuch as it sought to set up a custom inconsistent with the written contract. C D E F G

The first of the cases which are distinguishable from the present case is *Aktieselskab Helios v. Ekman & Co.* (4). There, similarly to the wording here, the words of the charterparty were "brought to and taken from alongside the ship at merchants' expense." Barges were sent by the consignees alongside the ship to take the cargo, and the point in controversy was whether by the custom of the Port of London the shipowner was bound not only to deliver the cargo into these barges but to stow it on them. The consignees asserted that by the custom of the Port of London in the case of ships discharging timber at that port an obligation lay upon the shipowner to stow the long lengths of timber, of which the cargo in question was partly composed, in lighters brought alongside the ship by the consignees for the purpose of receiving the cargo. COLLINS, J., who tried the case, found that upon the evidence there was a custom of the Port of London by which, in the case of a ship discharging long lengths of timber, the shipowner was bound to put the timber into lighters in such a way and to such an extent that the lighters might fairly be deemed to be loaded, but he found it unnecessary for the purposes of the case to decide whether the obligation imposed by the custom embraced stowing the timber in the barges in the sense H I

A of so arranging it that a barge might be conveniently navigated and should be loaded to her full capacity, and held that the custom so found by him to exist was not inconsistent with the charterparty. The Court of Appeal, composed of LORD ESHER, M.R., A. L. SMITH and CHITTY, L.JJ., held that the custom was not inconsistent with the provisions of the charterparty. CHITTY, L.J., put the reason for the decision neatly in these words :

B "The custom merely diminishes the obligation of the merchants to this extent, namely, that the timber coming over the ship's side is to be put on board the lighter by the ship's crew. When that operation has been performed it is the duty of the merchants, in accordance with the charterparty, to take from alongside the cargo thus delivered."

C The second of these distinguishable cases is *Glasgow Navigation Co., Ltd. v. Howard Bros. & Co.* (8). In it the charterparty provided that the cargo was

"to be brought to and taken from alongside the steamer at charterer's risk and expense,"

and provided further that

D "if discharged in London cargo shall be discharged as customary with customary steamer dispatch in accordance with the custom of the port as fast as the steamer can deliver during ordinary working hours of the port, Sundays and holidays (unless used) excepted."

The bill of lading contained the following clause :

E "If discharged in London cargo shall be discharged as customary with customary steamer dispatch."

The question in dispute between the parties was the extent to which the custom of the Port of London affected the mode in which the timber constituting the cargo should be stowed and arranged in the craft which the merchant sends alongside. It was held by HAMILTON, J., that by the custom and practice of the Port of London in the case of cargoes of timber the receiver is only liable to provide sufficient open craft alongside ready to receive the goods from the ship, and is under no obligation to have any men on such open craft to receive the goods from the ship's tackle or to stow the goods therein; that the shipowner is bound to do the whole work of delivering the goods into the craft and of stowing the goods therein in the reasonable and ordinary manner, so that the goods may not be damaged or imperilled, and so that the craft may be loaded to the usual and reasonable extent and may be properly and safely navigable. It is apparent, therefore, that the matter in controversy in that case was not that now under debate before your lordships, but, to a large extent, as the learned judge said, the controversy was what was included in the word "discharging" used in the documents.

H The decision in *Northmoore Steamship Co. v. Harland and Wolff* (9) is not directly in point; but the judgment of PALLES, C.B., is well worth perusal, especially in view of his criticism of the judgment delivered by BIGHAM, J., in *Stephens v. Wintringham* (6). The charterparty in *Stephens v. Wintringham* (6) provided, as does the charterparty in the present case, that the cargo should be taken from "alongside" the ship at the merchant's risk and expense according to the custom of the port, and the custom of the port was that after the cargo was raised from the hold by means of winches and slings it was taken by stevedores employed and paid by the shipowner and carried to the only place on the quay fit to receive it, which was about 60 or 70 ft. from the vessel's side, and there dumped in piles. The merchant did not interfere in any way with these stevedores. The learned judge held that this mode of discharge amounted to "taking the cargo from alongside and nothing more than alongside." The Chief Baron said :

"I think the ground of that decision was that according to the custom of the port the shipowner was bound to discharge on the quay, and that the only part of the quay on which he could discharge was a place which was 60 or 70 feet from the ship's side, so that he did no more than perform his obligation, although the mode of performance was rendered more expensive and onerous to him by the acts of those over whom neither he nor the merchant had control. This is the only view of the case which is consistent with *Holman v. Wade* (1) and *The Nifa* (3)."

This observation suggests, I think, that the learned Chief Baron approved of the decision of these two last-mentioned cases. I concur in this criticism of *Stephens v. Wintringham* (6). As to *Holman v. Wade* (2), I may for myself say that, on the additional facts, which, by the helpful industry of the Master of the Rolls, we are now in a position to consider, the case was rightly decided. For these reasons I think the appeal must be dismissed with costs, and I so move. My noble and learned friend, LORD PARMOOR, concurs in the opinion I have just expressed.

LORD ATKINSON.—I concur.

LORD SUMNER.—All the courts below have felt themselves bound to follow and apply the decision of the Court of Appeal in *Holman v. Wade* (2), which your Lordships are free to overrule. The first question is, how far would it be expedient to do so, for no one suggests that it can be distinguished. It is a decision on words which have long been common in timber charters, and it regulates the relation of such charters to established customs in a number of places of great importance. It was, indeed, only reported in the Times newspaper, but, so far from being lost sight of by those interested in timber charters and timber cargoes, it has all along been set out in one at least of the classic treatises on the subject—CARVER ON CARRIAGE OF GOODS BY SEA; it has been cited in argument over and over again—in *The Nifa* (3), *The Helios* (4), and *Stephens v. Wintringham* (6), to name no others; and in particular was relied on as an authority which they applied in their judgments by both SIR FRANCIS JEUNE and A. L. SMITH, J., in *The Nifa* (3). The Master of the Rolls in the court below says that *Holman v. Wade* (2)

"is only reported in a most unsatisfactory manner, that is to say, it is only reported as a piece of news in the newspaper . . . the only difficulty about it is the difficulty of ascertaining exactly what it decided."

As for this, if it had not been reported at all it would still have been a decision which when brought to light by any means must have been regarded as authority. I have often wondered what would happen if some learned and industrious person compiled from the records and cases lodged by the parties in your Lordships' House, and the transcripts of your Lordships' opinions preserved in the Parliament Office, a selection of "Unnoticed Cases in the House of Lords." The results might be somewhat unexpected, but the decisions themselves all courts, your Lordships' House included, would be bound to follow wherever they applied. As for the actual report of *Holman v. Wade* (2), it turns out on reference to the original pleadings to be very correct, and I think it is plain what was decided. It is true the report is very brief, and I wish this model were more often followed. We, who deliver judgments, would alone regret it.

I should not in these circumstances have thought it necessary to inquire whether this decision, now forty-four years old and never doubted, was or was not right, had it not been that HILL, J., and SCRUTTON, L.J., whose opinions command the greatest attention, would have been inclined, if free, to decide the other way. *Holman v. Wade* (2) is in line with all other cases on this kind of point except *Stephens v. Wintringham* (6), which cannot, in my opinion, be distinguished

A unless on the ground that "taken from alongside" gave a greater latitude in determining where "alongside" was than the words "from alongside the ship" would have done. This is not the ground taken in the judgment. The learned judge seems to have merely dealt with the case as a question of fact, and, if so, it is not of general importance. He apparently put to himself the question: "If the captain whose ship is at the quay delivers the cargo in, at any rate, the

B customary method, when does he get it to a place that can be called 'alongside' the ship so as to complete the performance of his duty?" His answer on the facts was: "When he has got 70 ft. away." As this involved the ship in extra and special expenses, I think it was not in accordance with the charter. In *The Nifa* (3), on the other hand, the Divisional Court held that this very custom of Great Yarmouth was inconsistent with the express words of the charter, because in

C imposing on the ship the cost of doing something after the cargo was clear of the ship (which in the case of long lengths of timber is what I suppose A. L. SMITH, J., meant by "putting the goods on the ship's rail") it contradicted the charter, which said that whatever was done thereafter the merchant must pay for it. On the other hand, in *Aktieselskab Helios v. Ekman & Co.* (4), to which A. L. SMITH, L.J., was a party, *The Nifa* (3) and *Holman v. Wade* (2) were cited, but were not commented on, the case being regarded, and rightly, as being quite different from them. The question was not: "How far off from the ship can a spot be said to be alongside the ship?" but:

D

"Is it inconsistent with such a charter to require the ship when lowering a long length of timber out of the ship into a lighter alongside to get the pieces of timber fore and aft of the barge before releasing it."

E

As this was a question of the mode of handling the goods when delivering in the agreed place it fell within the custom to which the charter referred. The decision in *Northmoore Steamship Co. v. Harland and Wolff* (9) follows the same reasoning as that adopted in *The Nifa* (3).

F The views of HILL, J., in the present case, that the place in question was "reasonably along the side of the ship" and so was within the express contract, and of SCRUTTON, L.J., who, agreeing with HILL, J., further says that the custom simply explains what the delivery of the cargo alongside is, are based on an examination of the locality denoted by "alongside." Presumably they thought that, if the place of delivery was alongside, though 23 ft. away, no question of expense arose. Conversely, in *The Nifa* (3) and *The Northmoore Case* (9) I

G presume the court would have said that the spot of which they spoke was not alongside, and, therefore, the prescriptions of the charter as to expense were paramount. I do not think that the two considerations of place and expense can be so completely severed. Doubtless the words "alongside the steamer" may be satisfied though the apparatus of reception, be it barge or cart or what not, may not be in actual contact with the ship's side. It may well be that the

H ship can be required to deliver to the full reach of her tackles; but here not distance only but cost, also conditions, the customary mode of delivery, and the question of being alongside depends not only on the distance to be traversed to reach the customary place of alongside delivery, but also on the trouble, which is, of course, commercially convertible into the expense, of getting there. Here an extemporised pier had to be built out at the ship's expense, although no one

I says she could have got any nearer to the quay or was not an arrived ship. The quay was the defendants' quay, and there was not enough water at it for the ship to lie alongside of it always afloat. The quay was one which, from circumstances affecting the receivers only, had to be clear of all timber piles to a depth of 10 ft. from its edge, and along or behind that 10 ft. line the custom required the ship to deliver her timber. Though the ship was in a position in which she was entitled to require the process of delivery to begin, the merchants say that they were duly taking the cargo from alongside the steamer, though

they could not reach the steamer from their selected spot, nor could the ship's stevedores reach it from the steamer without the interposition of a temporary structure, and of a new form of transport by man-handling the timber. I am unable to reconcile this with being alongside the steamer, the steamer being where she was entitled to be at the commencement of the process of delivery. The fact is the steamer is the starting point. It is from her side that the extension is to be measured, which ultimately reaches the customary spot, and when that extension involves 13 ft. of water bridged by a staging, and at least 10 ft. of quay, traversed by porters, I think the spot is too far away. Accordingly, in my opinion the appeal fails.

LORD BUCKMASTER.—I concur.

Appeal dismissed.

Solicitors: *Trinder, Capron, Kekewich & Co.; Botterell & Roche.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

Re LORILLARD. GRIFFITHS v. CATFORTH

[CHANCERY DIVISION (Eve, J.), February 2, 1922]

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), May 18, 1922]

[Reported [1922] 2 Ch. 638; 92 L.J.Ch. 148; 127 L.T. 613; 38 T.L.R. 666]

Administration of Estates—Testator domiciled abroad—Assets in hands of English executor—Unsatisfied creditors abroad—Duty of English executor—Discharge of all debts according to English law.

The testator died in England, domiciled in the United States, and possessed of personal property in England and the United States. In an administration action in England it was found that no English debts remained unpaid and that there were English assets of the value of £2,300. In proceedings in America it was found that the estate left in the hands of the American administrator was insufficient to discharge the claims of American creditors which were alleged to be statute-barred in England, but not under American law. The American creditors had not come in to prove in the English administration action.

Held: the English executor must apply the assets in discharge of all the debts of the testator of which he had notice, whether in England or America; in so doing he must treat the claims of all the creditors as governed by English law, wherever the debts had been contracted and wherever the creditors were resident; the American creditors (who might or might not have debts capable of proof against the assets in this country) would have two months in which to present their claims in England, and after their determination the English administrator could distribute the surplus assets.

Notes. Applied: *Re Delhi Electric Supply and Traction Co.*, [1953] 2 All E.R. 1452. Approved: *Government of India v. Taylor*, [1955] 1 All E.R. 292.

As to the administration of assets in England of a testator domiciled abroad see 7 HALSBURY'S LAWS (3rd Edn.) 65-68; and for cases see 11 DIGEST (Repl.) 393 et seq.

Case referred to:

(1) *Re Kloebe, Kannreuther v. Geisselbrecht* (1884), 28 Ch.D. 175; 54 L.J.Ch. 297; 52 L.T. 19; 33 W.R. 391; 1 T.L.R. 139; 24 Digest (Repl.) 875, 8731.

A Also referred to in argument:

Enohin v. Wylie (1862), 10 H.L. Cas. 1; 31 L.J.Ch. 402; 2 L.T. 263; 8 Jur. N.S. 897; 10 W.R. 467; 11 E.R. 924, H.L.; 11 Digest (Repl.) 394, 508.
Preston v. Melville (1841), 8 Cl. & Fin. 1; 8 E.R. 1, L.C.; 11 Digest (Repl.) 393, 507.

B *Re Henderson, Nouvion v. Freeman* (1887), 37 Ch.D. 244; 57 L.J.Ch. 367; 58 L.T. 242, C.A.; affirmed sub nom. *Nouvion v. Freeman* (1889), 15 App. Cas. 1; 59 L.J.Ch. 337; 62 L.T. 189; 38 W.R. 581, H.L.; 11 Digest (Repl.) 513, 1282.

Re Low; Bland v. Low, [1894] 1 Ch. 147; 63 L.J.Ch. 60; 70 L.T. 57; 10 T.L.R. 106; 38 Sol. Jo. 78; 7 R. 346, C.A. 11 Digest (Repl.) 532, 1431.

C *R. v. Lovitt*, [1912] A.C. 212; 81 L.J.P.C. 140; 105 L.T. 650; 28 T.L.R. 41, P.C.; 8 Digest (Repl.) 546, 28.

Ewing v. Orr-Ewing (1883), 9 App. Cas. 34; 53 L.J.Ch. 435; 50 L.T. 401; 32 W.R. 573, H.L.; 11 Digest (Repl.) 374, 391.

Ewing v. Orr-Ewing (1885), 10 App. Cas. 453; 53 L.T. 826; 1 T.L.R. 645, H.L.; 24 Digest (Repl.) 836, 8285.

D **Adjourned Summonses.**

The testator, Jacob Lorillard, who died in England on April 28, 1916, domiciled in the United States of America, was at his death possessed of personal property in the United Kingdom and also in the United States. By his will, made in England, the testator, with the exception of certain appointed property, bequeathed the whole of his property to his wife, Gertrude Lorillard, who, with the plaintiff

E on the first summons, Percival Davis Griffiths, was appointed executrix. The testator's will was proved by his widow in the United States, probate thereof being granted to her on Oct. 21, 1916, by the Surrogates Court of New York. The testator's will was also proved in England, probate being granted on Jan. 4, 1917, to Gertrude Lorillard and P. D. Griffiths. Gertrude Lorillard died on Feb. 15, 1918, possessed of property under £2,000 in value in the United States,**F** but otherwise only of property in the United Kingdom. By her will she appointed the first defendant on the first summons, Arthur Edwin Cutforth, her executor, and bequeathed two-thirds of her residuary estate to her son by the testator, the defendant, E. M. Lorillard. E. C. Lorillard was appointed in New York administrator with the will annexed of the testator's estate, but that grant was revoked and a special grant made to the applicant on the second summons, Ira Lorraine**G** Miller, the chief creditor of the estate. After the decease of Gertrude Lorillard, advertisements for creditors in connection with both the estate of the testator and her estate were issued in England and America, and, except the debt of the applicant on the second summons, Ira Lorraine Miller, and one other, allowed in proceedings instituted by E. C. Lorillard as administrator in New York, all debts had been paid. All claims made against the testator's estate as to which**H** judgments had been obtained in the United States were alleged to be statute-barred according to English law. The master's certificate of the result of enquiries in England in the administration action was dated Oct. 28, 1921, and found that no debts remained unpaid. It was stated that there were English assets of the value of £2,300.**I** The plaintiff, P. D. Griffiths, sought by the first summons the direction of the court as to the disposal of surplus assets of the testator in his hands as executor. By the second summons, entitled in the matter of the estate of Jacob Lorillard and in the matter of the estate of Gertrude Lorillard, on the application of Ira L. Miller, to whom, on Mar. 12, 1921, letters of administration with the will annexed of the goods, chattels and credits of the testator were granted by the Surrogates Court of New York County, the applicant asked for (i) a declaration that the testator, having been domiciled at the time of his death in New York, the administration of his estate in New York was the principal administration

and the administration in England was ancillary thereto, and, accordingly, the applicant, as administrator in the administration of the estate in New York was entitled to receive the surplus assets of the estate of the testator in England remaining after satisfaction of the debts of the testator, and (ii) that the plaintiff, P. D. Griffiths, as the surviving legal personal representative in England of the testator might be ordered to get in, so far as not already got in, and pay and transfer to the applicant the surplus assets of the estate in England remaining after satisfaction of the debts of the testator.

Courthope Wilson, K.C. and *R. H. Hodge* for the applicant on the second summons.

J. M. Gover, K.C. and *Beebee* for the plaintiff, Griffiths.

J. V. Nesbitt for the defendant, *A. E. Cutforth*, executor of *Gertrude Lorillard*.

Gordon Brown for her residuary legatee.

EYE, J.—The result of the American administration was that the estate left in the hands of *E. C. Lorillard* in February, 1921, was insufficient to discharge the claims of certain creditors in that country who were asserting their rights there to payment out of the estate. The English administration proceeded in due course, and the surviving executor here, believing that he had discharged all claims properly maintainable against the estate in England, but wishing to make the matter clear, in November, 1920, obtained an order for the administration of the estate in this country, the proceedings thereunder being limited to the enquiry as to the testator's debts. On Oct. 28, 1921, a certificate was made certifying that there were no debts of the testator remaining unpaid. The result was to leave a surplus of assets in this country amounting to between £2,000 and £3,000 in the hands of the executor, and he now comes to the court for directions as to how he ought to dispose of this surplus. Ought he to pay it to the beneficiaries, or is he precluded from doing so by reason of the fact that he has had notice of the claims of judgment creditors in America, although such creditors have deliberately abstained from coming in to prove in the administration action in this country? Side by side with the executor's summons for directions, the American administrator has issued a summons asking that the balance may be ordered to be paid to her, and the two summonses are now before me.

It is said that so far as the English executor is concerned he is protected by the certificate in the action and that the surplus is *primâ facie* held for the persons beneficially entitled after the creditors have all been paid. On the other hand, the American administrator contends that it is held not for the persons beneficially entitled, but for the persons who under the law of the testator's domicile still have claims against that surplus in respect of debts contracted in the country of domicile, and inasmuch as those creditors can be more conveniently ascertained in that country—or, rather—she puts it somewhat higher—inasmuch as those creditors have in fact been ascertained in that country, he argues that the court ought to order payment of the balance to the administrator acting in the country of the domicile, and leave her to apply it in accordance with the law there, which means satisfying, *pro tanto*, the debts of these judgment creditors.

These contentions involve the question whether there is any available surplus to which the law of domicile is applicable? I think the authorities clearly establish that the only surplus to which the law of domicile is applicable is such surplus as remains for distribution among the persons beneficially entitled to the estate, and that until the existence of such a surplus is demonstrated there is no room for the application of the law of domicile. The executor in this country says: I am in doubt whether, in fact, any such surplus exists; it is because I am in such doubt that I apply to the court for directions. He, therefore, does not assert the existence of any such surplus. Still less can the American administrator do so,

A seeing that her case is that, even if the whole of this surplus be transmitted to America, the estate will still be insufficient to discharge the claims of creditors who have established their debts there. I must deal with this, therefore, as an insolvent estate—an insolvent estate to this extent, that there is at present no surplus to which the law of domicile can have any application.

B What, then, is the position of the plaintiff to whom the administration of the English assets has been committed? I think that *Re Kloebe, Kannreuther v. Geisselbrecht* (1) shows exactly what his position is. PEARSON, J., says there:

"I think MR. WESTLAKE in a passage cited lays down the law perfectly correctly. In s. 102 in the last edition of his work on PRIVATE INTERNATIONAL LAW [2nd Edn.], he says:

C 'Every administrator, principal or ancillary, must apply the assets reduced into possession under his grant in paying all the debts of the deceased, whether contracted in the jurisdiction from which the grant issued or out of it, and whether owing to creditors domiciled or resident in that jurisdiction or out of it, in that order of priority which according to the nature of the debts or of the assets is prescribed by the laws of the jurisdiction from which the grant issued.'

D Therefore, it became incumbent upon the executors who proved the testator's will in this country to apply the assets in discharge of all the debts of the testator of which they had notice, whether in England or in America, and in so applying the assets to treat the claims of all the creditors as governed by the laws of this country, wherever the debts were contracted, and wherever the creditors may be resident.

E The plaintiff made an attempt by his action to ascertain definitely all the creditors, and although that attempt has not been successful in that certain of the creditors have not come in to establish their debts under the inquiry, the plaintiff cannot distribute, and I do not think the court ought to direct him to distribute, the assets that remain after discharging the debts of those creditors who have come in and proved their debts without giving those persons who now assert that they are creditors entitled to participate in the ascertained surplus a further opportunity of coming in and proving their right so to participate. It appears to me, therefore, that in all the circumstances the proper order to make is to give the American creditors who may or may not have established debts capable of proof against the assets in this country, a further opportunity of coming in and establishing those debts, and if within a limited time they fail so to do, then to give the executor a direction to distribute the surplus assets among the beneficiaries entitled thereto in accordance with the law of the American domicile. The question which exercises my mind is the length of time which ought to be afforded to the American creditors to establish their claims here. I think if I give them a further period of two months, I shall be giving them as long a time as is reasonably necessary for the purpose, and, accordingly, I direct that unless within two months from the date of this order steps shall have been instituted by the American creditors to establish their claims against the assets in this country, those assets must be dealt with by the executor as assets free for distribution among the beneficiaries in accordance with the law of the testator's domicile, that is to say, in accordance with the law of the State of New York.

I The American administrator appealed.

Courthope Wilson, K.C. and R. H. Hodge for the appellant.

Gover, K.C. and Beebee; J. V. Nesbitt and W. Gordon Brown for other parties interested.

LORD STERNDALÉ, M.R.—This is an unusual question arising in administration proceedings. I do not see my way to differ from the decision of Eve, J.

In the English administration no claims were brought in. In America there were debts, but debts which according to English law would be statute-barred. If the creditors came to England and made their claims in the English court they would be rejected. The administrator in England asked for the directions of the court as to what course they ought to pursue. We do not know any similar case in which such a question has arisen. What is the duty of the English administrator? It is to see that the debts are paid, i.e., debts which are due according to English law. EVE, J., held that the American creditors should have two months in which to present their claims here. They did not bring in those claims, presumably knowing that, if they had done so, they would have been rejected. It is argued, however, that it is still the duty of the English administrator to send the moneys in his hands to the American administrator, but I cannot see any reason to interfere with the exercise of his discretion by EVE, J., and the appeal must be dismissed.

WARRINGTON, L.J.—I am of the same opinion. The principle is that the administration of the estate of a deceased person is governed entirely by the *lex loci*, and it is only when the administration is over that the law of his domicile comes in. Here the administrator is acting under the direction of the court in an administration action, and the master has certified that no debts remain unpaid. It is certainly a matter of discretion for the learned judge as to what direction he should give with regard to the disposal of the residue in this country. But when the persons entitled to the unadministered residue are in this country, the court would not order these moneys to be sent to an administrator abroad. The learned judge was informed that there were debts owing by the deceased in America, but that these were all debts which might be here barred by the statutes of limitation, and he gave to the American creditors an opportunity to come in and prove their debts. There is no authority conflicting with what the learned judge has done in the exercise of his discretion.

YOUNGER, L.J.—I am of the same opinion. A certificate has been made that there are no debts unpaid, according to the law of England. The question is one that must be decided by the courts of this country. The American administrator asks that the clear residue of the fund may be sent to the United States of America to be there administered, and the learned judge has refused to accede to his application. The only persons whom the American administrator claims to represent, the so-called American creditors, would fail in this country. It is suggested that the reason why the American administrator is entitled to succeed in her application is that the deceased was domiciled in the United States of America. The real reason, however, why the debts are admitted in America is that such debts would be admitted against any testator in the United States, and not merely against one who was domiciled there. Both on principle and authority there is no justification for any interference with the exercise of his discretion by the learned judge.

Appeal dismissed.

Solicitors: *Rubinstein, Nash & Co.; Broad & Son; P. Marr Johnson.*

[*Reported by W. P. PAIN, Esq., and J. L. DENISON, Esq., Barristers-at-Law.*]

A YORKSHIRE INSURANCE CO., LTD. AND ANOTHER
v. CRAINE

[PRIVY COUNCIL (Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Parmoor and Lord Wrenbury), May 5, 8, July 20, 1922.]

B [Reported [1922] 2 A.C. 541; 91 L.J.P.C. 226; 128 L.T. 77; 38 T.L.R. 845; 66 Sol. Jo. 708]

Estoppel—Estoppel by conduct—Insurance—Insurers taking possession under salvage clause—Estoppel from relying on non-fulfilment of inter-dependent condition as to delivery of claim.

C By policies of insurance two insurance companies insured the assured against loss resulting from the destruction by fire of certain motor cars, the property of the assured. By condition 11 of the policies it was provided: "On the happening of any loss or damage the insured must forthwith give notice in writing thereof to the company, and must, within fifteen days . . . or such time as the company may in writing allow . . . deliver to the company a claim in writing for the loss and damage. . . ." By condition 12: "Salvage: D On the happening of any loss or damage the company may, so long as the claim is not adjusted, without thereby incurring any liability (a) enter, and take, and keep possession of the building or premises where the loss or damage has happened; (b) take possession of, or require to be delivered to it, any property of the insured . . . on the premises at the time of the loss . . . ; (c) E examine, sort, arrange, or remove all or any of such property; (d) sell or dispose of . . . any salvage . . . taken possession of . . ." On Sept. 30, 1917, a fire occurred at the assured's premises, resulting in the destruction of the insured motor cars. On Oct. 5 a representative of the insurers went into possession of the assured's premises and remained in possession until Feb. 4, 1918. In their defence to an action on the policies by the assured the insurers pleaded that the plaintiff had failed to comply with the requirements of condition 11 relating to the delivery of claims.

F **Held:** conditions 11 and 12 were inter-dependent the one on the other and the use of the powers conferred on the insurers by condition 12 was only authorised when the requirements of condition 11 as to claims had been fulfilled; accordingly, the conduct of the insurers in going into possession of the premises of the assured could only be legal if claims, valid or accepted G as valid, had been made on them by the assured; they could not insist that their own action was unauthorised and illegal; and, therefore, they were estopped from contending that the claims made by the assured did not comply with condition 11.

H *Estoppel by representation—Representation of existing fact, not of promise or future intention.*

Per CURIAM: It is well established that, to support a plea of estoppel by representation, the representation must be a representation of an existing fact, and that a representation of a promise or intention to do something in the future is insufficient.

I **Notes.** Distinguished: *Macaura v. Northern Assurance*, [1925] A.C. 619. Referred to: *Locker and Woolf v. Western Australian Insurance Co.* (1936), 154 L.T. 667.

As to estoppel by representation and conduct see 15 HALSBURY'S LAWS (3rd Edn.) 223-232, 235-243; and for cases see 21 DIGEST 290-310, 328 et seq. As to estoppel in relation to conditions in insurance policies and adjustment of loss see 22 HALSBURY'S LAWS (3rd Edn.) 228, 229, 251 et seq.; and for cases see 29 DIGEST 330 et seq.

Cases referred to :

- (1) *Wing v. Harvey* (1854), 5 De G.M. & G. 265; 2 Eq. Rep. 533; 23 L.J.Ch. 511; 23 L.T.O.S. 120; 18 Jur. 394; 2 W.R. 370; 43 E.R. 872, L.J.J.; 29 Digest 56, 177.
- (2) *Browne v. Dunn* (1893), 6 R. 67, H.L.; 22 Digest (Repl.) 454, 4974.
- (3) *Nevill v. Fine Art and General Insurance Co.*, [1897] A.C. 68; 66 L.J.Q.B. 195; 75 L.T. 606; 61 J.P. 500; 13 T.L.R. 97, H.L.; 32 Digest 72, 1010.
- (4) *Seaton v. Burnand*, [1900] A.C. 135; 69 L.J.Q.B. 409; 82 L.T. 205; 16 T.L.R. 232; 44 Sol. Jo. 276; 5 Com. Cas. 198, H.L.; 26 Digest (Repl.) 221, 1707.
- (5) *Edgington v. Fitzmaurice* (1884), 29 Ch.D. 459; 53 L.T. 369; 32 W.R. 848; affd. 29 Ch.D. p. 476, C.A.; 35 Digest 32, 240.
- (6) *Connecticut Fire Insurance Co. v. Kavanagh*, [1892] A.C. 473; 61 L.J.P.C. 50; 67 L.T. 508; 57 J.P. 21; 8 T.L.R. 752, P.C.; 35 Digest 69, 657.

Also referred to in argument :

- Atlas Insurance Co. v. Brownell* (1899), 29 S.C.R. 537; 29 Digest 332, 2699 ix.
- Clarke and Chapman v. Hatt* (1858), 6 H.L. Cas. 633; 27 L.J.Ch. 615; 32 L.T.O.S. 380; 5 Jur. N.S. 447; 10 E.R. 1443, H.L.; 10 Digest (Repl.) 1192, 8330.
- Davenport v. R.* (1877), 3 App. Cas. 115; 47 L.J.P.C. 8; 37 L.T. 727, P.C.; 31 Digest (Repl.) 525, 6480.
- Freeman v. Cooke* (1848), 2 Exch. 654; 6 Dow. & L. 187; 18 L.J.Ex. 114; 12 L.T.O.S. 66; 12 Jur. 777; 154 E.R. 652; 21 Digest 287, 1019.
- Jorden v. Money* (1854), 5 H.L. Cas. 185; 23 L.J.Ch. 865; 24 L.T.O.S. 160; 10 E.R. 868, H.L.; 21 Digest 292, 1041.
- Matthews v. Smallwood*, [1910] 1 Ch. 777; 79 L.J.Ch. 322; 102 L.T. 228; 31 Digest (Repl.) 554, 6739.
- Pickard v. Sears* (1837), 6 Ad. & El. 469; 2 Nev. & K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest 290, 1032.
- R. v. Paulson*, [1921] 1 A.C. 271; 90 L.J.P.C. 1; 124 L.T. 449, P.C.; 31 Digest (Repl.) 559, 6801.
- Whitechurch v. Cavanagh*, [1902] A.C. 117; 71 L.J.K.B. 400; 85 L.T. 349; 50 W.R. 218; 17 T.L.R. 746; 9 Mans. 351, H.L.; 21 Digest 295, 1057.

Appeal by special leave from a judgment of the High Court of Australia (KNOX, C.J., ISAACS and STARKE, JJ.), reversing an order of SIR WILLIAM IRVINE, C.J., in two actions tried before him with a jury in the Supreme Court of the State of Victoria, and brought by the respondent against the two appellants insurance companies, claiming under policies of insurance upon motor cars against damage by fire. The facts and the material conditions in the policies are set out in their Lordships' judgment.

R. A. Wright, K.C. and *C. F. Lowenthal* for the insurance companies.

Langdon, K.C. and *Sir H. Cassie Holden* for the respondent, the assured.

July 20. **LORD ATKINSON.**—This is an appeal from a judgment of the High Court of Australia dated Aug. 31, 1920, reversing a judgment given by the Chief Justice of Victoria, sitting with a jury, in favour of the appellants in two actions tried together. Thomas Craine, the present respondent, was the plaintiff in both actions, the Yorkshire Insurance Co. being the defendants in one and the Colonial Mutual Fire Insurance Co. the defendants in the other. For convenience sake the two companies have in the proceedings been referred to respectively as the Yorkshire company and the Colonial company. The action against the Yorkshire company was brought to recover, under three policies of insurance issued by them, the loss which the plaintiff alleged that he had suffered by reason of the destruction by fire of certain motor cars, his property, insured under the said policies; and the action against the Colonial company was brought to recover the

A loss resulting from the destruction by the same fire of three other and different motor cars insured by the latter company under three policies similar in terms to those issued by the Yorkshire company. Statements of defence raising many defences, including fraud, were filed in both actions; but a verdict was found against the companies on the issues raised on these defences, and in reference to all those issues, save those raised on the defence based upon condition 11 attached to the policies, the findings of the jury are not now challenged. Conditions 11 and 12 of the policies run as follows :

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"Condition 11—Occurrence of fire.—On the happening of any loss or damage the insured must forthwith give notice in writing thereof to the company, and must within fifteen days after the loss or damage, or such further time as the company may in writing allow in that behalf, deliver to the company a claim in writing for the loss and damage, containing as particular an account as is reasonably practicable of all the articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, and of any other insurances; and must at all times at his own expense produce and give to the company all such books, vouchers, and other evidence as may be reasonably required by or on behalf of the company, together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith; and if the insurance is subject to average, the insured must within the aforesaid fifteen days, or such further time as the company may in writing allow in that behalf, deliver to the company an account of all the property insured with the estimated value thereof at the breaking out of the fire. No amount shall be payable under this policy unless the terms of this condition have been complied with.

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"Condition 12—Salvage.—On the happening of any loss or damage the company may, so long as the claim is not adjusted, without thereby incurring any liability: (a) enter, and take, and keep possession of the building or premises where the loss or damage has happened; (b) take possession of, or require to be delivered to it, any property of the insured in the building or on the premises at the time of the loss or damage; (c) examine, sort, arrange, or remove all or any of such property; (d) sell or dispose of, for account of whom it may concern, any salvage or other property taken possession of or removed. In no case shall the company be obliged to undertake the sale or disposal of damaged goods, nor shall the insured under any circumstances have the right to abandon to the company any property, damaged, or undamaged, whether taken possession of by the company or not. Entry upon or taking possession of the premises by the company shall not be taken as recognition of abandonment by the insured."

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It will be observed that the claim, which, under condition 11, is to be delivered within fifteen days after the loss or damage, or such further time as may be allowed in that behalf, must contain many things as particulars—(i) an account as may be reasonably practicable of all the articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, and of any other insurances; and (ii) a declaration on oath or in other legal form of the truth of the claim, and of any matters connected therewith. The information required is obviously very full. The truth of it, and of all matters connected with it, must be verified by a declaration on oath. One would suppose that, in such a business matter as this insurance, if all the information thus required was furnished, the company would be able to make up their minds whether or not the claim was a valid one and represented a real and genuine loss, although they might dispute the amount claimed. The penalty inflicted upon the assured in case all the terms of condition 11 be not complied with is that no amount should be payable to the assured under the policy of insurance. The company are thus free to take an objection to the non-performance of any of these terms, and refuse

to pay anything to the insured. The important question remains: Can the company do this after they have availed themselves, and while they are availing themselves, of the powers conferred upon them by condition No. 12? Those powers are vast, they are far-reaching, and might in their operation and results inflict serious pecuniary loss on the assured. The company are empowered (i) to enter, take, and keep possession of the premises of the assured where the loss or damage has occurred; (ii) to take possession of, or require to be delivered up to them, any of the property of the assured in the building or on these premises at the time of the loss or damage, whether that property be covered by the policy or not; (iii) to examine, sort, arrange, or remove all or any portion of this property; and (iv) sell or dispose of, for account of whom it may concern, any salvage or other property taken possession of or removed. It may well be that it would be just and fair and businesslike to empower each company to exercise all or any of those powers while the amount of the claim of the assured was not adjusted; but it would be most oppressive and unbusinesslike to enable them, after they had exercised these or any of these powers, to say to the assured: "Your claim did not comply with all the terms of condition 11; therefore, although we have taken possession of your premises and sold your property, we will pay you nothing on foot of your policies." In their Lordships' view, the proper construction of condition 12 protects the assured against treatment such as that, and, of course, the assured is only bound by his contract as properly construed. The opening words of the condition show clearly that the assured is so protected. They run as follows:

"On the happening of any loss or damage, the company may, so long as the claim is not adjusted, without thereby incurring any liability,"

&c. These words suggest that adjustment is all that remains to be done to the claim. They pre-suppose that a valid claim against the company has been made, and that all that remains to be done is to adjust the amount of it. If no claim had been made, or a claim is so defective as to give no right to obtain any money under the policy, it would be ridiculous to refer to the adjustment of it. Until the company accept the claim of the assured as valid, imposing on them a liability, there would be nothing to adjust. Until the company accept the claim as valid, they may insist that they owe nothing under the policy, and a cipher cannot be adjusted. These two conditions are inter-dependent the one upon the other, and the use of the powers conferred by the second is only authorised when the requirements of the first as to claims, at least, have been fulfilled. If that be so, then, in their Lordships' view, it is not competent for either of the companies, if they have gone into or continued in possession of the premises of the assured after they have received and accepted the assured's claims, to contend that those claims fail to comply with the terms of condition 11. They are estopped by their conduct from doing so, since they cannot insist that their own action was unauthorised and illegal. It could only be legal if claims valid, or accepted as valid, had been made by the assured upon and delivered to them.

Many authorities on the subject of estoppel by conduct might be cited. For instance, in *Wing v. Harvey* (1), it was held in the Court of Appeal that the acceptance of premiums with the knowledge of circumstances entitling the insurer to avoid the policy, estopped him from averring that, by reason of those circumstances, the policy was not valid. Again, a man who, acting as a director of a company, takes part in the allotment of shares to himself, cannot in any action for calls be permitted to say that his appointment as director, or the allotment to him of the shares, was irregular and ultra vires. So the companies here, if by the act of their authorised agent, they go into possession and retain possession of the premises of the assured, expel him from them and only allow him to enter into them by their permission, cannot be permitted to say that the circumstances legalising their action did not in fact exist. The ruling on this point

A would involve nothing more than the decision of the proper construction of two clauses in a written document. As will presently be shown, there is in reality no controverted issue of fact to be considered or ruled upon. It is necessary, however, to refer to some facts on which this question depends which are in substance undisputed.

B The fire took place on Sept. 30, 1917. The claim should have been delivered on or before Oct. 15, 1917. An application in writing was on that day made to extend for a week the time to lodge formal claims. By a letter dated Oct. 15, 1917, written by Mr. Leslie on behalf of the companies, the time was extended up to four o'clock on Oct. 22, 1917. A further extension of time was asked for, and by letter of Oct. 24, 1917, granted, namely, up to twelve o'clock on Friday, Oct. 26. The claims were not lodged within that time, and Mr. Leslie, on that
C day, wrote to the representative of the insured, the plaintiff, a letter containing the following paragraph :

D "These claims should have been lodged not later than twelve o'clock noon of this date, but were only left at my office without any covering letter after three o'clock this afternoon. I therefore acknowledge their receipt without prejudice and without setting up any waiver of any of the provisions or requirements of the policy conditions."

On Oct. 29, 1917, the plaintiff, Craine, wrote to both the companies a letter complaining of the delay. It ran as follows :

E "It is now four weeks since the disastrous fire occurred to my premises at 50, City Road, South Melbourne. The reason for this long delay in adjustment is not apparent. A settlement could and should have been effected within forty-eight hours. As you are no doubt aware, my machinery and plant were not insured, and have been exposed in wet weather since the fire. My men and I have not been allowed on the premises to attend to it, and this salvaging (sic) of the undestroyed property owing to the arbitrary manner your adjuster has adopted. The keeping of my premises closed for such an unreasonable
F time has been a very serious loss to me and this annoying and expensive delay is being adversely commented upon by policy holders of your company."

In reply to this letter the plaintiff received from the companies the two letters following :

G "Yorkshire Insurance Company to plaintiff, Oct. 29, 1917. We beg to acknowledge your letter of the 29th inst. As the adjustment of the claim is in the hands of Mr. F. F. Leslie, we have forwarded your letter on to him for his attention."

H "The Colonial Mutual Fire Insurance Co., Ltd., to plaintiff, dated Oct. 29, 1917. I am duly in receipt of your favour of the 29th inst. and note contents. The matter having been placed in the hands of Mr. F. F. Leslie, of 47, Queen Street, Melbourne, for his attention, I have therefore forwarded to him your letter."

I Mr. F. F. Leslie is thus by both companies constituted and held out to be their representative and agent, fully authorised to deal on their behalf with the plaintiff's claims. It is sworn to by the assured, and not disputed by Leslie, that the latter went into possession of the assured's premises on Oct. 5, 1917, and held possession of them till Feb. 4, 1918. The assured had been kept out of possession of them and only allowed to enter them by Leslie's permission. He had an interview with Leslie on Oct. 2, 1917. On the same day, and presumably after that interview, Leslie wrote to the plaintiff a letter in which he states that he, Leslie, directed the plaintiff's attention to the conditions of the policies, asked him to comply with them and formally to acquaint him, Leslie, with the insurances on six motor cars, which he names, stock-in-trade of coach-builder, machinery and plant, etc., and then proceeds as follows :

"I require you to forthwith produce and give me all books, papers or other documents relating to your business which you have in your possession. Having regard to your statement that the last stock sheets have been destroyed, I require you to deliver to me the copy of your last income tax return, which you stated is in your possession. I also await in due course your claims for the loss and damage: (i) As to each of the motor-cars above enumerated. (ii) As to the stock-in-trade, with details, showing of what this consisted, of its aggregate value at the time of the fire, and of the value of the salvage. You will be permitted access to the premises between the hours of 9 and 5 p.m. at any time you may make an appointment with me for this purpose. Of course, you will be granted whatever opportunity you desire for the examination of the documents and stock on the premises to enable you to fulfil my requirements, and support your claim. . . . As to the foregoing information, will you please let me have your prompt compliance with my request for books, documents and list of insurances; as to all the other information I recognise that it will take time for you to prepare data, but I trust you will do this as quickly as possible."

From the paragraph preceding the last portion of this letter it is clear that Leslie had made up his mind to go into possession of the plaintiff's premises when he wrote. He states the terms upon which the assured will be permitted to enter his own premises, and, notwithstanding the time given by the statement in the last paragraph, he went into possession forty-eight hours after this paragraph was written, and ten days before the time was up for delivering the claims, namely, Oct. 15, 1917. It may well be that Leslie, acting on behalf of the companies, was entitled under condition 11 to receive all that he demanded in this letter, and that, if his request was not complied with, the company might repudiate all liability. But it is obvious that Leslie went into possession before the plaintiff was in any default whatever, and did not pretend to do so because of any default on the part of the plaintiff. It appears to their Lordships impossible to contend that condition 12 authorised or justified any such action.

On the receipt of this letter the plaintiff appointed one Frederick William Spry, a public accountant, to act on his behalf in this matter under the direction, however, of Mr. Doria, the plaintiff's solicitor. This gentleman had interviews with Leslie on Oct. 8 and 12, 1917. There was some controversy whether what was said during them was not stipulated to be without prejudice. The learned judges admitted the evidence of what passed, but it is not desirable because of this controversy to base this judgment in any way upon it. On Oct. 26 Spry delivered at Leslie's office seven distinct claims in respect of the different items of loss mentioned in them. Each claim was duly verified by a statutory declaration. Spry received from Leslie a letter of the same date, the relevant parts of which run as follows:

"Declaration and statement of claim against the Yorkshire Insurance Co. for £197 in respect of the Talbot motor car. These claims should have been lodged not later than twelve o'clock noon of this date, but were only left at my office, without any covering letter, after three o'clock this afternoon. I therefore acknowledge their receipt without prejudice and without setting up any waiver of any of the provisions or requirements of the policy conditions. A casual glance at the claim forms show that some at least of them are irregularly executed. I will advise you in due course of my further requisitions in the matter of these claims. In the meantime, I call upon Mr. Craine to forthwith give full answers to the questions and requisitions already made. I also have to request confirmation in writing of the verbal intimation given and accepted, and under which I have been acting, of the appointment you hold from Mr. Craine to represent him in all matters appertaining to his claim against the several companies for whom I am acting."

A The plaintiff then wrote to the company the letter of Oct. 29, already set out. The only answer received to which was the following :

B "F. F. Leslie to plaintiff, dated Oct. 30, 1917. The managers of the Royal Exchange Assurance Corporation, the Yorkshire Insurance Co. and the Colonial Mutual Insurance Co. have handed to me your letters of Oct. 29, sent to them individually. It will facilitate matters generally if you will kindly correspond direct with me instead of with the companies. Replying to your letter, I have to say that the reason for the delay in the adjustment of your claims is known, and should be apparent to you. So far as your machinery, plant and tools are concerned, your statement that you and your men have not been allowed to attend to these is not correct. You and your foreman have been given every facility for being on the premises, and the salvage of these particular interests was urged upon you for your own benefit. It was even suggested to you by me that you should collect all these things together and remove them from the premises if you so desired. As to the keeping of your business 'closed,' I know of nothing to prevent the continuation of your business. In regard to the settlements of claims these are not yet adjusted, and no amounts are payable unless and until you comply with the policy conditions."

D The plaintiff received another letter from Mr. Leslie of the same date, repeating the requisitions made in his letters of Oct. 5 and 15, 1917, making many further requisitions, stating that it was his intention to sell the salvage stock, asking him to remove the machinery and other things not insured, informing him that failing to give the information required about certain articles named would involve the sale of them on account of whom it might concern, in terms of condition 12 of the policy and as to the claims stating as follows :

E "1. Claims.—I have already acknowledged receipt of these—without prejudice and still under cover of this I now notify you that :—Royal Exchange Assurance Corporation.—The claim form is not signed by you and is not identified by the J.P. as the annexe referred to in your declaration. Colonial Mutual Fire Insurance Co.—The statements of loss are not signed by you or by the J.P. Yorkshire Insurance Co., Ltd.—The statements of claim (4) are not signed by you. Please call at your convenience, and either re-declare these before a J.P., or attend before the J's.P. who took your declaration and amend these forms. For this purpose I will attend on the justices with you. 2. Regarding your claims generally—I append hereto further requisitions and call upon you to give this further information and proofs as asked for by 4 p.m. on Thursday next, Nov. 1."

G The plaintiff's solicitor, Mr. Doria, called next day, Oct. 31, on Leslie. [His LORDSHIP read the evidence as to what passed at this interview.] From Nov. 5, 1917, until Feb. 8, 1918, several letters passed between the solicitor of the plaintiff and the solicitors of the defendants, the latter insisting that all the information required by their requisitions had not been furnished, and pointing out again and again that until that was done nothing was payable by the companies under the policies, and the former stating that the plaintiff had complied with the requisitions and given all the information he possibly could give.

H The judge at the trial, on the suggestion, or indeed, rather at the request of the counsel for the companies, left only one question to the jury, namely, this : Did the defendants represent to the plaintiff that they did not intend to rely upon the claims' having been put in too late? To which the jury answered : Yes, they waived their claims. It will be observed that no question was left to the jury touching the alleged omissions of the plaintiff to furnish to Leslie the copious information demanded by the numerous requisitions addressed to him by the latter. Neither is any question left to them as to the insufficiency or defectiveness in form of the claims when ultimately delivered corrected. The timely

delivery of the claims was treated as the question on which the case turned. A Their Lordships thoroughly concur with the following observations made by ISAACS, J., in the High Court. He said :

"Having regard to the well-known principles as to the conduct of a party at a trial laid down and acted on in *Broune v. Dunn* (2) (6 R. at pp. 75, 76 and 80), in *Nevill v. Fine Art and General Insurance Co.* (3) ([1897] A.C. at p. 76), and *Seaton v. Burnand* (4) ([1900] A.C. at p. 145), it must, we think, be taken as against the defendants that they did not really contest, or did not act as if they contested, the two elements of 'inducement' and 'prejudice,' if once the element of 'representation' was established, any more than they contested the fact of actual knowledge with reference to waiver. It must be taken, consequently, that they cannot be permitted to raise them now." C

But that does not get rid of the difficulty. It has been well established by a long line of authority that, in order to support a plea of estoppel by representation, the representation must be a representation of an existing fact, a promise or a representation of an intention to do something in the future is entirely insufficient, and this, although BOWEN, L.J., said, in *Edgington v. Fitzmaurice* (5) (29 Ch.D., at p. 483), that the state of a man's mind was as much a fact as the state of his digestion. In their Lordships' view it is impossible to say with any confidence whether the representation found by the jury to have been made, namely, "that the defendants did not intend to rely upon the claims having been put in late," is a representation of an existing fact, a present existing resolve, or a promise or representation of an intention to do something in the future. In those circumstances their Lordships think it is more desirable to dispose of the appeal on the ground of estoppel by conduct in going into possession, if that course be, in the circumstances, permissible, which they think it is. It is quite true that the question of the proper construction of condition 12 was not distinctly and clearly raised either at the trial or in the High Court on the hearing of the appeal. It can scarcely be said, however, that it was not indirectly referred to. In the defendants' defence delivered on Feb. 1, 1919, it is averred that, with the three exceptions named, the plaintiff never delivered to the defendants claims under the respective policies for loss or damage. In the reply of the plaintiffs to this defence it is averred that if the accounts and other declarations were not delivered as alleged the defendants are estopped from saying that they were not delivered. Particulars of this reply were delivered on July 28, 1919, and by an amendment made on Nov. 21, 1919, it is averred that each of the defendants entered into and took possession of the plaintiff's premises on or about Sept. 30, 1917, and retained that possession, excluding the plaintiff until on or about Feb. 4, 1918. The question of the construction of condition 12 is necessarily involved in the question of estoppel by going into possession, raised in the amended particulars. The appellants in their reasons given for their appeal, deal with this question of possession, and the respondent in his reasons sets out that the appellants D E F G H

"took and retained possession of the premises and salvage until Feb. 4, 1918, to the detriment of the respondent, and should, therefore, not now be admitted to aver that no valid claim was made and pending."

Whether, however, this be so or not, their Lordships think, on the authority of LORD WATSON's judgment delivered in the Privy Council in *Connecticut Fire Insurance Co. v. Kavanagh* (6), the construction of condition 12 should be ruled upon. He said ([1892] A.C. at p. 480): I

"When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea."

In the present case condition 12 is a written document, and the fact that the

A company entered into possession is proved beyond controversy. It will be observed that this statement of LORD WATSON is not rested upon any statutory enactment resembling s. 4 of the Appellate Jurisdiction Act, 1876, but upon the general principle upon which a tribunal of last resort exercises in the public interest the jurisdiction conferred upon it. Every word of LORD WATSON's judgment is, in their Lordships' view, applicable to this case, and they think that, on this question of estoppel by conduct, namely, the taking of the possession of the plaintiff's premises, the appeal on the proper construction of condition 12 fails, and they will humbly advise His Majesty accordingly. Having regard to the appellants' undertaking given when special leave to appeal was granted they must pay the respondent's costs of the appeal as between solicitor and client.

Appeal dismissed.

Solicitors: *Gray & Dodsworth; Brundrett, Whitmore & Randall.*

[Reported by W. C. SANDFORD, ESQ., Barrister-at-Law.]

D

E NORWICH UNION FIRE INSURANCE SOCIETY v. COLONIAL MUTUAL FIRE INSURANCE CO.

[KING'S BENCH DIVISION (McCardie, J.), June 22, July 4, 1922]

[Reported [1922] 2 K.B. 461; 91 L.J.K.B. 881; 128 L.T. 121; 38 T.L.R. 822; 66 Sol. Jo. 720; 16 Asp. M.L.C. 98; 28 Com. Cas. 20]

F *Insurance—Re-insurance—Liability of re-insurer—Variation of head policy—No notice of variation to re-insurer—Payment by insurers—Liability of re-insurer.*

G Insurers issued to the owners of a ship an insurance policy dated July 9, 1920, in the usual form, for £15,000 for twelve months from July 14, 1920, to July 13, 1921. The policy contained the following words: "Hull and machinery, valued at £313,050, subject to Institute Time Clauses as attached, including the four-fifths running down clause. Subject to Institute Warranties as attached. Cancelling insurance already placed." Clause 18 of the Institute Time Clauses was as follows: "In ascertaining whether the vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account." By a policy of re-insurance dated Aug. 13, 1920, for a period of twelve months, the insurers insured part of their risk amounting to £2,500 with re-insurers for a premium of 25s. per cent. The policy contained the following words: "The said ship, &c., goods and merchandise, &c., for so much as concerns the insured by agreement between the insured and the [re-insurers] in this policy are and shall be valued at £2,500 on the hull and machinery, &c., valued at £313,050, or valued as original policy or policies, being against the risks of total and/or constructive and/or arranged total loss of steamship only. No salvage charges and no sue and labour charges attach hereto. Subject to valuation clause as and if in original. Subject to original warranties but half additional premiums cancelling returns only; being a re-insurance of [the insurers]. Subject to the same clauses and conditions as the original policy." In February, 1921, negotiations took place between the insurers and the shipowners, and an agreement was arrived at

and a slip was initialled by the insurers as follows: "Agreed to reduce policies on hull and machinery valued £313,050. To pay only £225,000 in event of total loss; constructive total loss; and return premium 10s. per cent. gross on £313,050. Amounts insured on disbursements and freight not to be prejudiced thereby. Dated Feb. 8, 1921." This agreement was endorsed on the ship-owners' policy. The re-insurers never assented to, nor were they aware of, any variation in the head policy. In February, 1921, the vessel became a total loss, the insurers made a payment to the owners of the vessel in respect of the loss, and claimed from the re-insurers an indemnity under the re-insurance policy.

Held: as by the agreement embodied in the slip dated Feb. 8, 1921, and endorsed on the head policy the terms of the head policy were altered without the knowledge or assent of the re-insurers, the latter were relieved from liability to the insurers.

Lower Rhine and Württemberg Insurance Association v. Sedgwick (1) [1899] 1 Q.B. 179, applied.

Notes. As to re-insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 103 et seq.; and for cases see 29 DIGEST 117-121. For the Marine Insurance Act, 1906, see 13 HALSBURY'S STATUTES (2nd Edn.) 14.

Cases referred to:

- (1) *Lower Rhine and Württemberg Insurance Association v. Sedgwick*, [1899] 1 Q.B. 179; 68 L.J.Q.B. 186; 80 L.T. 6; 47 W.R. 261; 15 T.L.R. 65; 8 Asp. M.L.C. 466; 4 Com. Cas. 14, C.A.; 29 Digest 73, 340.
- (2) *Mackenzie v. Whitworth* (1875), L.R. 10 Exch. 142; 44 L.J.Ex. 81; 32 L.T. 163; 23 W.R. 323; 2 Asp. M.L.C. 490; affirmed: 1 Ex.D. 36; 45 L.J.Q.B. 233; 33 L.T. 655; 24 W.R. 287; 3 Asp. M.L.C. 81, C.A.; 29 Digest 93, 506.
- (3) *British Dominions General Insurance Co., Ltd. v. Duder*, [1915] 2 K.B. 394; 84 L.J.K.B. 1401; 113 L.T. 210; 31 T.L.R. 361; 13 Asp. M.L.C. 84; 20 Com. Cas. 270, C.A.; 29 Digest 121, 734.
- (4) *Morris v. Baron & Co.*, [1918] A.C. 1; 87 L.J.K.B. 145; 118 L.T. 34, H.L.; 12 Digest (Repl.) 398, 3086.
- (5) *Marten v. Steamship Owners' Underwriting Association, Ltd.* (1902), 71 L.J.K.B. 718; 87 L.T. 208; 50 W.R. 587; 18 T.L.R. 613; 9 Asp. M.L.C. 339; 7 Com. Cas. 195; 29 Digest 118, 720.
- (6) *Reliance Marine Insurance Co. v. Duder*; [1913] 1 K.B. 265; 81 L.J.K.B. 870; 106 L.T. 936; 28 T.L.R. 469; 12 Asp. M.L.C. 223; 17 Com. Cas. 24, 227, C.A.; 29 Digest 119, 725.
- (7) *Scottish National Insurance Co., Ltd. v. Poole* (1912), 107 L.T. 687; 29 T.L.R. 16; 57 Sol. Jo. 45; 12 Asp. M.L.C. 266; 18 Com. Cas. 9; 29 Digest 118, 724.
- (8) *Emanuel & Co. v. Andrew Weir & Co.* (1914), 30 T.L.R. 518; 29 Digest 126, 788.
- (9) *Holme v. Brunskill* (1878), 3 Q.B.D. 495; 47 L.J.Q.B. 610; 38 L.T. 838; 42 J.P. 757, C.A.; 26 Digest (Repl.) 163, 1221.
- (10) *Re Eddystone Marine Insurance Co., Ex parte Western Insurance Co.*, [1892] 2 Ch. 423; 61 L.J.Ch. 362; 66 L.T. 370; 40 W.R. 441; 8 T.L.R. 393; 36 Sol. Jo. 308; 7 Asp. M.L.C. 107; 29 Digest 117, 718.
- (11) *British Union and National Insurance Co. v. Rawson*, [1916] 2 Ch. 476; 85 L.J.Ch. 769; 115 L.T. 331; 32 T.L.R. 665; 60 Sol. Jo. 679, C.A.; 26 Digest (Repl.) 241, 1841.
- (12) *Nelson v. Empress Assurance Corpn., Ltd.*, [1905] 2 K.B. 281; 74 L.J.K.B. 699; 93 L.J. 62; 53 W.R. 648; 21 T.L.R. 555; 10 Asp. M.L.C. 68; 10 Com. Cas. 237, C.A.; 29 Digest 48, 105.
- (13) *Street v. Royal Exchange Assurance* (1914), 111 L.T. 235; 30 T.L.R. 495; 12 Asp. M.L.C. 496; 19 Com. Cas. 339, C.A.; 29 Digest 120, 729.

A **Action** tried by McCARDIE, J., sitting in the Commercial Court without a jury.

The plaintiffs had issued an insurance policy to the owners of the *Victorieux*, and had re-insured part of their risk with the defendants. A loss having occurred under the head policy, the plaintiffs claimed against the defendants under the policy of re-insurance.

B The facts and arguments are stated in the judgment of McCARDIE, J.

C. R. Dunlop, K.C., and *R. I. Simey* for the plaintiffs, the insurers.

F. D. MacKinnon, K.C., and *S. Lowry Porter* for the defendants, the re-insurers.

Cur. adv. vult.

C July 4. **McCARDIE, J.**, read the following judgment. The points in this case involve the principles of marine and other re-insurance. The plaintiffs and the defendants are insurance companies. The plaintiffs' claim rests on a policy of re-insurance dated Aug. 13, 1920, and made with the defendants on a steamship, the *Victorieux*. The head policy issued by the plaintiffs to the owners of the *Victorieux* was dated July 9, 1920. It was in the usual form. It was numbered 133,424. The sum insured was £15,000. The premium (at 5 guineas per cent.) was £787 10s. The period was for twelve months from July 14, 1920, to July 13, 1921, inclusive. The head policy contained the following words:

D "Hull and machinery valued at £313,050. Subject to Institute Time Clauses as attached including the four-fifths running down clause. Subject to Institute Warranties as attached. Cancelling insurance already placed."

E Amongst the Institute Time Clauses was the following cl. 18:

"In ascertaining whether the vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account."

F Such was the head policy. The policy of re-insurance now sued on by the plaintiffs was, as I have said, dated Aug. 13, 1920. It was for a period of twelve months from July 3, 1920, to July 2, 1921, or as original. The amount insured was £2,500. The premium was 25s. per cent. The following are the material words.

G "The said ship, &c., goods and merchandise, &c., for so much as concerns the insured by agreement between the insured and the said company in this policy are and shall be valued at £2,500 on the hull and machinery, &c., valued at £313,050, or valued as original policy or policies, being against the risks of total and/or constructive and/or arranged total loss of steamship only. No salvage charges and no sue and labour charges attach hereto. Subject to valuation clause as and if in original. Subject to original warranties but half additional premiums cancelling returns only; being a re-insurance of Norwich Union Co. Subject to the same clauses and conditions as the original policy and/or policies and to pay as may be paid thereon."

H Such is the re-insurance policy, which is limited to actual and/or constructive and/or arranged total loss of the vessel. Apparently the plaintiffs had re-insured under the above and like policies to the extent of £7,500. In February, 1921, a transaction took place between the owners of the ship and the plaintiffs whereby the defendants say that they (the re-insurers) were freed from any liability on their re-insurance policy. The owners of the vessel desired a reduction of the premium paid to the plaintiffs and the other underwriters. The underwriters were willing to meet the owners if terms could be arranged. As a result of negotiations an agreement was reached and a slip was initialled by the various underwriters concerned, including the plaintiffs. This was the slip:

I "Agreed to reduce policies on hull and machinery valued £313,050. To pay only £225,000 in event of total loss; constructive total loss; and return premium

10s. per cent. gross on £313,050. Amounts insured on disbursements and freight not to be prejudiced thereby. Dated February 8, 1921." A

The agreement represented by this slip was, so far as it touched the plaintiffs, duly endorsed on the head policy with such words, mutatis mutandis, as were appropriate to express the bargain as between the owners of the ship and the plaintiffs. The alteration was apparently operative as from Feb. 8, 1921. The defendants submit that the effect of the matters above stated was to destroy in toto their liability to the plaintiffs upon the re-insurance policy. The defendants never assented to, nor were they aware of, the variation made by the owners of the ship with the plaintiffs. B

I must now state quite briefly a curious set of facts, so that the whole position between the parties may be clear. On Feb. 6, 1921, the *Victorieux* encountered a cyclone. As a result (so the owners asserted) the vessel became a total loss on that day. The vessel, however, remained afloat. The crew tried to leave her, but heavy seas prevented. On Feb. 10, 1921, the crew were able to leave the *Victorieux*, and on that day she sank. It is obvious that these facts give rise to argument as to when the vessel became a total loss. Was it on Feb. 6, 1921, before the slip came into force, or was it on Feb. 10, 1921, after the slip came into force? The various underwriters concerned (including the plaintiffs) at first paid on the footing of £225,000, i.e., on the assumption that the total loss took place after Feb. 8, 1921 (the date of the slip). But the owners claimed that the total loss occurred on Feb. 6, 1921, i.e., before the date of the slip, and hence they demanded payment on the footing of £313,050, i.e., the original valued amount. The difference between the two amounts is about £88,000. Ultimately, the various underwriters concerned compromised this further claim of the owners for the figure of £30,000. Thus the total sum paid by the various underwriters (including the plaintiffs) in respect of the total loss of the vessel was £255,000. Applying these figures to the head policy as between the owners of the vessel and the plaintiffs, the matter works out thus: The effect of the reduction made by the slip and endorsed on the policy was to reduce the plaintiffs' policy with the owners from £15,000 to £10,781. This sum was paid by the plaintiffs to the owners. Then the plaintiffs' share of the compromise figure was about £1,430. This sum also the plaintiffs paid to the owners. Thus the plaintiffs have made a payment in all of about £12,200 to the owners of the *Victorieux* in respect of the total loss of that vessel. The defendants, although they dispute any liability at all, have made certain payments to the plaintiffs. They, first of all, paid the plaintiffs the sum of £1,796 16s. 9d. upon the footing that the value of the vessel lost was to be taken as £225,000. Then, after the above-mentioned compromise, the defendants paid to the plaintiffs a further sum of £239 11s. 7d. Thus the defendants have paid the plaintiffs a total of £2,036 8s. 4d., which, deducted from the amount of £2,500 in the re-insurance policy, leaves a balance of £463 11s. 8d. It is this balance which the plaintiffs claim in this action. Thus they claim the full amount of the re-insurance policy. C D E F G

Upon the above facts the defendants submit: (i) That they are not liable to the plaintiffs at all, owing to the alteration of the bargain between the owners of the vessel and the plaintiffs; and (ii) that, if liable at all, they have in any event paid the correct amount due from them to the plaintiffs under the re-insurance policy. It is obvious that these two points are distinct, although the considerations relevant to the one point may bear upon the second point. The arguments on behalf of the plaintiffs were presented very ably and ingeniously by their counsel, I proceed to consider the first question. It is one of serious importance to underwriters. Are the defendants liable at all? It is curious to observe that in the eighteenth century re-insurance was declared unlawful in England, save where the insurer was insolvent, bankrupt, or dead: see 19 Geo. 2, c. 37, s. 4, and ARNOULD ON MARINE INSURANCE (10th Edn.) vol. 1, p. 442. In *Mackenzie v. Whitworth* (L.R. 10 Exch. at p. 149), POLLOCK, B., remarked: H I

A "Re-insurance has been known almost as long as insurance, and (except during a certain period in our own country) it has been practised all over the world."

By the Inland Revenue (Stamp Duties) Act, 1864, re-insurance was made lawful. The matter is now dealt with by s. 9 of the Marine Insurance Act, 1906, which provides :

B "(1) The insurer under a contract of marine insurance has an insurable interest in his risk, and may re-insure in respect of it. (2) Unless the policy otherwise provides, the original assured has no right or interest in respect of such re-insurance."

C I may say that a policy of re-insurance need not specify that it is a re-insurance (see s. 26 (2) of the Act of 1906 and *Mackenzie v. Whitworth* (2), and that where an insurer has re-insured his risk no notice of abandonment need be given by him (see s. 62 (9)). I call attention to the use of the word "risk" in s. 9 (1) and s. 62 (9). Now, as counsel for the defendants pointed out in the course of his luminous argument, a policy of insurance and its attendant burdens and rights must, subject to any special rules of law, and to any statutory provisions applicable to insurance, be construed on the normal principles of contract which prevail in the English courts. Insurance, after all, is a mere branch of the general body of contracts. The question of its liability must be tested with that consideration in mind. This being so, it is necessary to turn to the re-insurance policy. It was for £2,500 on the hull, &c., "valued at £313,050 or valued as original policy or policies." It was "against the risks of total and/or constructive and/or arranged total loss of steamer only." It was subject to valuation clause as and if in original. It was expressed to be "a re-insurance of the Norwich Union Co., subject to the same clauses and conditions as the original policy and/or policies and to pay as may be paid thereon."

F There was but one original policy in question—namely, the head policy, dated July 9, 1920, and numbered 133,424. In my view, it was on that policy, No. 133,424, and that policy only, that the re-insurance policy was based. No other foundation existed. The parties to the re-insurance policy used clear and express words as to the subject-matter of their bargain. It is quite true that in *ARNOULD ON MARINE INSURANCE* appears the following passage (10th Edn., vol. 1, p. 443):

G "The thing which the reassured insures is the thing originally insured. In this thing he has an insurable interest to the extent of the liability which he may incur under and by reason of his original contract of insurance."

H This passage is based on the words of *BUCKLEY, L.J.*, in *British Dominions General Insurance Co., Ltd. v. Duder* (3), but the words which I have cited, and which were much relied upon by counsel for the plaintiffs, must not be read too narrowly. It is true that the physical subject-matter of the thing reassured is the thing originally insured, but the physical subject-matter of the thing re-insured is one thing and the contractual basis of the re-insurance bargain is another and additional thing. That contractual basis is necessarily described in the re-insurance policy, for otherwise the contractual obligations of the re-insurer could not be defined. In the case now before me I think it is clear that the contractual basis, was the head policy of July 9, 1920, numbered 133,424. This being so, what was the effect of the bargain made between the owners of the ship and the original underwriters, and which was embodied in the slip of Feb. 8, 1921, and then endorsed on the head policy?

I Counsel contended on behalf of the plaintiffs that it constituted neither a rescission nor even a variation of the head policy of July 9, 1920, and that if a variation, it was not of a material character. I agree that there was no rescission. The distinction between rescission and variation is recognised in all the opinions of the House of Lords in *Morris v. Baron & Co* (4). As *LORD DUNEDIN* said ([1918]

A.C. at p. 25): "The difference between variation and rescission is a real one," and the learned Law Lord indicated several tests. I cannot possibly assent, however, to the suggestion of counsel for the plaintiffs that there was no variation. The parties first embodied their new bargain in a slip, and then endorsed the effect of the slip on the re-insurance policy. If this was not a variation, and a variation, moreover of a material character, I know not what a material variation can be. The original rights and obligations under the head policy were altered in a substantial fashion. Premiums were varied and returned and the amount payable on total loss, constructive total loss, and/or arranged total loss was deliberately altered to a striking extent—namely, from £313,050 to £225,000. It cannot, I think, possibly be said that the policy as altered was the same as the original policy. The very object of the parties was to effect a serious alteration. It is true that the "thing" (that is, the physical subject-matter of the re-insurance policy) remained the same, but the foundation of the re-insurance policy (to wit, the head policy) was changed in a substantial manner. In other words, the original foundation of the re-insurance policy had, in my view, ceased to exist. The original policy had in substance become a fresh policy with different terms. The alteration had been effected without the assent or even the knowledge of the defendants. One effect of the alteration will be seen by reference to s. 81 of the Marine Insurance Act, 1906, which provides:

"Where the assured is insured for an amount less than the insurable value, or, in the case of a valued policy for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance."

Here an uninsured balance of £88,000 had come into being. In connection with the above point it is also necessary to remember cl. 18 of the Institute Time Clauses, already set out. It is unnecessary to work out the various results which would follow from the reduction of the £313,050 to £225,000. It obviously, *inter alia*, brought nearer the probability of a claim for total loss: see *Marten v. Steamship Owners Underwriting Association, Ltd.* (5).

In my opinion, the present case is covered by the ratio of the Court of Appeal per A. L. SMITH, RIGBY, and COLLINS, L.JJ., in *Lower Rhine and Württemberg Insurance Association v. Sedgwick* (1). There the re-insurance policy was expressed to be subject to the original policy or policies and to pay as might be paid thereon. The re-insured had underwritten two time policies on the ship, and those were in force when the re-insurance was effected. Subsequently, during the currency of the re-insurance policy those two policies came to an end and the re-insured underwrote a fresh time policy of the same subject-matter differing as to the valuation of the ship and in other respects from the two original policies. It was held by the Court of Appeal that the policies referred to in the re-insurance policy were the policies then in existence and that the liability of the re-insurer did not extend to losses which might be incurred by the assured under a policy not containing the same terms, conditions and clauses as the original policies. A clear light is thrown upon the opinion of the Court of Appeal by the dictum of RIGBY, L.J., reported only in 4 Com. Cas., at p. 19, where he said:

"It is one thing for the plaintiffs to trust to the policies which the defendants had made and another to trust to those which he might make in the future."

The *Lower Rhine Case* (1) was considered by the Court of Appeal in *Reliance Marine Insurance Co. v. Duder* (6), but nothing was said to weaken the *Lower Rhine Case* (1). Nor is the effect of the *Lower Rhine Case* (1) modified by the judgment of BRAY, J., in *Scottish National Insurance Co., Ltd. v. Poole* (7) or of BAILHACHE, J., in *Emanuel & Co. v. Andrew Weir & Co.* (8).

There would seem to be no difference in principle between a cancellation of the original copy followed by a substitution of a fresh policy on different terms and conditions as distinguished from a substantial variation of the original policy by an alteration in its clauses, values, or warranties. It appears to me that

A there is no halfway house between a right to alter the head policy without consent and an absence of right to do so. Either it can be altered or not. If it can be altered, then what limit is to be placed on the right of alteration? The only sound rule seems to be that the head policy cannot be altered save with the consent of the re-insurer. It is not without interest to refer to a branch of the law, which, although different in some ways, yet presents many features in common with insurance. I refer to suretyship. It is well settled that if a creditor, without the consent of the surety, varies the terms of his bargain with the debtor the surety is *prima facie* discharged (see LEAKE ON CONTRACTS (6th Edn.), pp. 599-601). As pointed out by LEAKE at p. 600 :

C "The Court will not entertain the question of the materiality of the variation in the contract guaranteed, and unless it is self-evident that it is not material or prejudicial to the surety he is left to be the sole judge whether he will consent to remain liable."

This passage is amply supported by the well-known judgment of COTTON, L.J., in *Holme v. Brunskill* (9). It seems to me that a rule at least rigorous should apply to matters of insurance. If a head policy could be altered without the consent of the re-insurer the latter would be thrown into a position of danger, difficulty and doubt. The English law has ever been severe towards the unauthorised alteration of a document, and the austerity of its attitude will be apparent on referring to the particular branch of law dealt with in LEAKE ON CONTRACTS (6th Edn.) pp. 603, et seq., and ARNOULD ON MARINE INSURANCE (10th Edn.), vol. 1, s. 40.

E For these reasons I must hold that the defendants were relieved from liability to the plaintiffs. It thus becomes unnecessary to give a developed decision on the further defence, namely, that, whether liable or not, the defendants have already paid all that they could be called upon to pay. Upon this point counsel for the defendants relied, *inter alia*, on s. 81 of the Act, and the principle involved in *British Dominions General Insurance Co., Ltd. v. Duder* (3), where the Court of Appeal held that a contract of re-insurance was a contract of indemnity only, and that the defendants, the re-insurers, had refused to agree to the compromise. Counsel for the plaintiffs on the other hand referred, *inter alia*, to *Re Eddystone Marine Insurance Co.* (10), *Marten's Case* (5), *British Union and National Insurance Co., Ltd. v. Rawson* (11), and *Nelson v. Empress Assurance Corpn., Ltd.* (12). He also mentioned *Street v. Royal Exchange Assurance* (13). I do not, in view of my ruling on the first point, pause to analyse the arguments or the decisions cited. I will merely say that, in my opinion, the defendants are right in their second contention also. I must therefore give judgment for the defendants.

Judgment for defendants.

Solicitors : W. A. Crump & Son ; Parker, Garrett & Co.

[Reported by T. W. MORGAN, ESQ., Barrister-at-Law.]

DEWEY v. FAULKNER

[KING'S BENCH DIVISION (Lord Hewart, C.J., Darling and Salter, JJ.), December 12, 13, 1922]

[Reported [1923] 1 K.B. 315; 92 L.J.K.B. 318; 128 L.T. 602; 87 J.P. 45; 39 T.L.R. 130; 67 Sol. Jo. 316; 21 L.G.R. 96; 27 Cox, C.C. 388]

Food and Drugs—Milk—Warranty of quality—Milk supplied to retailer under agreement to supply "new milk"—Label on churn: "Guaranteed pure unskimmed milk with all its cream"—No reference in agreement to label—Sale by retailer as "milk"—Food and Drugs Act, 1875 (38 & 39 Vict., c. 63), s. 25.

A retailer bought milk under a written contract which provided for the sale to him of "new milk," and which contained no other express condition or warranty as to the quality of the milk to be supplied. The milk was delivered to the retailer in churns which were labelled "guaranteed pure unskimmed milk with all its cream." The retailer re-sold some of the milk to the prosecutor as "milk," and the milk so sold was found to be deficient in fat. When prosecuted under s. 9 of the Sale of Food and Drugs Act, 1875, the retailer contended that he had purchased the article in question as the same in nature, substance and quality as that demanded of him by the prosecutor, and with a written warranty to that effect and so had a defence under s. 25 of the Sale of Food and Drugs Act, 1875 [now s. 115 (1) of the Food and Drugs Act, 1955].

Held: this defence failed because, as the contract made no provision for a written warranty to accompany the milk when delivered, the milk had not been "purchased [by the retailer] with" any written warranty which might otherwise have been given by the words on the label: *Jiorns v. Van Tromp* (1) (1895), 64 L.J.M.C. 171, distinguished; *Jeynes v. Hindle* (2), [1921] 2 K.B. 581, applied; accordingly, the only written warranty with which the retailer had purchased the milk was that implied by the words "new milk," and those words did not imply any warranty that nothing had been improperly added to or subtracted from the milk.

Notes. The Food and Drugs Acts, 1875 and 1899, have been repealed. The current Act is the Food and Drugs Act, 1955, s. 115 (1) and (2) of which re-enacts, with modifications, which are not material to the principles established by this case, the provisions formerly contained in s. 25 of the 1875 Act and s. 20 (1) of the 1899 Act. Section 1 of the 1955 Act includes the provisions formerly contained in s. 9 of the 1875 Act: s. 33 of the 1955 Act contains the provisions formerly contained in s. 4 (1) of the 1899 Act, and the current regulations are the Sale of Milk Regulations, 1939, S.R. & O. 1939 No. 1417, regs. 1 and 2 of which contain the provisions formerly contained in reg. 1 of the 1901 regulations referred to by LORD HEWART, C.J.

As to warranty as a defence to prosecutions under the Food and Drugs Act, see 17 HALSBURY'S LAWS (3rd Edn.) 598 et seq., as to the sale of milk see *ibid.* 534 et seq.; and for cases see 25 DIGEST 93 et seq. and 126 et seq. For the Food and Drugs Act, 1955, see 35 HALSBURY'S STATUTES (2nd Edn.) 91, and for the Sale of Milk Regulations, 1939, see 9 HALSBURY'S STATUTORY INSTRUMENTS.

Cases referred to:

- (1) *Jiorns v. Van Tromp* (1895), 64 L.J.M.C. 171; sub nom. *Iorns v. Van Tromp*, 72 L.T. 499; 59 J.P. 246; 15 R. 392; sub nom. *Irons v. Van Tromp*, 11 T.L.R. 320; 18 Cox, C.C. 132, D.C.; 25 Digest 94, 190.
- (2) *Jeynes v. Hindle*, [1921] 2 K.B. 581; 90 L.J.K.B. 603; 124 L.T. 670; 85 J.P. 121; 37 T.L.R. 454; 64 Sol. Jo. 397; 19 L.G.R. 231; 26 Cox, C.C. 709, D.C.; 25 Digest 94, 191.

- A** (3) *Rook v. Hopley* (1878), 3 Ex.D. 209; 47 L.J.M.C. 118; 38 L.T. 649; 42 J.P. 551; 26 W.R. 663, D.C.; 25 Digest 95, 194.

Also referred to in argument :

Hunt v. Richardson, [1916] 2 K.B. 446; 85 L.J.K.B. 1360; 115 L.T. 114; 80 J.P. 305; 32 T.L.R. 560; 60 Sol. Jo. 588; 14 L.G.R. 854; 25 Cox, C.C. 441, D.C.; 25 Digest 128, 492.

- B** *Irving v. Callow Park Dairy Co., Ltd., Bacon v. Same* (1902), 87 L.T. 70; 66 J.P. 804; 18 T.L.R. 573; 20 Cox, C.C. 295, D.C.; 25 Digest 94, 193.

Parker v. Alder, [1899] 1 Q.B. 20; 68 L.J.Q.B. 7; 79 L.T. 381; 62 J.P. 772; 47 W.R. 142; 15 T.L.R. 3; 43 Sol. Jo. 15; 19 Cox, C.C. 191, D.C.; 25 Digest 81, 97.

- C** **Case Stated** by a metropolitan magistrate sitting at the Lambeth Police Court.

At a court of summary jurisdiction sitting at the Lambeth Police Court, on June 15, 1922, an information was preferred by George Thomas Dewey (hereinafter called "the appellant") under s. 9 of the Sale of Food and Drugs Act, 1875, against Frederick Faulkner (hereinafter called "the respondent"), for that he

- D** on May 22, 1922, in Cronin Road, Camberwell, London, did unlawfully sell a certain article of food, to wit, milk, from which ten per cent. of the original fat had been abstracted so as to affect injuriously its quality, substance, or nature, and without making disclosure of the alteration, contrary to the statute. Upon the hearing it was admitted or proved: (a) On May 22, 1922, in Cronin Road, in the borough of Camberwell, the respondent sold to the appellant one half-pint of milk. (b) A sample of the milk was taken and all the provisions of the statute

- E** were duly complied with. As shown by the analyst's certificate ten per cent. of the original fat had been abstracted from the milk so sold to the appellant by the respondent, and such abstraction of fat had affected injuriously its quality, substance, or nature, and no disclosure of the alteration had been made by the respondent. (c) Before the hearing the respondent had given notice to the appellant under s. 20 (1) of the Sale of Food and Drugs Act, 1899, that at the

- F** hearing of the information he intended to rely upon a written warranty alleged to be contained in (i) a memorandum of agreement dated Mar. 24, 1922, made between the South-Western Dairies, Ltd., of Sherborne, Dorset, of the first part, and the said respondent of the other part; and (ii) a written label bearing date May 21, 1922. The milk sold to the appellant was milk which had been taken

- G** from one of the churns which had attached to it a similar label. (d) The respondent collected eight churns of milk from Vauxhall railway station at 3 a.m. on May 22, 1922. These eight churns of milk had been despatched by the South-Western Dairies, Ltd., addressed to the respondent at Vauxhall station. The respondent took the eight churns to his shop in Southampton Street, Camberwell, where they were kept until he started on his round. The milk was left alone outside

- H** his shop for no more than half an hour. The respondent strained the milk by putting it through the strainer and noticed that morning that the milk was very buttery. In cross-examination the respondent stated: "The Dairies warrant it up to the time when it goes on the train. I receive this milk only at Vauxhall. I do not know what happens before that."

- I** On the part of the appellant it was contended: (a) That neither the agreement dated Mar. 24, 1922, nor the label dated May 21, 1922, nor both of them, constituted any warranty within the meaning of s. 25 of the Sale of Food and Drugs Act, 1875, or at all. (b) That if any warranty was given by the South-Western Dairies, Ltd., such warranty expired when the milk left their depot at Henstridge, or in the alternative, that the warranty (if any) expired when the milk was handed to the carrier and put on rail by the said South-Western Dairies, Ltd. (c) That a considerable interval of time had elapsed between the cessation of the vendors' warranty (if any) and the time when the milk was taken possession of by the respondent, and that no evidence was given on behalf of

the respondent that the milk had not been tampered with from the time when it left the depot of the South-Western Dairies, Ltd., until it was handed over to the carrier, nor during the time occupied in the transit of the milk by rail from Henstridge station to Vauxhall station, nor during the time when it was at Vauxhall station, nor was any evidence given that it had not been possible for it to be tampered with during the half-hour when it was left by the respondent outside his shop and he was absent from it. (d) That the respondent had not satisfied the provisions of s. 25 of the Sale of Food and Drugs Act, 1875, and was not entitled to be discharged from the prosecution. On the part of the respondent it was contended: (a) That he was entitled to be discharged from the prosecution under s. 25 of the Sale of Food and Drugs Act, 1875. (b) That the warranty given by the South-Western Dairies, Ltd., was to deliver the milk free to the purchaser's railway station, i.e., Vauxhall station on the London and South-Western Railway, and that the South-Western Dairies, Ltd., warranted the milk up to the time of its delivery to the respondent at Vauxhall station. (c) That it was proved that the milk was part of that so received by the respondent from the South-Western Dairies, Ltd., and that it was sold in the same condition as when it was received.

The magistrate was of opinion: (i) That the memorandum of agreement and label constituted a warranty. (ii) That Vauxhall railway station was the purchaser's railway station at which the milk was to be delivered free in accordance with the agreement, and that therefore the warranty protected the respondent until the milk was delivered to him at Vauxhall. (iii) That the respondent proved that the milk sold by him to the appellant was part of that received by him from the South-Western Dairies, Ltd., at Vauxhall, under the warranty, and was sold to the appellant in the same condition as that in which the respondent received it. The magistrate, therefore, dismissed the information.

The following was a copy of the memorandum of agreement:

"Memorandum of Agreement made this 24th day of March, 1922, Between the South-Western Dairies, Ltd. (their successors, administrators or assigns) of Sherborne, Dorset (hereinafter called "the vendors"), of the one part, and Mr. F. Faulkner, of 105, Southampton Street, Camberwell, S.E.5 (hereinafter called "the purchaser"), of the other part, whereas the vendors have agreed to sell and the purchaser agreed to purchase by special licence the following quantities of new milk at the prices and on the conditions stated below for the period of—months, viz.: April to September inclusive, quantities—one hundred and twenty-eight gallons daily.

"Prices.

"1922.—April, 1s. per imperial gallon; May, 11d. per imperial gallon; June, 11d. per imperial gallon; July, 1s. per imperial gallon; August, 1s. 1d. per imperial gallon; September, 1s. 1d. per imperial gallon. Subject to any advances rendered inevitable by drought or other unforeseen circumstances. Delivered free to the purchaser's railway station. Terms—Weekly payments.

"Condition.

"1. The purchaser agrees that extras shall be charged for at current market prices and to pay a charge for dairying on quantities not taken up to contract. Twenty-four hours' notice to be given if required to vary the daily supply. 2. All empties shall be returned the same day as received and on no account are they to be used for supplying the purchaser's own customers. 3. The vendors accept no responsibility for any loss that may be incurred owing to war risks, strikes, delay, or mishap during transit. Should any consignment arrive at the purchaser's station out of condition the vendors are to be notified by telegram and the milk returned immediately. No claim will be entertained on milk accepted and removed from the purchaser's station. 4. The purchaser agrees with the vendors that in the event of any

A claim for loss due to accident, miscarriage, or pilferage in transit, being declined by the railway company each party shall allow for one-half the amount of such claim."

The following was a copy of the label :

B "Mr. Faulkner, Vauxhall Station, 8 churns 128 imp. gallons, guaranteed pure unskimmed milk with all its cream. From the South-Western Dairies, Ltd., Head Office, Sherborne, Dorset. Ex Henstridge Depot. 21/5/1922."

The Sale of Food and Drugs Act, 1875, provided :

C Section 9: "No person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration, under a penalty in each case not exceeding twenty pounds."

D Section 25: "If the defendant in any prosecution under this Act prove to the satisfaction of the justices or court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he shall have given due notice to him that he will rely on the above defence."

E The Sale of Food and Drugs Act, 1899, s. 20 (1) provided :

F "A warranty or invoice shall not be available as a defence to any proceeding under the Sale of Food and Drugs Act unless the defendant has, within seven days after service of the summons, sent to the purchaser a copy of such warranty or invoice with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to such person."

Disturnal, K.C. and *W. C. Croasdel* for the appellant.

Whiteley, K.C. and *H. J. Fuller* for the respondent.

G **LORD HEWART, C.J.**—This is a Case stated by the learned magistrate sitting at Lambeth Police Court. It arises out of a prosecution of the respondent under s. 9 of the Sale of Food and Drugs Act, 1875, for that he on a certain day unlawfully did sell a certain article of food, to wit, milk from which ten per cent. of the original fat had been abstracted so as to affect injuriously its quality, substance or nature, without making disclosure of the alteration. The information came before the learned magistrate on July 6, 1922. He dismissed it and discharged the respondent from the prosecution. The question before the court is whether on the facts stated in the Case he came to a correct determination in point of law.

H The real question is whether, under s. 25 of the Sale of Food and Drugs Act, 1875, there was a written warranty of such a kind as to satisfy that section. It is a little important to see exactly what are the provisions of the statute. I First of all, the prosecution was under s. 9 which is not the usual section to have recourse to in such cases. That section provides as follows :

"No person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration. . . ."

The Case states in para. 2 (a), that on May 22, 1922, the respondent sold to the appellant one half-pint of milk. Milk is one of the commodities, no doubt

by reason of the part which it plays in the health of the individual, which are specially dealt with by the Act of 1899. By s. 4 (1) of the Sale of Food and Drugs Act, 1899, it is provided that

"The Board of Agriculture may, after such inquiry as they deem necessary, make regulations for determining what deficiency in any of the normal constituents of genuine milk, cream, butter, or cheese, or what addition of extraneous matter or proportion of water, in any sample of milk (including condensed milk), cream, butter, or cheese, shall, for the purpose of the Sale of Food and Drugs Acts, raise a presumption, until the contrary is proved, that the milk, cream, butter, or cheese is not genuine or is injurious to health, and an analyst shall have regard to such regulations in certifying the result of an analysis under those Acts."

and regulations were accordingly made. The regulation which refers to milk is reg. 1 of the year 1901 and it provides as follows :

"Where a sample of milk (not being milk sold as skimmed, or separated, or condensed milk) contains less than three per cent. of milk fat, it shall be presumed for the purposes of the Sale of Food and Drugs Act, 1875 to 1899, until the contrary is proved, that the milk is not genuine by reason of the abstraction therefrom of milk fat, or the addition thereto of water."

In this case it is found to have been proved that a sample of the milk was taken and all the provisions of the statute were duly complied with, and, as shown by the analyst's certificate, ten per cent. of the original fat had been abstracted from the milk so sold to the appellant by the respondent, and such abstraction of fat had affected injuriously its quality, substance, or nature, and no disclosure of the alteration had been made by the respondent.

However, it was said that this was a case in which the respondent might put forward the defence contemplated by s. 25 of the Act of 1875. That section provides :

"If the defendant in any prosecution under this Act prove to the satisfaction of the justices or court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution. . . ."

It is to be observed that the word which that section employs is "with." The defendant in order to succeed under that section, has not merely to show that a warranty accompanied the goods when he received them, or took delivery of them; he has to show that he purchased the article in question as being of a certain kind and with a written warranty to that effect. The well-known cases upon that matter have been cited, and I need only mention *Jeynes v. Hindle* (2) where the decision turned on the fact that there was no term in the contract of purchase that there should be a written warranty, and *Rook v. Hopley* (3), and *Iorns v. Van Tromp* (1). The cases no doubt have gone to this length that, if it is a term of the contract of purchase that a written warranty shall accompany the article when delivered, that is a written warranty sufficient to satisfy s. 25. Now what was it that was relied on here on the part of the respondent as fulfilling the conditions of s. 25? I can have no doubt, from the form in which the learned magistrate has expressed his opinion, that the case made before him was that the memorandum of agreement and the label, that is to say the memorandum of agreement made between the respondent and the persons who sold to him, on the one hand, and the label affixed to the particular churn, on the other hand, taken together, although not when regarded separately, constituted a warranty, and the magistrate has found that the memorandum of agreement and label

A constituted a warranty. Now what is it that the memorandum of agreement does? It is dated Mar. 24, 1922, and it is an agreement of sale for certain quantities of what is described as "new milk." That is the whole phrase contained in the agreement. It is a very different phrase from such a phrase as that which appears in some of the reported cases, "pure new milk with all its cream." This commodity is described, and described simply, as "new milk," and the argument
B on behalf of the respondent seems to go this length, that as the purchaser in the present case, the appellant, appears only to have asked for milk, and as that which was sold to him, whatever its defect, was milk, and as that which was bought by the respondent from the persons who sold to him was described in the contract as milk, that is enough. If that argument were to prevail there would be no need for this Act; in my opinion it would be waste paper. The
C memorandum of agreement describes the commodity as new milk, but it does not stop there. It provides that the delivery shall be to the purchaser's railway station, that is to say, Vauxhall, and condition 3 says :

"Should any consignment arrive at the purchaser's station out of condition the vendor's are to be notified by telegram and the milk returned immediately.
D No claim will be entertained on milk accepted and removed from purchaser's station."

Then there is a supplementary provision (condition 4) :

"The purchaser agrees with the vendors that in the event of any claim for loss due to accident, miscarriage or pilferage [—a euphemistic term—] in transit, being declined by the railway company each party shall allow for
E one-half the amount of such claim."

That is the memorandum of agreement, and it is to be observed that the contract between the parties was reduced to writing, and there is not in that written contract a word which stipulates for any further or other warranty of any kind whatever. To the churns, however, there was attached a label bearing these words, "Guaranteed pure unskimmed milk with all its cream."

F It is apparent from the Case that the argument which was made to the learned magistrate was that, if one reads that memorandum of agreement together with that label, and treats them as parts of one whole, taken together they constitute a warranty, and I think that that is what the learned magistrate has found. Is that conclusion right? In my opinion, it is wrong. There is nothing in these facts to connect the label which was attached to the churn with the stipulations
G of the contract made between the parties; on the contrary the memorandum of agreement, which, it is to be observed, was not an oral agreement, but was itself a written agreement, purports to contain all the terms agreed between the parties, and it would be a variation, and a most important variation, of that written contract if it were sought to add to it an oral stipulation that the churns should be accompanied by a warranty going beyond what was contained in the contract.
H In my opinion, we cannot on the facts of this case read the label with the memorandum of agreement so as to get a warranty out of the two, if it cannot be got out of the memorandum of agreement itself.

It has, however, been argued before us, although I doubt very much whether the suggestion was made in the court below, that, if one looks at the memorandum of agreement by itself, there is there a sufficient warranty to satisfy s. 25. Of
I course, if that were true, there would be no difficulty arising from the requirement that the warranty relied on should be a warranty with which the commodity was purchased. That difficulty arises when one tries to read the subsequent label into the antecedent contract, but can it fairly be said that this memorandum of agreement considered by itself amounts to a warranty? When the argument is put in this way the label upon the churn is treated in a wholly different way from the way in which it is treated on the first mode of putting the argument; on this mode of putting the argument the label becomes merely an identifying

document which shows that the particular churn of milk was indeed delivered under a contract, which in its turn contained the whole of the warranty. Now what is the alleged warranty? It is that the milk is new milk. The regulations draw a clear distinction between milk at large and milk which will satisfy the requirements of these Acts. There is skimmed milk, there is separated milk, and there is condensed milk. Those on the one hand are contrasted with what the regulations call genuine milk. One cannot help thinking that the experienced persons who devised the form of words "warranted pure new milk with all its cream," did not adopt those words by accident or without reflection. They adopted them because they perceived that the words "new milk" taken alone were by no means sufficient. New milk may be new milk of various kinds, but what is wanted to protect the seller under s. 25 is a warranty that the article is the same in nature, substance, and quality, as that demanded by the prosecutor; in other words, however it may be expressed, it is to be a warranty that the milk is what counsel for the appellant has shortly called statutory milk, milk, in other words, that is genuine milk and satisfies the requirements of the statute. I do not think that the words "new milk" do fulfil that condition, and the more ample phrase contained in this label may be thought itself to supply a commentary upon the meagreness of description in the agreement itself. The agreement says "new milk"; the label says "guaranteed pure unskimmed milk with all its cream." The person who composed the label thought, and I think thought rightly, that it would not be right to put on the label merely the words "new milk." I think, therefore, that this memorandum of agreement did not contain a warranty of such a kind station was the purchaser's railway station at which the milk was to be delivered in accordance with the agreement, and that therefore the warranty protected the as to satisfy s. 25. The Case further goes on to find that Vauxhall railway respondent until the milk was delivered to him at Vauxhall. That would undoubtedly be true if there were indeed a warranty, but if I am right in the view which I have sought to express, that there was no warranty, that question does not arise.

Finally, the learned magistrate says that the respondent proved that the milk sold by him to the appellant was part of that received by him from the limited company under the warranty, and was sold to the appellant in the same condition as that in which the respondent receive it. That is a somewhat elliptical finding, because it is pointed out on the part of the appellant, in para. 4 (c), as part of his contentions,

"That a considerable interval of time had elapsed between the cessation of the vendors' warranty (if any) and the time when the milk was taken possession of by the respondent, and that no evidence was given on behalf of the respondent that the milk had not been tampered with from the time when it left the depot of the South-Western Dairies, Ltd., until it was handed over to the carrier, nor during the time occupied in the transit of the milk by rail from Henstridge station to Vauxhall station, nor during the time when it was at Vauxhall station, nor was any evidence given that it had not been possible for it to be tampered with during the half-hour when it was left by the respondent outside his shop, and he was absent from it."

However, this finding that the milk was sold to the appellant in the same condition as that in which the respondent received it (which on the face of it appears to be *per saltum*), ceases to be material for the purpose of this case, if there was no warranty; it is only as an ingredient in the fulfilment of s. 25 that it becomes of importance. But I must add this, that although a warranty, and a warranty in writing, and a warranty owing its origin contemporaneously to an agreement made at the time of the making of the contract, or a part of the contract, itself is necessary, it is not all that is necessary; the seller must do more than show a warranty; he must show two other things, that he had

A no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it. Those subsidiary matters are not really important in this case in view of the primary importance which must attach to this question of warranty.

B In my view, whether one looks at the memorandum of agreement itself (and I think that that is the only document which can be looked at), or whether one looks at the memorandum of agreement and the label, which I think can only be looked at for a limited purpose, on either view of the matter, whichever way the respondent's case is put, there was here no written warranty of such a kind as to satisfy s. 25, and therefore the learned magistrate came to an incorrect determination in point of law. The case must go back to the magistrate with a direction to convict.

C **DARLING, J.**—I am of the same opinion. It seems to me that the label can only be properly looked at to satisfy oneself whether the liquid contained in the churn is some of the milk which was purchased under a written agreement between the farmer and the dairyman. The statute provides that the only defence which can be afforded by a warranty, in circumstances like those of this prosecution, is where the milk was purchased with a written warranty. Therefore it seems to me that one cannot look at the label, one must look at the contract of purchase. A great many cases have been decided in this court on this subject, and all of them are not reconcilable, but the matter seems to be tolerably understood at last, and I would suggest to these people engaged in this trade, that they should, with the advantage of all these cases, get some barrister to draw up a form of contract (it would be perfectly simple now) applying to these cases. Such people as farmers and dairymen have big protection societies and instead of bringing these cases when there is a prosecution, they would be much better advised, I think, in getting some competent lawyer, that means any lawyer, to draw up a form of contract and in using that contract and no other. This observation I need hardly say is made entirely in the interest of the Court of King's Bench.

G **SALTER, J.**—I am of the same opinion. This was a prosecution under s. 9 of the Act of 1875 for selling milk from which fat had been intentionally and injuriously abstracted. Having regard to the Sale of Milk Regulations, 1901, the result of the analysis was *prima facie* evidence that the milk was not genuine by reason of abstraction, or addition, or both. The point was not taken, and I express no opinion about it, whether that was *prima facie* evidence of an offence under the second part of s. 9. Be it assumed, for the purpose of this case, that it was and that the respondent accepted that position and relied on s. 25. To comply with s. 25 the warranty must be a warranty that the goods are the same in nature, substance, and quality as that demanded by the purchaser. Here there is no evidence what the demand was; in the vast majority of purchases of milk, I should think, there is no demand at all, and nothing whatever is said as to what is being bought; a customer simply holds out a jug to be filled. I will take it in favour of the respondent that the demand here was for pure milk, that is to say, milk to which there had been no material and improper addition, and from which there had been no material and improper subtraction, milk in substance as it came from the cow. The warranty, therefore, to comply with s. 25, must be a warranty to that effect. Here the description in the contract was "new milk," and, assuming that to be a warranty, I do not think that that is a wide enough warranty to satisfy s. 25. The terms of the guarantee on the label may be wide enough, but that guarantee was not part of the contract.

Appeal allowed and Case remitted.

Solicitors: *Wedlake, Letts & Birds; Percy Robinson & Co.*

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

Re DE LEEUW, JAKENS AND OTHERS v. CENTRAL ADVANCE AND DISCOUNT CORPORATION, LTD.

[CHANCERY DIVISION (Peterson, J.), March 14, 15, 16, April 12, 1922]

[Reported [1922] 2 Ch. 540; 91 L.J.Ch. 617; 127 L.T. 350]

Mortgage—Fraudulent execution of deeds by mortgagor—Property held as trustee under will—Beneficiaries ignorant of mortgage—Validity of mortgage against beneficiaries—Land register—Constructive notice to mortgagee of facts therein—Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 35.

Estoppel—Estoppel by record—Judgment against trustee and executor—Estoppel of beneficiaries—Fraud by executor—No notice to beneficiaries of fraudulent acts.

The testator, Charles de Leeuw, by his will, after appointing his wife and his son, also named Charles de Leeuw, executors and trustees, bequeathed to them two leasehold houses of which he was the assignee upon trust for his wife for her life, and after her death for his six children absolutely. The testator died in September, 1908, registered as proprietor with a possessory title of the two houses, and in October, 1908, his executors were registered as the proprietors as such executors. The widow left the entire management of the estate to her co-executor with whom the leases, assignments and land certificates of the houses were placed. In March, 1918, the testator's son borrowed £225 from the defendant company on the security of the two houses, without informing the company of his father's death, but representing himself to be his father. In 1919 he was made bankrupt and later that year the company commenced foreclosure proceedings against him. In January, 1921, the company obtained an order absolute for foreclosure, and in pursuance of that order the company was entered on the Land Registry as the proprietor of the leasehold houses. The property being then advertised for sale, the children of the testator other than Charles de Leeuw became aware for the first time of the proceedings, and in the present action claimed against the company a declaration that the mortgage and decree of foreclosure were invalid as against them.

Held: (i) Charles de Leeuw, in executing the mortgages, had personated his father, and so his signatures to the mortgage deeds were forgeries, with the result that, while he might be estopped from saying that the mortgages were not good as against his beneficial interest in the leaseholds, the mortgage deeds were void as against the other beneficiaries; (ii) R.S.C. Ord. 16, r. 8 (which provided that trustees, executors and administrators might sue on behalf of the property or estate which they represented and should be considered as representing beneficiaries), did not apply to a case, such as the present, regarding a transaction which the beneficiaries had a solid ground for impeaching, but had had no opportunity of intervening; (iii) the deeds being void, the company could not be regarded as a purchaser for value, and, in any case, the company had had constructive notice of the facts which it would have ascertained if it had inspected the Land Register; (iv) a transfer within s. 35 of the Land Transfer Act, 1875 [see now Land Registration Act, 1925, s. 23], did not cover the case of an order for foreclosure, and so a transfer under such an order was not "free from all [other] estates and interests" within that section; and, therefore, the plaintiffs were entitled to the declaration they sought and rectification of the register by the substitution of newly appointed trustees.

Notes. Considered: *Weston v. Henshow*, [1950] Ch. 510.

As to the representation by executors of beneficiaries in mortgage proceedings, see 27 HALSBURY'S LAWS (3rd Edn.) 421, 422; as to land registration see *ibid.*, vol. 23, p. 141 et seq.; and as to estoppel by record see *ibid.*, vol. 15, p. 176 et seq. For cases see 21 DIGEST 140 et seq., and 35 DIGEST 561, 562. For Land Registration Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 940.

A Cases referred to :

- (1) *Solomon v. Attenborough*, [1911] 2 Ch. 159; 80 L.J.Ch. 503; 105 L.T. 11; 27 T.L.R. 47; reversed [1922] 1 Ch. 451; 81 L.J.Ch. 242; 106 L.T. 87; 28 T.L.R. 225; 56 Sol. Jo. 270, C.A., affirmed sub nom. *Attenborough v. Solomon*, [1913] A.C. 76; 82 L.J.Ch. 178; 107 L.T. 833; 29 T.L.R. 79; 57 Sol. Jo. 76; 23 Digest (Repl.) 394, 4649.

- B** (2) *Re Cooper. Cooper v. Vesey* (1882), 20 Ch.D. 611; 51 L.J.Ch. 862; 47 L.T. 89; 30 W.R. 648, C.A.; 35 Digest 631, 3643.

- (3) *Francis v. Harrison* (1889), 43 Ch.D. 183; 59 L.J.Ch. 248; 61 L.T. 667; 38 W.R. 329; 35 Digest 562, 2932.

- (4) *Cox v. Dublin City Distillery Co., Ltd.* (No. 3), [1917] 1 Ir. Rep. 203, 208; 21 Digest 189, g.

- C** (5) *Jones v. Smith* (1841) 1 Hare, 43; 11 L.J.Ch. 83; 6 Jur. 8; 66 E.R. 943; affirmed (1843), 1 Ph. 244, L.C.; 35 Digest 528, 2605.

- (6) *Huntington v. I.R. Comrs.*, [1896] 1 Q.B. 422; 65 L.J.Q.B. 297; 74 L.T. 28; 44 W.R. 300; 12 T.L.R. 143; 40 Sol. Jo. 212 D.C.; 35 Digest 585, 3225.

- (7) *Re Lovell and Collard's Contract* [1907] 1 Ch. 249; 76 L.J.Ch. 246; 96 L.T. 382; 35 Digest 585, 3228.

- D** (8) *Capital and Counties Bank, Ltd. v. Rhodes*, [1903] 1 Ch. 631; 72 L.J.Ch. 336; 88 L.T. 255; 51 W.R. 470; 19 T.L.R. 280; 47 Sol. Jo. 334, C.A.; 35 Digest 269, 266.

Also referred to in argument :

- E** *Re Ingham, Jones v. Ingham*, [1893] 1 Ch. 352; 62 L.J.Ch. 100; 68 L.T. 152; 41 W.R. 235; 37 Sol. Jo. 80; 3 R. 126; 35 Digest 481, 2143.

- Jacques v. Harrison* (1884), 12 Q.B.D. 165; 53 L.J.Q.B. 137; 50 L.T. 246; 32 W.R. 470, C.A.; 35 Digest 403, 1445.

- Agra Bank, Ltd. v. Barry* (1874), L.R. 7 H.L. 135, H.L.; 35 Digest 457, 1977.

- Ware v. Lord Egmont* (1854), 4 De G.M. & G. 460; 3 Eq. Rep. 1; 24 L.J.Ch. 361; 24 L.T.O.S. 195; 1 Jur. N.S. 97; 3 W.R. 48; 43 E.R. 586, L.C.; 30 Digest (Repl.) 348, 93.

- F** *Bailey v. Barnes*, [1894] 1 Ch. 25; 63 L.J.Ch. 73; 69 L.T. 542; 42 W.R. 66; 38 Sol. Jo. 9; 7 R. 9, C.A.; 35 Digest 461, 2001.

- Hunt v. Luck*, [1902] 1 Ch. 428; 71 L.J.Ch. 239; 86 L.T. 68; 50 W.R. 291; 18 T.L.R. 265; 46 Sol. Jo. 229; C.A.; 35 Digest 469, 2044.

Witness Action for a declaration.

- G** The testator, Charles de Leeuw, was the assignee of the leases of two houses known as Nos. 11, Kenmare Road and 19, Brampton Road. In 1907 he was registered under the Land Transfer Acts as proprietor with a possessory title of both houses, and obtained the usual certificates from the Land Registry. The lease and the assignment of No. 11, Kenmare Road were indorsed in red ink by the registrar with the words "Land Registry, London, No. 122,399, Registered April 22, 1907."

- H** In the lease of No. 19, Brampton Road were included Nos. 21 and 23, Brampton Road. The testator had only an attested copy of this lease, and he produced it at the Land Registry. This copy and the assignment of the lease of No. 19, Brampton Road, were indorsed by the registrar in red ink with the words "as to 19, Brampton Road, Land Registry, London, No. 122,528, Registered April 30, 1907." The testator died on Sept. 15, 1908, having appointed his wife Mary

- I** Theresa de Leeuw and his son Charles de Leeuw executors and trustees of his will, and bequeathed to them (inter alia) the two houses in question upon trust to pay the rents to his wife for life and after her death to sell the houses and divide the net proceeds of sale among his six children in equal shares. The will was proved by both the executors. The testator's six children were the first five plaintiffs in the present action, and Charles de Leeuw the sixth. On Oct. 12, 1908, Mary Theresa de Leeuw and Charles de Leeuw (the son) were registered as proprietors of the two leasehold houses and were described in the register as "executors

of Charles de Leeuw deceased," and entries being made in the certificates to the same effect. On Jan. 30, 1913, a caution in favour of Mrs. de Leeuw was registered and entries of these cautions were also made in the certificates. The certificates thus showed that Mrs. de Leeuw and Charles de Leeuw (the son) were the registered proprietors of the two leases in the capacity of executors of Charles de Leeuw, the testator. Mrs. de Leeuw left the management of the property to her son Charles. The leases, the assignments, and the land certificates were placed in his custody. In May, 1916, an order was made in an action for administering the testator's estate in which Charles de Leeuw, the son, was a defendant, for payment by him into court of a balance of £55 6s. 11d. due from him, and by the same order he was directed to pay the costs of the action. It did not appear whether that order had been obeyed; but, having regard to his subsequent conduct, it was probable that he did not make the payments which the order directed. In 1908 he was a printer's machine manager, but from the evidence it seemed that at the time of the action he was a machine minder. He was adjudicated a bankrupt in the first half of the year 1919. In March, 1918, he went to the office of the defendant company and asked for a loan of £225. He produced the lease of No. 11, Kenmare Road, and the assignment of it to his father, and the attested copy of the lease of Nos. 19, 21 and 23, Brampton Road, and the assignment of No. 19, Brampton Road to his father. He did not produce the probate of his father's will or the land certificates, nor did he inform the representative of the defendant company that the Charles de Leeuw named in the assignments was his father or that he was dead or that he himself and his mother were executors of his father's will. The company's representative thought that he was the Charles de Leeuw to whom the leases had been assigned in 1907, and in this belief the company advanced to him the sum of £225 on the security of two mortgages of the two leasehold houses. By the deeds Charles de Leeuw, in consideration of the sum of £225 paid to him, covenanted to pay to the company the sum by weekly instalments, and as beneficial owner demised the leasehold houses to the company for the residue of the terms except the last day thereof respectively, and declared that he would stand possessed of the nominal reversions in trust for the company, and he appointed the company's representative his attorney to assign the nominal reversions. The mortgages also contained restrictions on the mortgagor's power of leasing, and covenants by the mortgagor to repair and insure. In 1919 the instalments payable under the mortgages fell into arrear, and in June of that year the company's solicitor (Mr. Hale) required payment by Charles de Leeuw of the amount due. In July he learnt that Charles de Leeuw had been adjudged a bankrupt. He then had an interview with Charles de Leeuw who, at his request, handed over the land certificates which were in his possession. Mr. Hale admitted that he then knew that Charles de Leeuw had personated his father and was one of two executors, and realised that it was doubtful whether the mortgages were good as against the beneficiaries. In evidence Mr. Hale said that Charles de Leeuw told him that the money was borrowed for executorship purposes, and that on this assurance he thought that it was a case of ignorance and not one of personation. Charles de Leeuw promised to bring Mrs. de Leeuw to Mr. Hale, and said that she would sign anything to put matters right, but he did not do so. On Aug. 28, 1919, the defendant company began foreclosure proceedings against Charles de Leeuw and Mrs. de Leeuw. Charles de Leeuw entered an appearance for himself and his mother. No defence was delivered.

The statement of claim stated that the testator was registered as proprietor with a possessory title of the leaseholds in question, that the defendants were his executors and trustees, and that they were registered as proprietors of the premises as executors of the testator, and it was alleged that Charles de Leeuw (the son), with the knowledge and consent of Mrs. de Leeuw, applied to the company for a loan on the security of the leaseholds and deposited with the company the assignments

A of the two leases to his father, but "concealed from the plaintiffs the fact that he was not the same person as the testator mentioned in such assignment." It was further said that the title had been registered, and that "such concealment as aforesaid was known to and authorised by the defendant Mrs. de Leeuw." The statement of claim then alleged alternatively (i) that the money was borrowed by the executors for the purpose of the executorship, and that the mortgages were executed by Charles de Leeuw in the exercise of the powers conferred on him as executor, and with the knowledge and consent of Mrs. de Leeuw; and (ii) that, if the loan was not raised by the two executors for the purpose of the executorship, the concealment which was alleged was made fraudulently by the executors. The learned judge expressed the opinion that there was no ground for suggesting that Mrs. de Leeuw was a party to any fraud, or that she had any knowledge that Charles de Leeuw intended to personate or had personated his father, nor was she aware that her son proposed to raise the money in question on the security of these leaseholds, nor has it been shown in this action that the money was applied for the purposes of the estate. The statement of claim further stated that the company had only recently discovered that the Charles de Leeuw who executed the mortgages was not the beneficial owner of the property, and it was stated by counsel for the company during the hearing of the action that the company believed that the mortgages were executed by the Charles de Leeuw to whom the leases had been assigned in 1907.

On Jan. 23, 1920, the usual decree for foreclosure nisi was made, on Jan. 12, 1921, the order absolute was made, and in pursuance of that order the company was entered on the land register as the proprietor of the leaseholds in question. The company proceeded to advertise the properties for sale, whereupon the beneficiaries under the testator's will other than Charles de Leeuw and his mother began the present action in which they claimed against the defendant company a declaration that the order for foreclosure was not binding upon them; that the plaintiffs, John de Leeuw and Ernest Jakens, who, on May 30, 1921, were appointed trustees of the testator's will in place of Charles de Leeuw and his mother, be entered on the register as proprietors of the leasehold hereditaments known as No. 11, Kenmare Road and No. 19, Brampton Road; and that the mortgage created in favour of the defendant company and the foreclosure decree obtained by the company were invalid as against them.

T. R. Hughes, K.C., and C. A. Bennett for the plaintiffs.

Jolly for the defendant company.

April 12. **PETERSON, J.**, read the following judgment. This is a curious case in which, owing to the defective character of some of the evidence, I have found some difficulty in arriving at a conclusion. In this action beneficiaries under the will of Charles de Leeuw (senior) seek to establish that the mortgage created in favour of the defendant company and a foreclosure decree obtained by that company are invalid as against them. The defence raises several questions. The company alleges (i) that it was determined in the foreclosure action that the loan was raised by Charles de Leeuw for executorship purposes, and that the mortgages were executed by him in due exercise of the powers conferred upon him as executor and with the knowledge and consent of Mrs. de Leeuw; that by R.S.C. Ord. 16, r. 8, the present plaintiffs were represented in the foreclosure action by the executors, and that the present plaintiffs are estopped from disputing the validity of the foreclosure orders; (ii) that the present plaintiffs are estopped from denying the truth of the allegations referred to in (i) and from alleging that the money was borrowed by Charles de Leeuw for his own purposes, or that the mortgage was not executed by him in exercise of his powers as executor or with the knowledge or consent of Mrs de Leeuw or that such mortgages were executed in fraud of the plaintiffs; (iii) that the company is a purchaser for value without notice; and (iv) the company relies upon the fact that it is the registered proprietor

with a possessory title of the leaseholds. It is admitted that the company, when the advance was made to Charles de Leeuw, was not aware that he was an executor, and that the loan was made to him as the absolute owner of the leaseholds. The company cannot then rely upon the right of a lender to assume that an executor to whom an advance is made is acting properly within his powers, for the loan was not made to Charles de Leeuw as an executor: *Solomon v. Attenborough* (1), [1911] 2 Ch. at p. 164. If, as appears to be the case, the property had become vested in Charles de Leeuw and Mrs. de Leeuw as trustees, they had not, either separately or in conjunction, any power to mortgage it.

In my opinion, the true conclusion from the evidence before me is that Charles de Leeuw borrowed the sum of £225 from the defendant company for his own purposes and effected his object by fraudulently representing himself to be the person to whom the leases had been assigned, and that Mrs de Leeuw took no part in the transaction, and had no knowledge of it. In these circumstances, in executing the mortgages, he personated his father and his signature was a forgery: *Re Cooper, Cooper v. Vesey* (2). The result of this was that, even if the property had not been vested in him and his mother as trustees, while he may be estopped from saying that the mortgages are not good as against his beneficial interest in the leaseholds, the deeds—apart from some considerations with which I will deal—are void as against Mrs. de Leeuw and other beneficiaries: (*Re Cooper* (2)).

The question then arises: What is the effect of the orders made in the foreclosure action? Mrs. de Leeuw, who is not a party to the present action, may be estopped from asserting that the mortgages are invalid as against her interest in the premises as she has allowed judgment to go against her on the basis that the money was raised for executorship purposes and that the mortgages were executed by her son in the exercise of the powers conferred on him as executor with her knowledge and consent, although it may be observed that the due exercise by Charles de Leeuw of his powers as executor cannot be said to include the deliberate concealment of the fact that he was not the same person as his testator the Charles de Leeuw, who was the assignee of the leases. But the question is whether the beneficiaries who have been defrauded by Charles de Leeuw and who are not parties to the foreclosure action are bound by the decree in that action, or whether they can assert that, notwithstanding the result of the foreclosure action, they are entitled to maintain that the two forged deeds are void as against them. The company relies upon the provisions of Ord. 16, r. 8. Under this rule trustees, executors, and others may sue and be sued as representing the property or estate of which they are trustees or representatives without joining the beneficiaries, and are to be considered as representing the beneficiaries. This rule applies to trustees, executors, and others who are sued in proceedings to enforce a security by foreclosure; and it enables the court at any stage of the proceedings to order any of the beneficiaries to be made parties. Before the addition of the words which make this rule applicable to trustees and legal personal representatives in foreclosure actions, it was necessary in a foreclosure action to join the beneficiaries as defendants: *Francis v. Harrison* (3), and the addition was made in order to avoid the unnecessary expense and delay of joining beneficiaries whose interests were sufficiently represented by trustees or executors or others. The rule may be compared with Ord. 16, r. 9, which enables one or more persons of a numerous class to sue or be sued on behalf of or for the benefit of the class.

In ordinary cases, no doubt, a judgment in an action against trustees is, under Ord. 16, r. 8, binding upon the beneficiaries and in the Irish case of *Cox v. Dublin City Distillery Co., Ltd.* (4) this view prevailed, although the trustees had not put in a defence. I do not think that this proposition could successfully be disputed where the trustees in fact represented their cestuis que trust. But there are cases in which the trustees do not represent the interests of their beneficiaries. For instance, executors may mortgage part of their testator's estate to secure a sum

A which they have borrowed for their own purposes, and the lender may have notice of facts which show that the money is being borrowed for illegitimate purposes. It would be a startling result of r. 8 if a judgment obtained by the lender against the executors in a foreclosure action in such circumstances estopped the beneficiaries from establishing their rights. In such a case the protection afforded by the power to require the beneficiaries to be joined as defendants would be of little use, as the
B court would not know of the facts which rendered it proper for the beneficiaries to be joined, and that power cannot under the rule be exercised after the proceedings have come to an end. So, too, a trustee without power of sale might contract to sell part of the trust estate and submit to judgment in an action for specific performance. Could the purchaser, relying upon this judgment, accept the title of the trustee, and take a conveyance, and then successfully contend that by virtue of r. 8 the
C beneficiaries are estopped from asserting that the sale was a nullity? If, as in this case, the beneficiaries had not any knowledge that the action was pending, they could not avail themselves of the right to be added as parties under the provisions of this rule, and although the real question in an action brought by them was whether the act of the trustees was binding upon the estate, they might find themselves deprived of their property by an act of the trustees which was invalid against
D them without having had any opportunity of challenging it.

In my opinion, Ord. 16, r. 8, is directed to cases in which the trustee or executor who is sued does in fact represent the beneficiaries whose interests it is his duty to protect and was never intended to apply to a case in which the beneficiaries had solid ground for impeaching a transaction between a fraudulent trustee or executor and the plaintiff. In such a case the question is not merely one between the
E plaintiff and the estate; it is also one between the beneficiaries, on the one hand, and the trustees and the plaintiff, on the other hand. The plaintiff might no doubt have acquired rights against the trustees, but the real question would be whether the act of the trustees had conferred any rights upon the plaintiff against the property of the beneficiaries. In cases of this description the trustees do not represent their beneficiaries; their interests are divergent or opposed, and I cannot accept the view
F that in such cases where beneficiaries have not had an opportunity of intervening, they are precluded from establishing their rights by a judgment against the trustees in an action in which the trustees have not put in a defence, or have put in a defence which admitted the plaintiff's claim. In the foreclosure action in the present case, the company alleged that the sum in question had been raised by the
G executors for the purposes of their executorship, and that the mortgages were executed by Charles de Leeuw in due exercise of the powers conferred upon him as executor with the knowledge and consent of Mrs. de Leeuw, and, alternatively, that the two executors had been guilty of fraud. The issue raised was whether the executors had given to the company mortgages which bound the property to which the beneficiaries were entitled, and, if not, whether the executors were liable to the
H company in damages for fraud. The statement of claim shows that the company was aware that the mortgages might be open to challenge by the beneficiaries; and this is confirmed by the claim for a declaration that under and by virtue of the two mortgages the company was entitled to a mortgage on the leaseholds for securing the payment by the executors to the company of the amount remaining unpaid. As the real question in the action was whether the acts of the executors were valid as
I against the beneficiaries it could not, in my opinion, be determined in the absence of the beneficiaries so as to bind them. In my view, then, the present plaintiffs are not bound by the judgment in the foreclosure action and, if they are not, it is impossible to hold that they are estopped from alleging that the mortgages are invalid against them, that the money was borrowed by Charles de Leeuw for his own purposes, and that the mortgages were not executed by him in exercise of his powers as executor or with the knowledge or assent of his mother.

It was then contended that the company was a purchaser for value without notice.

It was said that the company was not aware that Charles de Leeuw was not the beneficial owner of the leases. I agree that the company's representatives believed that Charles de Leeuw was the Charles de Leeuw to whom the leases had been assigned, and that they did not know that the mortgagor was an executor of the assignee. But if these mortgages were forgeries and void as against everyone except the Charles de Leeuw who executed them, I fail to see how the question whether the company was purchaser for value without notice arises. A purchaser for value without notice is one to whom property has been conveyed without notice of the rights of other persons in it. But these deeds were altogether void except, by estoppel, against Charles de Leeuw. They did not pass any estate or interest which was capable of being protected by such a plea. But if the question had to be determined, the company, in my opinion, had notice of the fact that Charles de Leeuw was one of the executors and was not the assignee of the leases under the deed of 1907, or the beneficial owner of the property. The leases and the assignments bore on the face of them the statement that they had been registered in the Land Registry, and the company's representative could not have failed to see it. Any reasonable person who found that the property was on the Land Register would inspect the register and require that the land certificates should be handed to him before he accepted the title, and, in my opinion, would be guilty of very great negligence if he did not do so. If the land certificate had been produced or if the register had been inspected the real position of Charles de Leeuw would necessarily have been discovered. Whether the question of notice is determined by s. 3 of the Conveyancing Act, 1882, or by the law as expounded in the well-known judgment of WIGRAM, V.-C., in *Jones v. Smith* (5), the result appears to me to be the same. The company had actual notice that the property was registered in the Land Registry, and is bound by constructive notice of the facts which it would have ascertained if it had inspected the register, or, indeed, had taken the obvious course of requiring the land certificates to be handed to it.

There remains the contention that, as the company has been entered on the Land Register as proprietor with a possessory title in pursuance of the order for foreclosure absolute, it has a title under the Land Transfer Acts which the plaintiffs cannot impeach. This contention involves the proposition that, although the order by virtue of which the company was placed on the register is not effectual against the plaintiffs, their rights are defeated by the registration which has been effected in accordance with the order; the argument in support of this contention was based upon rules 140 and 142 of the Land Transfer Rules, 1903 and s. 35 of the Land Transfer Act, 1875. Rule 142 provides

"A transfer for valuable consideration of leasehold land registered with a possessory title shall, when registered, have the same effect as a transfer for valuable consideration of the same land registered with an absolute title, save that the transfer shall not affect or prejudice the enforcement of any right or interest (whether in respect of the lessor's title or otherwise) adverse to or in derogation of the title of the first registered proprietor and subsisting or capable of arising at the time of the registration of such proprietor."

Rule 140 provides

"A transfer for valuable consideration of leasehold land registered with an absolute title shall, when registered, have the effect given by s. 35 of the Act of 1875 to such a transfer of leasehold land registered with a declaration that the lessor had an absolute title to grant the lease under which the land is held,"

subject to an exception which for present purposes is immaterial. Section 35 of the Act of 1875 enacts that a transfer for valuable consideration of leasehold land registered with the declaration that the lessor had an absolute title to grant the lease shall when registered be deemed to vest in the transferee the possession of the land transferred for all the leasehold estate described in the registered lease, subject

A to certain covenants, liabilities, incumbrances, rights, and interests, which need not be mentioned, "but free from all other estates and interests whatsoever" [see now s. 23 of the Land Registration Act, 1925]. It is said that the order for foreclosure absolute is a transfer for valuable consideration, and that when it was registered it destroyed the plaintiffs' estate or interest by virtue of the final words of s. 35.

B Two cases were cited for the purpose of establishing that the order for foreclosure absolute was a transfer for valuable consideration: *Huntingdon v. I.R. Comrs.* (6); *Re Lovell and Collard's Contract* (7). By the former of these two cases it was determined that where a mortgagor in pursuance of an order for foreclosure absolute conveys all his estate or interest in the mortgage property to an equitable mortgagee, the conveyance is a "conveyance on sale" within the meaning of s. 54

C of the Stamp Act, 1891. In *Re Lovell and Collard's Contract* (7) it was held that an order for foreclosure absolute of a legal mortgage required to be stamped as a "conveyance on sale." Both these decisions turned upon the provisions of the Stamp Act, 1891. Section 54 of that Act declares that for the purposes of the Act the expression "conveyance on sale" includes every decree or order of any court

D whereby any estate or interest in any property upon the sale thereof is transferred to or vested in a purchaser. Section 57 provides that where any property is conveyed to any person in consideration of any debt due to him, whether being or constituting a charge upon the property or not, the debt is to be deemed the consideration in respect whereof the conveyance is chargeable with ad valorem duty. After the decision in *Huntington v. I.R. Comrs* (6), s. 6 of the Finance Act, 1898,

E "for the removal of doubts," declared that the definition of conveyance on sale in s. 54 of the Act of 1891 included a decree or order for foreclosure. It was by virtue of the provisions of these Acts that an order for foreclosure was for the purposes of the Acts a conveyance. But these decisions do not help me to determine what is "a transfer" within s. 35 of the Land Transfer Act, 1875, and the Land Transfer Rules. Sections 34 to 39 of the Act of 1875 deal with the "transfer of leasehold land," as s. 29 to 33 relate to the "transfer of freehold land." Section 34

F provides that every registered proprietor of leasehold land may transfer it in the prescribed manner and that the transfer shall be completed by registration of the transferee as proprietor, but that until registration the transferor is to be deemed the proprietor. The manner in which leasehold land may be transferred is prescribed by r. 138. This rule provides that a transfer of leasehold land shall be made by an instrument in form 35 in the first schedule to the rules. The form prescribed is as

G follows :

"In consideration of £ I., A. B., of &c., hereby transfer to C. D., of &c., the land comprised in the title above referred to for the residue of the term granted by the registered lease."

H Section 34 plainly contemplates an instrument by which the registered proprietor transfers his estate to another person. In my opinion, the words "a transfer" in s. 35 mean a transfer of the kind contemplated and authorised by s. 34, and that section does not cover the case of an order for foreclosure. This conclusion is, I think, supported by a reference to s. 39 [see now s. 24 of Act of 1925]. That section provides that on the transfer of any leasehold land under the Act, unless

I there be an entry on the register regulating such implication, there shall be implied on the part of the transferor a covenant with the transferee that, notwithstanding anything by such transferor done, omitted, or knowingly suffered, the rent, covenants, and conditions reserved and contained by and in the registered lease, and on the part of the lessee to be paid, performed and observed have been so paid, performed and observed up to the date of the transfer. The result of this section, if the defendants' contentions are correct, would be that the mortgagor would be liable to indemnify the mortgagee against all breaches of the covenants in the lease committed by the mortgagor before the order for foreclosure absolute.

The plaintiffs ask that the register may be rectified by inserting in it the names of the present trustees as the proprietors of the two houses in question. The power of the court to direct rectification of the register is contained in ss. 95 and 96 of the Land Transfer Act, 1875, and s. 7 (2) of the Land Transfer Act, 1897 [see now ss. 82-85 of Act of 1925]. Section 7 (2) of the Act of 1897 does not appear to apply to the present case. The words "a registered disposition" probably mean a registered transfer or a registered charge. If they do, then for reasons which I have already indicated they do not include an order for foreclosure. If they include an order for foreclosure, then it is impossible to say that the order for foreclosure in the present case is "absolutely void." But, in my opinion, ss. 95 and 96 confer upon the court ample power to direct rectification of the register in the present case: see *Capital and Counties Bank, Ltd. v. Rhodes* (8), [1903] 1 Ch. at p. 657. The opening words of these sections do not prevent the application of the sections to cases in which a person has been improperly registered as proprietor. I am, therefore, of opinion, that the plaintiffs are entitled to a declaration that the order for foreclosure is not binding upon them, and to an order that the plaintiffs John de Leeuw and Ernest Jakens, who are the present trustees of the will of the testator, be entered on the register as proprietors of the leasehold hereditaments known as No. 11, Kenmare Road, and No. 19, Brampton Road. The company may, under the foreclosure decree be entitled to the beneficial interests of Mrs. de Leeuw and Charles de Leeuw; but, if there is any question on this point, it cannot be determined in this action.

Solicitors: *F. W. Perkins; Matthew H. Hale.*

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

KELSEY v. KELSEY

[CHANCERY DIVISION (Eve, J.), February 14, 15, 16, 17, 21, 22, 23, 24, 28, March 1, 2, 1922]

[Reported 91 L.J.Ch. 382; 127 L.T. 86]

Executor—Powers—Powers before probate—Preservation and collection of testator's estate—Power to receive notice affecting bulk of estate and interests of beneficiaries—Death of partner—Option to surviving partner to carry on business—Notice to personal representatives of deceased party—Notice served before probate—Effect.

An executor, before he obtains probate, may do almost all the acts which are incidental to his office.

Where, therefore, two partners agreed that, upon the death of either, the surviving partner should have the option, to be notified in writing to the legal personal representatives of the deceased partner within three calendar months from his death, to succeed to the whole business, and on the death of one partner, before probate had been granted of his will, the surviving partner served within the specified time notice on the executors of the deceased partner of his wish to succeed,

Held: the executors had the powers necessary for the preservation and collection of the deceased partner's estate, and were competent to receive a notice such as that in question which affected the bulk of the estate and was of the greatest importance to beneficiaries,

A Notes. As to the capacity of executors or administrators before probate or grant see 16 HALSBURY'S LAWS (3rd Edn.) 132 et seq.; and for cases see 23 DIGEST (Repl.) 52 et seq.

Cases referred to :

B (1) *Re Stevens, Cooke v. Stevens*, [1897] 1 Ch. 422; 66 L.J.Ch. 155; 76 L.T. 18; 45 W.R. 284; affirmed [1898] 1 Ch. 162; 67 L.J.Ch. 118; 77 L.T. 508; 46 W.R. 177; 14 T.L.R. 111; 42 Sol. Jo. 113, C.A.; 23 Digest (Repl.) 45, 317.

(2) *Meyappa Chetty v. Supramanian Chetty*, [1916] 1 A.C. 603; L.R. 43 Ind. App. 113; 114 L.T. 1002; sub nom. *Chetty v. Chetty*, 85 L.J.P.C. 179, P.C.; 23 Digest (Repl.) 91, 911.

C Also referred to in argument :

Holland v. King (1848), 6 C.B. 727; 136 E.R. 1433; 36 Digest (Repl.) 536, 980.
Dibbins v. Dibbins, [1896] 2 Ch. 348; 65 L.J.Ch. 724; 75 L.T. 137; 44 W.R. 595; 40 Sol. Jo. 599; 36 Digest (Repl.) 547, 1077.

Vyse v. Foster (1874), L.R. 7 H.L. 318; 44 L.J.Ch. 37; 31 L.T. 177; 23 W.R. 355, H.L.; 36 Digest (Repl.) 559, 1178.

D *Saffron Walden Second Benefit Building Society v. Rayner* (1880), 14 Ch.D. 406; 49 L.J.Ch. 465; 43 L.T. 3; 28 WW.R. 681, C.A.; 42 Digest 75, 670.

Webb v. Adkins (1854), 14 C.B. 401; 2 C.L.R. 702; 23 L.J.C.P. 96; 22 L.T.O.S. 260; 2 W.R. 225; 139 E.R. 165; 23 Digest (Repl.) 57, 476.

Tarn v. Commercial Bank of Sydney (1884), 12 Q.B.D. 294; 50 L.T. 365; 32 W.R. 492; 23 Digest (Repl.) 57, 477.

E *Marker v. Marker* (1851), 9 Hare, 1; 20 L.J.Ch. 246; 17 L.T.O.S. 176; 15 Jur. 663; 68 E.R. 389; 21 Digest 180, 308.

Earl of Beauchamp v. Winn (1873), L.R. 6 H.L. 223; 22 W.R. 193, H.L.; 31 Digest (Repl.) 27, 1855.

Banque Jacques-Cartier v. Banque Epargne de la Cité et du District de Montreal (1887), 13 App. Cas. 111; 57 L.J.P.C. 42, P.C.; 21 Digest 334, 1268.

F *Cornwall v. Henson*, [1899] 2 Ch. 710; 68 L.J.Ch. 749; 81 L.T. 113; 48 W.R. 42; 15 T.L.R. 544; reversed [1900] 2 Ch. 298; 69 L.J.Ch. 581; 82 L.T. 735; 49 W.R. 42; 16 T.L.R. 422; 44 Sol. Jo. 514, C.A.; 40 Digest (Repl.) 193, 1560.

Hordern v. Hordern, [1910] A.C. 465; 80 L.J.P.C. 15; 102 L.T. 867; 26 T.L.R. 524, P.C.; 36 Digest (Repl.) 588, 1457.

G *Jackson v. Jackson* (1853), 1 Sm. & G. 184; 22 L.J.Ch. 873; 21 L.T.O.S. 98; 1 W.R. 264; 65 E.R. 80; 2 Digest (Repl.) 505, 514.

Richardson v. Smith (1870), 5 Ch. App. 648; 39 L.J.Ch. 877; 19 W.R. 81, L.C. & L.J.; 2 Digest (Repl.) 505, 516.

Vickers v. Vickers (1867), L.R. 4 Eq. 529; 36 L.J.Ch. 946; 2 Digest (Repl.) 429, 66.

H *Milnes v. Gery* (1807), 14 Ves. 400; 33 E.R. 574; 2 Digest (Repl.) 505, 513.

Dinham v. Bradford (1869), 5 Ch. App. 519, L.C.; 36 Digest (Repl.) 555, 1151.

Rhodes v. Bate (1866), 1 Ch. App. 252; 13 L.T. 778; 12 Jur. N.S. 178; 14 W.R. 292, L.J.J.; 42 Digest 78, 700.

Re Houghton, Hawley v. Blake, [1904] 1 Ch. 622; 73 L.J.Ch. 317; 90 L.T. 252; 52 W.R. 505; 20 T.L.R. 276; 48 Sol. Jo. 312; 24 Digest (Repl.) 641, 6323.

I *Wright v. Carter*, [1903] 1 Ch. 27; 72 L.J.Ch. 138; 87 L.T. 624; 51 W.R. 196; 19 T.L.R. 29 C.A.; 40 Digest (Repl.) 597, 1004.

Willis v. Barron, [1902] A.C. 271; 71 L.J.Ch. 609; 86 L.T. 805; 18 T.L.R. 602, H.L.; 42 Digest 78, 699.

Witness Action to set aside a deed of partnership.

By partnership articles dated Oct. 13, 1906, and made between Edward Maughan Kelsey (hereinafter called "the testator") of the one part, and the defendant,

Arthur Reginald Kelsey, of the other part, the testator and the defendant mutually covenanted and agreed that they would become and remain partners in the trade or business of brewers during their joint lives; that freehold, copyhold and leasehold assets of the business as on Jan. 11, 1906, were to be the property and assets of the firm; that the debts and liabilities of the business, as from such day were to be the debts and liabilities of the firm; and that the testator and the defendant should be each credited with one equal moiety of the net value of the assets, viz., £67,741 10s. 7d., the partners to be entitled to profits in equal shares. By cl. 29 it was provided that on the death of either partner the surviving partner should have the option, to be notified in writing to the personal representatives of the deceased partner within three calendar months from the date of his death, to succeed to the whole of the business upon the terms of cl. 31 thereof, provided always that any notice given, under cl. 29 might be given by notice in writing left at, or sent by registered post to, the last known residence, or last known place of abode in England, of the deceased partner during his life time, addressed "to the legal personal representatives of the late Mr. Kelsey," and any notice so addressed and left or sent should be valid and effectual whether at the time of giving, or leaving, or sending such notice the deceased partner had any legal personal representatives or not. By cl. 31 it was provided that, in the event of the surviving partner electing to succeed to the business, an account and valuation should be taken and made, in manner thereafter mentioned, of the partnership assets and liabilities, and the partner so succeeding to the business should pay to the representatives of the deceased the sum which on taking such account should appear to be the value of the deceased's share to bear interest at four per cent. to be paid by the succeeding partner, to the representatives of the deceased partner, and the whole partnership assets should, as from such death, become the sole property of the partner so succeeding to the business who should indemnify the representatives of the deceased partner, such conveyances and instruments, if any were necessary, to be executed by the representatives of the deceased partners as should be necessary for vesting the partnership assets in the succeeding partner and in the meantime the representatives of a deceased partner should stand possessed of the legal estate of any partnership property vested in them or him, either solely or jointly with any other person or persons in trust for the partner so succeeding, provided always that the account and valuation to be taken and made under that clause should be taken and made by two valuers one to be named by the representatives of the deceased partner and the other by the partner so succeeding to the business, or by an umpire to be named by such two valuers with a provision for payment by instalments if so desired.

By the joint operation of his will dated Oct. 13, 1917, and a codicil thereto of even date therewith the testator appointed the plaintiff Mrs. Beryl Fort Kelsey, his wife, and the defendant to be executors of his will and devised and bequeathed all his real and personal property (except property otherwise disposed of by his will or any codicil thereto) unto and to the use of the plaintiff, her heirs, executors, and assigns. The testator died on Oct. 2, 1919, and his will and codicil were proved on Mar. 16, 1920, by the plaintiff and the defendant. The testator's estate was solvent and sufficient for the payment of the whole of the £21,000 bequeathed as pecuniary legacies. On Oct. 8, 1919, the defendant informed Mr. Cripps, who had acted as solicitor in the preparation of the plaintiff's marriage settlement, the partnership articles, and the preparation of the testator's will, of his intention to purchase the share of the testator in the partnership assets and requested Mr. Cripps to prepare the formal notice of his intention to the representatives of the testator as required by the articles. On Oct. 11, 1919, the defendant saw the plaintiff, handed her a copy of the testator's will, orally informed her that there was a partnership deed which conferred an option upon a surviving

A partner to buy the share of a deceased partner, and that he intended to exercise that option. A notice in writing, dated Nov. 10, 1919, and addressed to the legal personal representatives of the testator, whereby the defendant was expressed to give notice that he elected to succeed to the whole of the partnership business upon the terms of cl. 31 of the partnership articles, was drawn up in the office of the defendant's solicitors, Messrs. W. C. Cripps, Son, and Harries. On Nov. 10, 1919 the defendant signed and handed to Mr. Cripps at his office the notice addressed to the legal personal representatives of E. M. Kelsey deceased stating that in accordance with cl. 29 of the articles he elected to succeed to the whole of the partnership business upon the terms of cl. 31 of the articles.

Mr. Cripps alleged that the notice was handed to the plaintiff at an interview on Nov. 17, 1919. By an agreement under seal (hereinafter called "the 1919 agreement"), dated Nov. 17, 1919 and expressed to be made between the plaintiff and the defendant described as "executors of the will of E. M. Kelsey deceased," of the first part, the plaintiff, described as "the residuary devisee and legatee under the will," of the second part, and Reginald Kelsey, of the third part (and executed by the plaintiff in the circumstances hereinafter mentioned) after a recital that on Nov. 10 the defendant by notice in writing under his hand had duly exercised the option, it was expressed to be arranged and agreed, for the saving of expense and for other good and sufficient reasons that the valuation which ought, under cl. 31 of the 1906 partnership articles, to be made should as between the personal representatives of the testator and defendant, be made by a Mr. Motion, that the decision of accountants therein mentioned as to any matter of account arising on taking the account should be final and the decision of Mr. Motion as to any matter of valuation arising on the making of the valuation should be final, and that the mode prescribed by the agreement for the taking of the account and the making of a valuation of partnership assets and liabilities should be substituted for the mode prescribed in cl. 31 of the partnership articles which articles should be modified accordingly. In the opinion of the learned judge, Mr. Cripps went to the interview at Cambridge on Nov. 17, 1919 at which the 1919 agreement was executed by the plaintiff with full knowledge of the plaintiff's disabilities in knowing nothing more about the business to be discussed thereat, and with full knowledge of the responsibilities which the position imposed upon him. On Jan. 7, 1920, Mrs. Kelsey called at Mr. Cripps' office, saw Mr. Cripps, and asked him for the document by which the defendant had exercised his option. She, at that time was and, from Dec. 1, 1919, had been advised by Mr. Armstrong, a friend of the plaintiff, who was a brewer. The learned judge accepted substantially the evidence given by Mr. Cripps, and concluded that Mrs. Kelsey knew and appreciated the document which she was executing, and that it was only when she had that full knowledge that Mr. Cripps authorised and allowed her to execute it. In his Lordship's opinion it was impossible, on the evidence before him, to come to any other conclusion than that the 1919 agreement was executed by the plaintiff with full knowledge of its contents and effect and without any undue pressure. With regard to a point pleaded that the deed, being in effect an agreement between the plaintiff as residuary legatee and the defendant as the purchaser, was executed by the plaintiff without the independent advice necessary in the circumstances of a fiduciary relationship existing between them, the learned judge did not regard the transaction as impressed with a character which demanded that the beneficiary should have wholly independent advice. It was doubtful whether the employment of two valuers and an umpire was advantageous, and expense to both parties was saved by the employment of a single valuer, and the learned judge stated that he could not see that this was a contract between trustee and beneficiary into which the doctrine of fiduciary relationship and a necessity for independent advice ever entered. If this was not so, the defendant did get competent independent advice from Mr. Cripps with which the court thoroughly agreed.

On Dec. 21, 1920, the plaintiff began the present action against the defendant. A
By it she sought to set aside the agreement of Nov. 17, 1919, and claimed further or
other relief. The defendant, by a counterclaim, asked for declarations that the
agreement was valid and binding on the plaintiff and that the plaintiff had been,
since Nov. 17, 1919, a trustee for the defendant of the legal estate in the assets of
the partnership vested in her, as executrix of the will of Edward M. Kelsey.

Upjohn, K.C., Edward Clayton, K.C. and J. Norman Daynes for the plaintiff. B
Maugham, K.C. (Gover, K.C. and Dighton Pollock with him) for the defendant.

EVE, J.—By this action the plaintiff seeks to have it declared that a deed
executed by her on Nov. 17, 1919 is not binding on her and ought to be delivered
up to be cancelled. The claim for this relief is founded upon three grounds—the C
first that the deed was executed by the plaintiff under an entire misapprehension of
its contents and effect; the second, that it was executed without any proper or
independent advice; and the third, that it was executed under considerable
pressure from Mr. Cripps. At the Bar it has further been argued that the deed is
invalid and inoperative by reason of the non-existence at the date of its execution of
any state of affairs to which it could apply. This last contention, if established, D
would obviate any further inquiry into the facts or law of the case, but, having
regard to the elaborate manner in which both have been discussed, it is impossible
for me to dispose of the action by adjudicating upon this one point only, and I
propose, therefore, to leave that point for the present and to state first the facts
as I find them to have been established at the hearing.

The testator died on Oct. 2, 1919. His will and the deed of partnership between E
him and the defendant were in the possession of Mr. Cripps, who, for many years
prior to his death, had acted as his solicitor and as solicitor for the partnership
firm, and to a lesser degree, for the defendant. By the will the plaintiff and the
defendant were appointed executors and subject to the payment of some legacies the
residuary estate was given to the plaintiff. It is clear from the evidence and Mr.
Cripps's entries that the defendant learned the provisions of his brother's will on F
Oct. 3, and thenceforth appreciated that the individual primarily, if not entirely,
interested under the will was his sister-in-law, the plaintiff. Within a day or two
of the death the defendant intimated to Mr. Cripps his intention of exercising the
option of acquiring the testator's interest in the partnership business, and on
Oct. 8, by which time Mr. Cripps had perused the partnership deed and made him-
self familiar with the essential provisions and the necessary results which would G
follow from the defendant's election to exercise the option, himself suggested that
the valuation thereby rendered necessary under cl. 31 of the articles might be made
to the advantage both of the plaintiff and the defendant by a single valuer instead of
by two valuers and their umpire, as was provided by the articles. The defendant
fell in with the proposal, and on the same day Mr. Collins, either the sole member H
of, or the senior partner in, the firm of Collins, Tootell & Co., who for many years
had acted as auditors and accountants for the partnership, was fully instructed as to
the valuation that would be required and was asked to name his fee for making it.
At the same time, as appears from the entry, it was made clear both to the
defendant and to Mr. Collins that nothing could be done towards modifying the
requirements of the articles without the assent of the plaintiff. In this state of I
affairs an interview took place between the defendant and the plaintiff on Oct. 11.
By that time, according to her own evidence, the plaintiff had already been
supplied by the defendant with a copy of her husband's will. The defendant is
under the impression that he took the copy with him to that interview, but that is
not very material because it is only one of the minor incidents at the interview upon
which the evidence of the plaintiff and her brother-in-law are directly at variance.
According to the plaintiff, no business whatever was discussed at that interview;
the defendant not only did not discuss, but was not desirous of discussing,

A business with her; all he did was to refer her to Mr. Cripps. [His LORDSHIP then considered the evidence, the signing by the defendant of the option, and the circumstances attending the execution of the deed of Nov. 17, 1919, arriving at the conclusion that the deed was executed by the plaintiff with full knowledge of its contents and effect, and that without any undue pressure and with sufficient independent advice, although Mr. Cripps might, perhaps, have been better advised
B had he drawn the plaintiffs' attention to the nature of the proposed deed before his interview with her on Nov. 17, and continued:]

The next point is one which counsel for the plaintiff rightly said goes to the root of the whole matter. It is said that this deed has been executed and this valuation made on a basis which never existed. The argument shortly stated is that the option
C was never exercised. Under the partnership deed the defendant in the events which had happened had the option of acquiring the testator's interest in the business upon the conditions contained in cl. 31 of the deed. One of those conditions required a notification of the exercise of the option, to be made in writing to the personal representatives of the deceased within three calendar months of his death. The notification made by the defendant is contained in the document of Nov. 10. It is
D not suggested that the document is not in form a sufficient notification, and it was made within the time limit, but it is argued that it never was in fact served on the personal representatives of the deceased, first because there were no legal personal representatives constituted within the three months, and, secondly, if there were legal personal representatives, because they were never in fact served. When
E reliance in the case of the first alternative is placed on the proviso with which cl. 29 concludes it is asserted that the terms of the proviso were not complied with. The plaintiff and defendant were, as I have already stated, the executors of the deceased. In November 1919, they had not, and, having regard to the nature of the estate, they could not have, obtained probate, but as executors named in his will they undoubtedly had wide powers of dealing with the testator's estate. I will read in a
F moment an authoritative statement of what the nature of those powers was, but putting it generally, they were powers which would make for the protection, the collection, and the preservation of the testator's estate. I cannot, myself, conceive any state of circumstances in which it was more necessary in the interest of the estate to have an early decision upon this matter of the defendant's option. The subject-matter was a commercial partnership with assets necessarily varying from
G day to day, its prosperity dependent upon a variety of circumstances over which nobody had any real control and presenting a position where it was almost essential that at the earliest possible date the executors should ascertain what their position was to be—were they to continue to be interested in the business or were they to be simply vendors of the testator's interest therein. But it is
H said these persons were not personal representatives competent to receive the notice. Is that so? Counsel for the plaintiff has argued that the expression "personal representatives" and "legal personal representatives" have but one proper meaning, and that is persons to whom probate or letters of administration have been granted, and that until a grant has been made no one can properly be said to be a personal or a legal personal representative. I do not agree.
I I think I have authority that the contrary is the case. But, after all, what is the object of cl. 29? It is not designed to impose upon the purchasing partner a fantastic or fanciful course of procedure; its whole object is to bring home to the persons to whom is entrusted the duty of administering the testator's estate notice within a limited time of what the surviving partner's intentions are. Has the partnership to be wound-up? Has it to be determined? Or can the executor act upon the footing that he will purchase the testator's interest therein?

In *Re Stevens, Cooke v. Stevens* (1) NORTH, J. ([1897] 1 Ch. at p. 429) reads in

his judgment a passage from WILLIAMS ON EXECUTORS (9th Edn.) at p. 429, which I think covers the case entirely. It is as follows :

"The executor, before he proves the will, may do almost all the acts which are incident to his office except only some of those which relate to suits. Thus he may seize and take into his hands any of the testator's effects, and he may enter peaceably into the house of the heir for that purpose and to take specialities and other securities for the debts due to the deceased. He may pay, or take releases of, debts owing from the estate; and he may receive or release debts which are owing to it; and distrain for rent due to the testator. And although he should die, after any of these acts so done, without proving the will, yet do these acts so done stand firm and good."

I cannot bring myself to hold, in face of such an authoritative statement of the law as this, that these executors were incompetent to receive a notice affecting the bulk of this testator's estate and a notice the reception of which was of the greatest importance not only for the administration of the estate but for determining the whole future of the beneficiary. Moreover, in *Chetty v. Chetty* (2) LORD PARKER would seem to have decided that in the absence of anything confining the expression "legal representative" to a person to whom a grant has actually been made, an executor is a legal representative: it is true he was there dealing with the construction of a particular ordinance, but the preceding paragraph of his speech indicates that he is treating of the position of an executor generally, and is discussing his competency as such prior to obtaining the grant of probate.

In my opinion, the executors in this case were personal representatives competent to receive the notice, but if they were not, and if, in fact, there were no legal personal representatives within the meaning of the first part of cl. 29, then the question arises whether the notice was properly given in accordance with the proviso with which the clause concludes. The notice was properly addressed and subject to the question whether it was or was not served in accordance with that proviso it cannot be impeached.

That brings me to the consideration of what took place with regard to this document. I think an unnecessary amount of time has been consumed in inquiring when this notice was signed and in whose presence and into details of that sort not really material. Presumably it was signed on Nov. 10, and, being a document intimately connected with the matter of this testator's estate it naturally found its way to Mr. Cripps. Mr. Cripps is, and always has been, of opinion that the option was exercised on the receipt by him of this document, and that, subject to his bringing it to the notice of the plaintiff, the notification to him as acting for the executors was a sufficient notification, and in the deed which was ultimately executed on Nov. 17, he inserted a recital treating the option as having been exercised on the day of its date. In one sense I think it was, for I doubt very much whether the defendant, after handing that document to Mr. Cripps, was in a position to withdraw it. But it does not seem to me material or necessary to consider on which of the particular days the election to exercise the option was in fact notified to the executors, because as I have already said, I accept Mr. Cripps' evidence of what took place at the interview on Nov. 17 with the plaintiff. I have not the slightest doubt that the existence of this notice was then brought to her attention that it was offered to her, and that she, as 999 women out of 1,000 would have done, merely said: "It is all right, thank you," and he left it on the table. I hold that notice was given to the executors and if it were necessary—in my opinion, it is not necessary—I should be prepared to hold that it was left at the residence of the testator within the meaning of the proviso in the second part of cl. 29. It was never contemplated that it would be left at the residence for all eternity; it would probably remain there for a very short time, because the first thing any legal representative would do on receiving such a notice would be to hand it to his legal advisor. In my opinion, there was a good and sufficient notice given

A to parties able to receive it, and there is no substance in the contention that no state of circumstances had been brought into existence calling for the execution of the deed.

Having regard to the conclusions at which I have arrived it is not open to the plaintiff to repudiate the valuation merely because it is less than she anticipated or even because it is inadequate, but as the matter has been gone into in much detail

B I feel bound to say that I am not prepared to find as a fact, on the evidence before me, that the valuation was in any way inaccurate. The result is that the action fails and will be dismissed with costs. [His Lordship dealt with the counterclaim, making an order to be expressed as follows: And the court being of opinion that the agreement of Nov. 17, 1919 is still capable of being carried into effect, declare that the same is valid and binding upon the plaintiff and that the plaintiff must pay the costs of the counterclaim.]

Solicitors: *Merrimans*, for *H. C. Squires*, Cambridge; *Sharpe, Pritchard & Co.*, for *W. C. Cripps, Son & Harries*, Tunbridge Wells.

[Reported by W. P. PAIN, Esq., Barrister-at-Law.]

D

E

AMBATIELOS v. ANTON JURGENS MARGARINE WORKS

[HOUSE OF LORDS (Viscount Cave, L.C., Viscount Finlay, Lord Atkinson and Lord Sumner), November 27, 28, 1922]

[Reported [1923] A.C. 175; 92 L.J.K.B. 306; 128 L.T. 417; 39 T.L.R. 106; 67 Sol. Jo. 167; 16 Asp. M.L.C. 28; 28 Com. Cas. 285]

F

Shipping—Demurrage—Exception clause—Detention of vessel by "cause over which charterers have no control"—Strike of dock labourers—Ejusdem generis rule.

G

A charterparty contained the following clause: "Should the vessel be detained by causes over which the charterers have no control, viz., quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo has been taken over, etc., no demurrage is to be charged and lay-days not to count." The chartered vessel was detained for a number of days beyond the lay-days by a strike of dock labourers at the port of discharge, a cause which, it was found, was one over which the charterers had no control. On a claim by the shipowner for demurrage,

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Held: (LORD SUMNER dissenting): the whole clause was governed by the initial general words and must be read as referring to all causes over which the charterers had no control—in particular, to the five causes specified, but also to all other cases which fell within the general words, and, therefore, the shipowner was not entitled to succeed.

I

Per VISCOUNT CAVE, L.C., VISCOUNT FINLAY and LORD ATKINSON: In construing the word "etcetera" in the clause the ejusdem generis rule did not apply.

Decision of Court of Appeal, [1922] 2 K.B. 185, affirmed.

Notes. Referred to: *Canadian National Rys. v. Canada S.S. Lines, Ltd.*, [1945] A.C. 204.

As to exceptions in a charterparty relieving the charterer see 30 HALSBURY'S LAWS (2nd Edn.) 352 et seq., and as to the ejusdem generis rule see *ibid.*, 3rd Edn., vol. 11, pp. 430, 431. For cases see 17 DIGEST (Repl.) 282–285 and 41 DIGEST 306–308, 558 et seq.

Cases referred to :

- (1) *Stukeley v. Butler* (1614), Hob. 168; 80 E.R. 316; 17 Digest (Repl.) 306, 1130.
- (2) *Elderslie Steamship Co. v. Borthwick*, [1905] A.C. 93; 74 L.J.K.B. 338; 92 L.T. 274; 53 W.R. 401; 21 T.L.R. 277; 10 Asp. M.L.C. 24; 10 Com. Cas. 109, H.L.; 41 Digest 446, 2800.

Also referred to in argument :

William Alexander & Sons v. Akt. Dampskibet Hansa, [1920] A.C. 88; 88 L.J.P.C. 182; 122 L.T. 1; 35 T.L.R. 709; 63 Sol. Jo. 788; 14 Asp. M.L.C. 493; 25 Com. Cas. 13, H.L.; 41 Digest 540, 3668.

Northfield Steamship Co. v. Compagnie L'Union Des Gaz, [1912] 1 K.B. 434; 81 L.J.K.B. 281; 105 L.T. 853; 28 T.L.R. 148; 17 Com. Cas. 74; 12 Asp. M.L.C. 87, C.A.; 41 Digest 570, 3944.

Larsen v. Syvester & Co., [1908] A.C. 295; 77 L.J.K.B. 993; 99 L.T. 94; 24 T.L.R. 640; 11 Asp. M.L.C. 78; 13 Com. Cas. 328, H.L.; 41 Digest 306, 1682.

Re Allison & Co. and Richards (1904), 20 T.L.R. 584, C.A.; 41 Digest 306, 1681.

S.S. Knutsford, Ltd. v. Tillmanns & Co., [1908] A.C. 406; 77 L.J.K.B. 977; 99 L.T. 399; 24 T.L.R. 786; 11 Asp. M.L.C. 105; sub nom. *Tillmanns v. S.S. Knutsford*, 13 Com. Cas. 334, H.L.; 41 Digest 522, 3504.

Price & Co. v. Union Lighterage Co., [1904] 1 K.B. 412; 73 L.J.K.B. 222; 89 L.T. 731; 52 W.R. 325; 20 T.L.R. 177; 48 Sol. Jo. 207; 9 Com. Cas. 120, C.A.; 41 Digest 426, 2677.

Postlethwaite v. Freeland (1880), 5 App. Cas. 599; 49 L.J.Q.B. 630; 42 L.T. 845; 28 W.R. 833; 4 Asp. M.L.C. 302, H.L.; 41 Digest 539, 3666.

Price v. Griffith (1851), 1 De G.M. & G. 80; 21 L.J.Ch. 78; 18 L.T.O.S. 190; 15 Jur. 1093; 42 E.R. 482, L.J.J.; 30 Digest (Repl.) 425, 688.

Parker v. Marchant (1842), 1 Y. & C. Ch. Cas. 290; 11 L.J.Ch. 223; 6 Jur. 292; 62 E.R. 893; 44 Digest 594, 4188.

Burton & Co. v. English & Co. (1883), 12 Q.B.D. 218; 53 L.J.Q.B. 133; 49 L.T. 768; 32 W.R. 655; 5 Asp. M.L.C. 187, C.A.; 41 Digest 596, 4218.

Thorman v. Dowgate Steamship Co., Ltd., [1910] 1 K.B. 410; 79 L.J.K.B. 287; 102 L.T. 242; 11 Asp. M.L.C. 481; 15 Com. Cas. 67; 17 Digest (Repl.) 282, 894.

Re Richardsons and M. Samuel & Co., [1898] 1 Q.B. 261; 66 L.J.Q.B. 868; 77 L.T. 479; 14 T.L.R. 5; 8 Asp. M.L.C. 330; 3 Com. Cas. 79, C.A.; 41 Digest 306, 1680.

Glynn v. Margetson & Co., [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; 9 T.L.R. 437; 7 Asp. M.L.C. 366; 1 R. 193, H.L.; 41 Digest 311, 1715.

Thames and Mersey Marine Insurance Co. v. Hamilton, Frazer & Co. (1887), 12 App. Cas. 484; 56 L.J.Q.B. 626; 57 L.T. 695; 36 W.R. 337; 3 T.L.R. 764; 6 Asp. M.L.C. 200, H.L.; 17 Digest (Repl.) 267, 708.

Cullen v. Butler (1816), 5 M. & S. 461; 105 E.R. 119; 29 Digest 224, 1815.

Nelson Line (Liverpool), Ltd. v. James Nelson & Sons, Ltd., [1908] A.C. 16; 77 L.J.K.B. 82; 97 L.T. 812; 24 T.L.R. 114; 52 Sol. Jo. 170; 10 Asp. M.L.C. 581; 13 Com. Cas. 104, H.L.; 41 Digest 474, 3056.

Timewell v. Perkins (1740), 2 Atk. 102; 26 E.R. 464; 44 Digest 591, 4153.

S.S. Magnhild v. McIntyre Bros & Co., [1921] 2 K.B. 97; 90 L.J.K.B. 527; 124 L.T. 771; 37 T.L.R. 413; 15 Asp. M.L.C. 230; 26 Com. Cas. 185, C.A.; 41 Digest 307, 1691.

Akt. Frank v. Namagua Copper Co., Ltd. (1920), 90 L.J.K.B. 36; 123 L.T. 523; 36 T.L.R. 438; 15 Asp. M.L.C. 20; 25 Com. Cas. 212; 41 Digest 307, 1690.

Rosin & Turpentine Import Co. v. Jacob & Sons (1909), 101 L.T. 56; 25 T.L.R. 687; 11 Asp. M.L.C. 260; 14 Com. Cas. 247, C.A.; affirmed (1910), 102

- A** L.T. 81; 26 T.L.R. 259; 54 Sol. Jo. 268; 11 Asp. M.L.C. 363; 15 Com. Cas. 111, H.L.; 41 Digest 426, 2679.
- Anderson v. Anderson*, [1895] 1 Q.B. 749; 64 L.J.Q.B. 457; 72 L.T. 313; 43 W.R. 322; 11 T.L.R. 253; 14 R. 367, C.A.; 17 Digest (Repl.) 283, 905.
- Cambridge v. Rous* (1802), 8 Ves. 12; 32 E.R. 254; 44 Digest 417, 2484.
- Sandiman v. Breach* (1827), 7 B. & C. 96; 9 Dow. & Ry. K.B. 796; 5 L.J.O.S.K.B. 298; 108 E.R. 661; 42 Digest 938, 100.
- B** *R. v. Cleworth* (1864), 4 B. & S. 927; 3 New Rep. 422; 9 L.T. 682; 28 J.P. 261; 122 E.R. 707; sub nom. *R. v. Silvester*, 33 L.J.M.C. 79; 10 Jur. N.S. 360; sub nom. *Cleworth v. Leigh Justices*, 12 W.R. 375; 42 Digest 938, 103.
- Gover v. Davis* (1860), 29 Beav. 222; 30 L.J.Ch. 505; 7 Jur. N.S. 399; 9 W.R. 87; 54 E.R. 612; 44 Digest 756, 6145.
- C** *Dean v. Gibson* (1867), L.R. 3 Eq. 713; 36 L.J.Ch. 657; 15 W.R. 809; 44 Digest 594, 4181.
- Mudie & Co. v. Strick* (1909), 100 L.T. 701; 25 T.L.R. 453; 53 Sol. Jo. 400; 11 Asp. M.L.C. 235; 14 Com. Cas. 135; 41 Digest 306, 1684.
- Hulthen v. Stewart & Co.*, [1903] A.C. 389; 72 L.J.K.B. 917; 88 L.T. 702; 19 T.L.R. 513; 9 Asp. M.L.C. 403; 8 Com. Cas. 297, H.L.; 41 Digest 547, 3746.
- D** *Herman v. Morris* (1919), 35 T.L.R. 574, C.A.; 17 Digest (Repl.) 284, 914.

Appeal from an order of the Court of Appeal on a Case Stated by an arbitrator.

By two charterparties by which the steamships, *Ambatielos* and *Penagis*, of both of which the appellant was the owner, were chartered to carry cargoes from ports in the East to Amsterdam or Rotterdam, it was provided in the first case that the cargo should be loaded and discharged in fourteen weather-working days, reversible, and in the second in twenty weather-working days, reversible. Both charters contained the following clause :

E "Should the vessel be detained by causes over which the charterers have no control; viz., quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc., no demurrage is to be charged and lay-days not to count."

F On arrival at Rotterdam both ships were detained, for forty and a half and forty-six days respectively, beyond the lay-days owing to a strike of dock labourers which, the arbitrator found, was a cause over which the charterers had no control. The Court of Appeal held, reversing the decision of McCARDIE, J., that the governing words of the exception clause in the charter were "causes over which the charterers have no control," the particular causes mentioned being merely instances to which, as they followed the general words, the ejusdem generis rule ought not to be applied. The shipowner appealed.

G *Dunlop, K.C.* and *S. L. Porter* for the appellant.

H *Sir John Simon, K.C.* and *Jowitt, K.C.* for the respondents.

VISCOUNT CAVE, L.C.—I have come to the conclusion that the decision of the Court of Appeal is right. The case turns upon the meaning of a clause which is contained in each of two charterparties. By each of these charterparties the respondents chartered from the appellant a vessel to carry a cargo from the East to Rotterdam. Each charterparty stipulated that the cargo should be loaded and discharged in a fixed number of weather-working days, reversible, and provided for demurrage, and each document contained this clause upon which the whole matter turns,

I "Should the vessel be detained by causes over which the charterers have no control, viz., quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc., no demurrage is to be charged and lay-days not to count."

The discharge of each vessel was delayed by a general strike of dock labourers at Rotterdam. The matter was referred to arbitration, and the finding of the umpire is :

"I find as a fact that the sole cause of the detention of each steamer as aforesaid was a general strike of dock labourers at Rotterdam which prevailed from Feb. 14 to April 28, 1920. I further find as a fact that the said strike was a cause over which the charterers had no control, and that but for the said strike the said steamships could and would have been discharged within their lay-days."

On that the question arose whether the charterers were liable for demurrage and damages for detention, which in this case would have amounted to a very large sum, exceeding £50,000, or whether they were excused by the clause which I have read. The umpire decided against the charterers and stated a Case for the opinion of the court. McCARDIE, J., agreed with the umpire, and his decision was reversed by the Court of Appeal who gave judgment for the charterers. Hence the present appeal.

It is desirable first to look at the frame of the clause in question. It begins with a general hypothesis, "Should the vessel be detained by causes over which the charterers have no control." There is no question that, if the condition stopped there, this case would fall within it, for it is found that the general strike which detained the vessel in each case was something over which the charterers had no control, but these words are followed by the other words which I have cited beginning at "viz." and ending at "etc.," and the question is whether that addition is sufficient to cut down and limit the preceding general words and to confine the effect of the clause to the particular cases stated in the added words, and to cases of a similar kind. In other words, are the added words defining and limiting words, or are they simply added in order to provide examples of what is meant by the general words, but not to cut them down? I find myself very much in agreement with what was said by the learned Master of the Rolls, which was repeated in the argument of Sir John Simon here today. It is not right to consider first the effect of the word "videlicet" by itself, and then to consider whether that effect is altered by the later occurrence of the expression "etc." One must consider the two together, and, if one does that, I think the effect of what I have called the added words is that the draftsman shows an intention, first, of giving examples of what the general words mean and cover, and, secondly, and this is equally important, of showing to those who read the clause by the use of the word "etc." that those examples are not intended to cover the whole ground, that they are not intended to be exhaustive, but that the general expression is still to include all the other cases which fall within its general terms. In other words, the clause must be read as referring to all causes over which the charterers have no control—in particular to the five causes specified—but also to all other cases which fall within the general words, and that is the reading which for myself I should give to the clause.

Certain arguments were put forward very forcibly on behalf of the appellant. First it was said that the dominant purpose of the charterparty is that there shall be no delay, that the vessel shall be loaded and unloaded within the time specified, and that you must not cut down the words which have that effect by this clause of exception. I cannot agree with that. The very purpose of the exception is to limit and cut down the earlier provisions of the charterparty, and all one has to see is whether in fact they have that effect. Then it is said that the added words, as I have called them, are limiting and not explanatory words. I have dealt with that. Further it is said that, assuming that they be such limiting words, they cut down the clause to the five cases specified with other cases of a similar kind, and we have to say whether for that purpose the well-known rule of ejusdem generis applies. I know of no authority for applying that rule to a

A case of this kind, a case where, to begin with, the whole clause is governed by the initial general words; secondly, where the expression to be so construed is the expression "etc."; thirdly, where, as in this case, there is no genus to which anyone can point which comprises all the five cases specified. With great respect to the learned judge who heard the case I cannot think that he was successful in finding such a genus. I, therefore, come back to the general proposition, and I am of opinion that the exception applies in all cases where the ship is detained by causes over which the charterers have no control, and, accordingly, applies to the present case.

I do not refer to authorities, many of which have been cited. Perhaps the most instructive one of all is *Stukely v. Butler* (1) where some very valuable observations were made by the learned judge, but there is no case in the whole list which is anything like this case and can be said to govern it. For these reasons I think this appeal fails and I move your Lordships that it be dismissed.

VISCOUNT FINLAY.—I am also of opinion that this appeal fails. The facts are very concisely stated and all that is material for the present purpose is to be found in the appendix to the Case Stated where the award is set out.

"The sole cause of the detention of each steamer as aforesaid was a general strike of dock labourers at Rotterdam which prevailed from Feb. 14 to April 28, 1920. I further find as a fact that the said strike was a cause over which the charterers had no control, and that but for the said strike the said steamships could and would have been discharged within their lay-days."

The umpire further says this :

"The shipowner further claimed that notwithstanding the strike the charterers could by reasonable diligence have discharged the steamers earlier, but on this issue which is an issue of fact, I find in favour of the charterers."

So it is found on the award that the strike was a matter over which the charterers had no control and that the delay which took place was entirely unavoidable and due to the strike. Of course there might be circumstances, although there were a strike, which would not necessarily entail delay in the loading. Labour might be got from the crew itself, or elsewhere, or some not very extravagant payment might have induced the men who were on strike to return to work. We are not concerned with any such case as that because it is quite clear on the findings of the umpire that the delay was unavoidable and nothing the charterers could do would have avoided the consequences.

Now we come to consider whether, in these circumstances, demurrage is payable. The amount is very considerable, but the determination of this large amount of money depends upon the construction to be put upon a very few lines in the charterparty. The provision as to the time for loading and discharging is as follows : "The cargo to be loaded and discharged in twenty weather-working days, reversible." Something has been said about the history of this charterparty which is in a printed form. It was a great deal altered, words in print were struck out, words in writing were inserted, and it was said that tracing the history of these alterations made it improbable that the construction for which the respondents contend should be the true one. All we are concerned with is the charterparty as it finally stands. We must construe the clause with which we have to deal according to the form which the charterparty ultimately assumed. All the particulars we have had may be very interesting as matters of history. I do not think they really affect the construction which ought to be put upon the charterparty now that we have got it.

After that clause, which makes it clear that twenty weather-working days are to be allowed for loading and discharging, we have the clause upon which the present dispute arises,

"Should the vessel be detained by causes over which the charterers have no control, viz., quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc., no demurrage to be charged and lay-days not to count."

To my mind, the frame of that clause is this. The initial lines lay down a general principle and state the ground of exemption—that is, if the detention arises from causes over which the charterers have no control, no demurrage is to be charged and the lay-days are not to count. But then, after the initial words to which I have referred as laying down the general principle, one finds this: "viz., quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc.," and it is said that these words show that you cannot deal with the matter merely on the general principle, but that the operation of the general principle, which was contained in the initial lines, taken by themselves, is controlled by the particulars which follow, so that the result will not be attained unless the particular cause, which here was a strike, can be found in the particulars enumerated, or is in some way, not very clearly defined, characterised by some feature in common with the things which are defined. The only common feature that I can find here is that all these things are things which detain the vessel and constitute the causes over which the charterer has no control. I do not think that the attempt made by the learned judge, McCARDIE, J., to establish common features apart from that general principle is successful. I refer to the passage in his judgment where he says:

"Applying that test to these words it is, I think, reasonably plain that there is a common or dominant feature. Quarantine is an act of a local authority, ice is a force of nature, hurricane is a force of nature, blockade is an act of authority, and the clearing of the steamer is obviously, I think, an act of the local authority in respect to points of clearance. Therefore, you do get a dominant feature, in the sense of overriding powers, whether by nature or local authority, whereas a strike in its essence is really and substantially different, because there is no question of authority imposed upon the ship, the shipowner, or the charterer. There is simply a voluntary abstention from work by a number of men which happens to interfere with the loading or causes a cessation so far as the work of loading is concerned. In its essence the thing is different from the exertion of a local authority's powers, and, therefore, I think that applying, if it can be applied here, the ejusdem generis rule, a strike would not fall within the genus or species, or whatever it may be, which is indicated by the preceding words."

I am not able to assent to the reasoning in that passage, or to conclusion which the learned judge draws from what he says.

It appears to me that the common feature which these various things enumerated have is that they constitute causes beyond the control of the charterers, and that such a cause caused the detention of the vessel. That seems to me the real, substantial feature in common, and if there is a class it is the class of things which will have the effect upon the vessel of detaining it without the charterers' being in fault. I confess I am quite unable to appreciate any theory based on the view that a hurricane is due to a law of nature, quarantine to the act of the local authority, and the clearing of the steamer to the local law of the port about loading. I do not think that is the true way of looking at it at all. It seems to me that the common feature is the detention of the vessel without fault on the part of the charterers. Looking more narrowly at the words which follow the statement of the general and governing principle, they are these: "viz., quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc." I go so far with the appellant in his argument that I think that the word "videlicet," in the correct sense of the word, does not denote and is not equivalent to "for instance" or "for example." I think "videlicet" is

A correctly rendered in English by "to wit" or "that is to say." That is the force of the word standing by itself, but then "videlicet" does not stand by itself here. Although these lines begin with "videlicet" they end with the word "etc." and it appears to me that the effect of these lines, taken as a whole, is to provide that if there is any cause beyond the control of the charterer which occasions delay the charterer is not to be liable. One cannot treat a charterparty as a work to which literary skill is an essential. It is obvious to say: Why do they set to work in such a circuitous way? They begin by stating very clearly the general principle. Then they propose to make their meaning clear by giving particular cases. They put them in, and then, if one may conjecture, they think: "But after all there may be other cases, and so we put in 'etc.'" What are the other cases?" "Etc." is absolutely different from "et alia." That subject was discussed in McCARDIE, J.'s, judgment below. It means "and all the rest." All the rest of what? I regard it here as being all other cases in which detention is caused by causes which are beyond the control of the charterer. On the finding of the umpire this strike was entirely beyond the control of the charterers and the results could not have been avoided by them. Therefore it appears to me that this appeal fails.

D **LORD ATKINSON.**—I entirely concur with the construction which has been put upon the clause in dispute here by my two noble and learned friends who preceded me, and I do not think it necessary to add anything.

E **LORD SUMNER.**—To my unfeigned sorrow I find myself unable to agree with the opinions which your Lordships have just expressed and with the judgment of the Court of Appeal. The general framework of this charterparty renders but little assistance in construing the particular clause before us, nor is anything to be gained by pointing out in detail that it is a quite unusual, unartificial document. It is true that it was originally printed to provide for a charterparty of that type which, at the port of discharge, instead of having fixed lay-days, has despatch in accordance with the custom of the port and that is reasonable despatch in the circumstances, and it has been converted by drastic alteration into a charterparty with fixed lay-days even at the port of discharge, but that does not put it beyond the power of the parties, if they have done so, to make a provision in a class of exceptions by which, if the number of lay-days are exceeded by the charterers through causes over which they have no control, they may be excused from liability in that event.

G What is important, however, to observe is that in this case the charterers clearly failed to discharge within the fixed time. They are, therefore, in default and must pay unless they can find words in the charterparty which exempt them from liability to pay. They point to the words which your Lordships have read. It is also clear that this being a clause inserted for the benefit of the charterers and to the prejudice of the shipowner, it is incumbent upon the charterers to express the words that relieve them with such reasonable clearness as to make it possible for the shipowner to know where he stands, and if they speak in that clause with two voices it is not for them to say that because one part of the clause achieves their object the conflict produced by the other part of the clause has no materiality. The principle laid down by your Lordships in *Elderslie Steamship Co. v. Borthwick* (2) has completely settled that. Another thing, I think, may be pointed out, and that is that this charterparty is so worded that one need not be surprised, although it is a business document, if they have arrived at the result of saying a good deal to which no meaning is to be attached at all, because redundancy is the feature of this charterparty. In this very clause, for example, the words "and lay-days not to count" are, in my view of this matter, I think, unnecessary, because all that the clause has to effect is to provide that no demurrage is to be charged, whether it be fixed demurrage or general damages

for detention, and to say that the lay-days are not to count is to contradict another clause which has already said what the lay-days are to be and what lay-days are to count. I, therefore, do not feel myself much impressed by the comment which undoubtedly arises that upon the construction which I think is the right one, several words in this clause might just as well not have been there; in fact it would have been very much better if they had not been there, and then no more should we have been here. Take the words as they stand, translate the two Latin abbreviations into English, and I take it they run thus: "Should the vessel be detained"—that is beyond the lay-days provided—"by causes over which the charterers have no control, that is to say, quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, and the rest—no demurrage is to be charged." What does that mean? I accept that one must not take one word in isolation from the other words which accompany it, and, having determined its isolated meaning, refused to allow that to be influenced by the meaning of the words in the company in which it is found, but with very great respect I cannot see that that fact alters the construction. I think "*videlicet*" means "that is to say," whether you take it by itself or whether you follow it at a respectful distance by the words "*etc.*" It still means "that is to say." I admit at once that if it meant "*exempli gratia*"—for example—there would be an end of the whole matter and the appeal would fail, but the words are "*videlicet*," "that is to say," certain things which are specified and the rest which are not specified. The rest of what? We are not told. I do not think there is any question here of what is called the *eiusdem generis* rule and I will not pursue that subject. The words are not "*et alia*"; they are "*etc.*"; but the word "*videlicet*" introduces two lines which consist as to one part of specified matters and as to the other part, of an omnibus reference to a residue of things, the totality of which is unknown to us, and was not expressed by the person whose business it was to express it, namely, the charterer. When you say "that is to say" following upon the general words, I think you inevitably limit and define the words that you have previously used. It is not merely an illustration, it is an explanation, a precise statement of what is meant by the general words with which the sentence begins, and, therefore, I recognise that upon this construction the causes over which the charterers have no control and with which the clause deals are: "quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over" whatever that may mean, and "*etc.*," whatever that again may mean. If you have once found that these specific matters are substituted for the general phrase: "Should the vessel be detained by causes over which the charterers have no control," I do not think that the words "*etc.*" either undo that effect and prevent "*videlicet*" from having a defining and limiting effect, nor are they so far self explanatory as to add to these enumerated and specially named things such an exception as strikes. It may be there, or it may not, but it was for the charterers to say so, and, as the charterers have not chosen to say so, I do not think that they can claim to have exempted themselves from a liability which, in the absence of an exemption, undoubtedly rests upon them.

My Lords, the point is an extremely narrow one. It may seem paradoxical that between £40,000 and £50,000 depend upon two Latin abbreviations, "*viz.*" and "*etc.*" but I do not find that this consideration either daunts or helps me. I think the appeal ought to succeed upon this short ground.

Appeal dismissed.

Solicitors: *Holman, Fenwick & Willan; Slaughter & May.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

A

HORNE v. POLAND

[KING'S BENCH DIVISION (Lush, J.), February 6, 14, 1922]

[Reported [1922] 2 K.B. 364; 91 L.J.K.B. 718; 127 L.T. 242;

38 T.L.R. 357; 66 Sol. Jo. 368]

B

Insurance—Invalidation of policy—Non-disclosure—Material fact—Assured an alien.

The plaintiff, who was born in Rumania, was brought to England when he was twelve years old, but had never been naturalised. He had registered as an alien and had assumed an English name. He took out a policy of insurance against burglary with the defendants, but did not disclose these facts to them. In a claim by him against the defendants under the policy,

C

Held: the non-disclosure of the fact that an assured was an alien was not in every case the non-disclosure of a material fact which invalidated the policy; each case depended on its own circumstances; as, in the circumstances in the present case, the facts were material, their non-disclosure invalidated the policy.

D

Notes. As to the non-disclosure and misrepresentation in a contract of insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 185 et seq.; and for cases see 29 DIGEST 49 et seq.

Case referred to:

- (1) *Joel v. Law Union and Crown Insurance Co.* [1908] 2 K.B. 863; 77 L.J.K.B. 1108; 99 L.T. 712; 24 T.L.R. 898; 52 Sol. Jo. 740, C.A.; 29 Digest 353, 2858.

E

Action.

The plaintiff claimed from the defendant, who represented himself and other of Lloyd's underwriters, a loss under a policy of insurance covering the plaintiff's premises. The policy was a householder's comprehensive policy of insurance for £500 which was issued in March, 1920. By that policy, the defendant and other underwriters undertook to pay the plaintiff the loss insured against. These losses included loss by burglary from the plaintiff's premises. The plaintiff was an alien and had registered himself as such under the Aliens' Registration Acts, but, in taking out the policy of insurance, he did not disclose the fact that he was an alien named Euda Gedale, but represented that his name was

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Harry Horne, nor did he disclose the fact that he was born in Rumania in 1877, was brought to England by his parents when he was twelve years old and had not been naturalised. In May, 1920, during the currency of the policy, there was a burglary on the plaintiff's premises and certain property was stolen the value of which the plaintiff estimated at £560. The defendants denied liability on the ground of non-disclosure of material facts. They alleged that the plaintiff

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in taking out the policy represented his name as Harry Horne and concealed the fact that he was an alien named Euda Gedale.

E. F. Lever for the plaintiff.

H. D. Samuels for the defendants.

Cur. adv. vult.

I

Feb. 14. **LUSH, J.**, read the following judgment in which he dealt with the facts of the burglary and of the loss which the plaintiff alleged he had suffered, said that, if the plaintiff was entitled to recover anything, it would be £130, and continued: I now come to the defence that the underwriters have raised that the policy is void owing to the non-disclosure by the plaintiff of material facts. The circumstances which have given rise to this contention are these. The plaintiff is an alien. He registered himself under the Aliens' Registration Acts, but when he effected the policy, and when he was insured, as he was before by

the Oceanic Company, he described himself as Harry Horne and he did not state that he was a Rumanian or that he had lived in Rumania for many years. It is not alleged by the underwriters that he acted fraudulently in that respect; what is said is that he did not disclose facts which were material to the underwriters to know, and that, therefore, the policy is invalidated. Whether, if the facts not disclosed were material, there is any further question to consider, or whether, on such a finding, the avoidance of the contract of insurance necessarily follows, I will deal with later. I will consider first the question whether the fact that the plaintiff was really Euda Gedale, a Rumanian, is, in the circumstances of the case, a material fact.

Evidence was given by the underwriters on that question. It amounted to this, that underwriters would not accept a proposal of an alien for insurance as satisfactory and would not accept the risk. One or two of the witnesses said that they did not and would not insure aliens. No objection was taken to that evidence. I felt some doubt whether evidence as to what a witness himself did, or would do, was admissible, although evidence as to the practice of underwriters in such cases is, in my opinion, admissible. But, even apart from the evidence, I cannot feel any doubt that, in the circumstances of this case, the fact was material. But I think that the actual contention of the defendants goes further than can be supported. I cannot agree with the view which was pressed on me, and in support of which no doubt the evidence to which I have referred was given, that the mere fact that a person is a foreigner and not a British subject is in all cases a material fact, so that the non-disclosure of it invalidates the policy. One can easily think of cases in which it cannot affect the mind of a reasonable underwriter. The assured might have come here from a State where the business, and social habits, the training and education that a child or young person received, and the views taken with regard to the observance of legal and other obligations, might be notoriously exacting, the same as those prevailing here. The assured might have spent his whole life in the United Kingdom and acquired a recognised position, and even been well known to those who insured him. It would be impossible in such circumstances to contend that his contract of insurance was invalid because he did not think it necessary to state, and the underwriter happened not to know, that he was not a British subject.

Each case must depend on its own circumstances. The circumstances here are that the plaintiff came from Eastern Europe, he and his parents being subjects of a State of whose habits and traditions the underwriters would naturally know nothing, and he only changed his name when he was twelve years old, having lived in his own country until he attained that age. The facts which were not disclosed were clearly, in my opinion, in those circumstances, material. The insurance includes, among other risks, loss by burglary or theft. The risk varies according to the honesty and good faith of the assured, the methods which he followed, and the care which he took, his views of duty, the way in which he would regard his social and legal obligations, and other matters. It is impossible to say that matters, such as nationality, caste and place of residence, may be of no importance in judging as to the risk that underwriters run in entering into such a contract. To say that, is to say that there are no racial differences, no national differences, as regards training and education and the other matters which I have mentioned. I say nothing, of course, against the national characteristics of the race to which the plaintiff belongs. That is not the question. The question is what I have stated, and I can only answer it in the way in which I have answered it by saying that a material fact was not disclosed.

The principle of law is usually stated as in *FLETCHER MOULTON, L.J.'s judgment in Joel v. Law Union and Crown Insurance Co.* (1) ([1908] 2 K.B. at p. 883). Counsel for the plaintiff has contended that it must also be shown that the assured was under a duty to disclose the fact, and that the plaintiff could not be assumed

A to know that people of his nationality were not as trustworthy and good for insurance as Englishmen, and that, therefore, he had no knowledge of any circumstances from which, as a reasonable man, he should have treated the facts in question as material. FLETCHER MOULTON, L.J., was only saying, as I understand the judgment, that, if an ordinary person, taking reasonable care and using reasonable judgment, would not know all the facts—if, for example, he would not

B know that a particular symptom indicated the presence of a serious malady—he is under no duty to state that he had the symptom, because all the material facts would not be within his knowledge. If they were within his knowledge, or if they would be within the knowledge of an ordinary reasonable person, then, the lord justice said, he must disclose them. It was immaterial that the plaintiff would not take the view that his countrymen were not as careful and trustworthy as Englishmen. That is not the real question. He knew all the facts, all the circumstances. If the ordinary reasonable person would know that underwriters would naturally be influenced, in deciding whether to accept the risk and what premiums to charge, by those circumstances, the fact that they were kept in ignorance of them, and, indeed, were misled, is fatal to the plaintiff's claim. The plaintiff was making a contract of insurance, and, if he failed to disclose what a

D reasonable man would disclose, he must suffer the same consequences as any other person who made a similar contract. I cannot doubt that the plaintiff knew, or would have known if he had thought, that his nationality and real name were not unimportant, and that, if he had to state all the material facts, he would not have omitted them. He had had to register here under the Aliens' Act, and had had, as he knew, to give his real name on his marriage. What he

E did not know was that he was under a duty to disclose material facts. He made the same mistake that many other people have made in effecting insurances, and the consequence of his mistake is that he cannot enforce the policy.

Although one cannot feel very much sympathy for the plaintiff after the exorbitant claim he has made, the case is a hard one. A great many aliens are residing and carrying on business in this country, and probably many of them

F are insured by policies which are unenforceable, although quite honestly effected. The risks that are incurred by persons who effect insurances without being carefully advised are often quite unknown to them. It is not a little curious that, at the very time when these defendants were investigating the claim and considering what course to take, the plaintiff effected another Lloyd's policy, though with a different underwriter, still insuring under the name of Harry Horne. It would

G seem more just that underwriters should ask as to the nationality of the person they propose to insure if they attach importance to it and are going to rely on it. But the law is, in my opinion, as I have stated, and, whatever the hardship may be, I have to apply it. There must be judgment for the defendants with costs.

Judgment for defendants.

Solicitors : *Lewis & Payne ; William C. Crocker.*

[*Reported by T. W. MORGAN, ESQ., Barrister-at-Law.*]

BURNS v. SCHOLFIELD

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Sankey, JJ.), October 26, 1922]

[Reported 128 L.T. 382; 87 J.P. 54; 21 L.G.R. 39; 27 Cox, C.C. 378]

Water Supply—Unlawful abstraction from main—Act of servant—Liability of master—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 59.

The appellant's servant, who was driving a steam wagon belonging to his master in the course of his employment drew water for the wagon from a street hydrant communicating with a water main belonging to a local authority, the undertakers under the Waterworks Clauses Act, 1847, which was in force in their district. The appellant had not agreed to be supplied with water by the undertakers, whose practice was to grant annual permits to take water for steam wagons on payment, each permit being attached to a particular wagon and being available for any employee of the owner of the wagon. The appellant having been summoned for unlawfully taking water for the wagon, contrary to s. 59 of the Act of 1847,

Held: the appellant's servant was acting within the scope of his employment, and, therefore, the appellant was liable.

Notes. The Waterworks Clauses Act, 1847, has been repealed by the Water Act, 1945, s. 62 and Sched. V. Section 65 (2) of Sched. III to the Act of 1945 corresponds to s. 59 of the Act of 1847.

As to waste and misuse of water supplied by water undertakers, see 33 HALSBURY'S LAWS (2nd Edn.) 476 et seq.; and for cases see 43 DIGEST 1095–1097. For the Water Act, 1945, Sched. III, s. 65, see 26 HALSBURY'S STATUTES (2nd Edn.) 899.

Case referred to :

- (1) *Coppen v. Moore* (No. 2), [1898] 2 Q.B. 306; 67 L.J.Q.B. 689; 78 L.T. 520; 62 J.P. 453; 46 W.R. 620; 14 T.L.R. 414; 42 Sol. Jo. 539; 19 Cox, C.C. 45, D.C.; 43 Digest 244, 877.

Case Stated by justices for the city of Manchester.

At a court of summary jurisdiction sitting at Manchester on July 4, 1922, an information was preferred by the respondent, William Scholfield, inspector of water supply, for and on behalf of the lord mayor, aldermen and citizens of the city of Manchester (hereinafter called "the undertakers,") under s. 59 of the Waterworks Clauses Act, 1847, against the appellant, John Henry Burns, charging that, on May 23, 1922, at Manchester, not having agreed to be supplied with water by the undertakers, he unlawfully took away water for the use of steam wagon No. A.W. 8450 from a pipe belonging to the undertakers, contrary to the form of the statute in that case made and provided. The following facts were admitted or proved: The undertakers were the undertakers in the city for the purposes of the Waterworks Clauses Act, 1847, and the provisions of that Act had been adopted by, and were in force in, the city of Manchester, and as such undertakers it was their practice to grant annual permits to take water within the city to the owners of steam motor-lorries or wagons, for which water was required in the course of their journeys, on payment for the same; a separate permit was issued in respect of each wagon or lorry, and the permit attached to the wagon or lorry and could be used by any employee of the owner who happened to be driving the wagon or lorry in question, and it enabled the driver to take for the use of the wagon or lorry water from any of the city mains not exceeding five inches in diameter. The appellant was a carrier and the owner of steam motor-lorries or wagons. At the material time or times, no permit to draw water had been granted by the undertakers in respect of steam wagon A.W. 8450 belonging to the appellant. At the material time or times one William Weston was employed by the appellant as a motor driver. On May 23, 1922, William Weston was driving the steam wagon for and on behalf of the

A appellant and during such journey drew water into the wagon from a street hydrant in Lees Street, Great Ancoats Street, in the city, which hydrant communicated with a water main belonging to the undertakers. Such act was done by William Weston in the course of his employment and was an act the benefit of which enured to the appellant and not to William Weston. William Weston was allowed to a great extent to please himself as to where he should obtain his water for the use of the steam wagon. He was provided by the appellant with £1 to obtain fuel and water for the steam wagon during its journey, and he tendered to a police officer of the city 2s. for the water taken by him, but this was refused by the police officer.

On the part of the appellant it was contended that: (a) On the true construction of the section, the person who committed an offence against the provisions of the section was not the appellant but the appellant's servant, William Weston. (b) The section did not make a master liable for the act of his servant. (c) On the true construction of the section, a master was, *prima facie*, not liable for the act of his servant. (d) On the true construction of the section, a master was only liable for the act of his servant if the prosecution proved affirmatively that such act was from its very nature obviously the act of the master. (e) The respondent did not prove affirmatively, or at all, any such fact or facts as would make the appellant liable for the act of his servant, William Weston. (f) The appellant was not liable for the act of his servant, William Weston. On the part of the respondent it was contended that: (a) On the true construction of the section, a master was liable for the act of his servant if, in doing such act, the servant was acting within the general scope of his authority and in the course of his employment. (b) On the true construction of the section a master was liable for the act of his servant if, in doing such act, the servant was acting completely in his master's interests. (c) The act of William Weston must be presumed to be the act of the appellant. (d) To hold the appellant not liable for the act would be contrary to the whole spirit of the statute, and the prohibition contained in the statute was an absolute prohibition. (e) The appellant was liable for the act of his servant, William Weston.

F The justices, being of opinion that the appellant was liable for the act of his servant, held that the appellant was guilty of the offence and fined him 20s. The appellant now appealed.

By the Waterworks Clauses Act, 1847, s. 59:

G "Every person who, not having agreed to be supplied with water by the undertakers, shall take any water from any reservoir, watercourse, or conduit belonging to the undertakers, or any pipe leading to any such reservoir, water course, or conduit, or from any cistern or other like place containing water belonging to the undertakers, other than such as may have been provided for the gratuitous use of the public, shall forfeit to the undertakers for every such offence a sum not exceeding ten pounds."

H *Cyril Atkinson, K.C.*, and *J. C. Jolly* for the appellant.
Eastham, K.C., and *N. J. Laski* for the respondent.

I **LORD HEWART, C.J.**—This is not a case like those in which a servant has been authorised to do a certain act and has done some other act and the master has been held not to be liable for the act done by the servant. Here the act of the servant in taking the water was done in the course of his employment, and the benefit of that act enured to his master, the appellant. The servant had considerable latitude as to when and where he should take in a supply of water for the steam wagon, and his offer of 2s. to the constable in payment shows an intention to pay for the water. The case is not one of larceny, but is simply a charge against the appellant of a special offence against s. 59 of the Waterworks Clauses Act, 1847, under which the penalty is the forfeiture to the undertakers of a sum not exceeding £10.

The question has been raised whether the appellant's servant, in taking the water as he did, was acting within the scope of his employment. Now it happens that in

the judgment of LORD RUSSELL OF KILLOWEN, C.J. in *Coppen v. Moore* (No. 2) (1) A
([1898] 2 Q.B. at p. 314), a decision under the Merchandise Marks Act, 1887, we
find this passage :

"We conceive the effect of the Act to be to make the master or principal liable
criminally (as he is already, by law, civilly) for the acts of his agents and
servants in all cases within the sections with which we are dealing where the
conduct constituting the offence was pursued by such servants and agents within
the scope or in course of their employment, subject to this : that the master or
principal may be relieved from criminal responsibility where he can prove that
he had acted in good faith and had done all that it was reasonably possible to do
to prevent the commission by his agents and servants of offences against the
Act."

In the present case, it is common ground that the appellant's servant was employed
not merely to drive the steam wagon, but to get fuel and water for it, and yet it has
been argued for the appellant that his servant was not acting within the scope of
his employment, because, although he was employed to purchase water, he
attempted to get water for which he could not pay, inasmuch as the constable had
no authority to accept the payment tendered to him. The ground of the constable's
refusal was that payment should have been made by the appellant annually in
advance under a permit restricted to the particular steam wagon. In my opinion,
the argument that the appellant's servant was not acting within the scope of his
employment in getting the water as he did fails, and the appeal must be dismissed.

AYORY, J.—I am of the same opinion. The case falls within the class of cases
where a statute has prohibited an act and the master has been held to be criminally
liable for the act of his servant if that act be done within the scope of the servant's
employment. From the findings in the Case, it is clear that the appellant's servant
was largely allowed to please himself as to when and where he should take the water
necessary for the journeys which he was employed to make with the steam wagon,
and the appellant had provided him with money with which to obtain fuel and
water. The only fair inference from these findings is that the appellant's servant,
who attempted to purchase water with the money given to him by the appellant,
was acting within the scope of his employment in such a way as to make the
appellant criminally liable. If there had been a finding that the appellant's
servant had attempted to get water without payment, keeping his master's money
in his pocket, a different state of things might arise.

SANKEY, J.—I agree.

Appeal dismissed.

Solicitors: *W. J. & E. H. Tremellen*, for *Simpson, North, Harley & Co.*,
Liverpool; *P. M. Heath*, Manchester.

[Reported by J. F. WALKER ESQ., Barrister-at-Law.]

A

Re HARDING. HARDING v. PATERSON

[CHANCERY DIVISION (Eve, J.), December 13, 1922]

[Reported [1923] 1 Ch. 182; 92 L.J.Ch. 251; 128 L.T. 562; 67 Sol. Jo. 298]

B

Will—Powers of appointment to persons nominatim and not by virtue of office—Death of one of donees—Survival of power—Trustee Act, 1893 (56 & 57 Vict., c. 53), s. 22.

C

By his will, dated Mar. 23, 1899, the testator appointed the plaintiffs and two others (since deceased) executors and trustees, and, by a codicil dated April 13, 1900, he desired that his wife should also act in that capacity. By cl. 30 of the will he declared that the power of appointing new trustees should vest in his wife for her life and thereafter in his five daughters (previously mentioned by name), or, if they could not agree, in the majority of them, provided that, if any daughter died leaving a child or children surviving her, the eldest child for the time being, if of full age, of such daughter should stand in the place of his or her mother and should be entitled to join in an appointment of new trustees. The testator died in 1900, leaving his widow and the five daughters. The widow died in 1911, and in 1921 one of the daughters died without issue. On a summons to determine whether, on the true construction of the will and in the events which had happened, the power survived and vested in the four surviving daughters or the majority of them,

D

E

Held: the rule that a bare power given to two or more persons by name and not annexed to an estate or office did not survive had not been abrogated by s. 22 of the Trustee Act, 1893, but, as the context disclosed a contrary intention, the power survived and could be exercised by the four surviving daughters or the majority of them.

F

Notes. The Trustee Act, 1893, was repealed by the Trustee Act, 1925, s. 22 of the Act of 1893, being replaced by s. 18 (1) of the Act of 1925. See HOOD AND CHALLIS'S PROPERTY ACTS (8th Edn.) (1938) p. 615, and UNDERHILLS LAW OF TRUSTS AND TRUSTEES (11th Edn.) (1959) p. 455.

As to execution of bare powers see 30 HALSBURY'S LAWS (3rd Edn.) 231; and for cases see 37 DIGEST 409. For s. 18 (1) of the Trustee Act, 1925, see 26 HALSBURY'S STATUTES (2nd Edn.) 76.

G

Case referred to in argument:

(1) *Re Skeat's Settlement, Skeats v. Evans*, (1889), 42 Ch.D. 522; 58 L.J.Ch. 656; 61 L.T. 500; 43 Digest 678, 1084.

Adjourned Summons.

H

I

The testator, by his will, dated Mar. 23, 1899, appointed the plaintiffs and two other persons since deceased executors and trustees thereof, and by a codicil dated April 13, 1900, he desired that his wife should be added to the number of executors. By cl. 30, of his will he declared that the power of appointing new trustees should vest in his wife for her life and afterwards in his five daughters (previously mentioned by name) or, if they could not agree, in the majority of them, provided always that in case any of his daughters should die leaving a child or children who survived her the eldest child for the time being, if of full age, of such daughter so dying should stand in the place of his or her mother and have and be entitled to exercise the right of joining in the appointment of new trustees. The testator died on May 22, 1900, leaving his widow and the five daughters surviving. The widow died in 1911, and in 1921 one of the five daughters died without having had issue. The trustees took out this summons, asking, among other things, whether, upon the true construction of the will and in the events which had happened, the power of appointing new trustees was exercisable by the four surviving daughters or a majority of them.

Beebee for the trustees.

Nicholson Combe for two of the daughters.

Vernon, Gilbert Smith, and Adams for other parties.

EVE, J.—I do not think the old rule that a bare power given to two or more persons by name and not annexed to an estate or office does not survive has been abrogated by s. 22 of the Trustee Act, 1893 (formerly s. 38 of the Conveyancing Act, 1881) [now s. 18 of Trustees Act, 1925]. I arrive at that conclusion on the introductory words of that section. They are "Where a power or trust is given to or vested in two or more trustees," words which must, I think, be construed strictly. The section does not read "Where a power or trust is given to or vested in two or more persons," but that would be the meaning if counsel's argument were well founded. That opinion, however, does not determine this case. In this will there is, I think, sufficient to show that the testator contemplated and intended the power to be exercisable by the survivors or survivor of the five daughters. One cannot read the proviso in cl. 30 [of the will] and believe that the testator intended the power to determine in the event of the death of one of his five daughters. He obviously considers that it will survive and provides for the keeping up of the numerical strength of the donees of the power by directing that if the deceased daughter leaves an eldest child who is then twenty-one, he or she is to be added to the body of persons to whom the exercise of the power is committed. I think it would be a strained construction of the clause to hold that the power was suspended on the death of any one of the daughters, and was revived if and when a child of a deceased daughter was of full age and competent to take the parent's place. The clause must be read as a whole with the result that the power survives and can be exercised by a majority of the persons for the time being constituting the body in whom it is vested.

Solicitors: *Calder Woods & Pethick*, for *Wansbrough, Robinson, Tayler & Taylor*, Bristol; *W. H. Pitman*, for *James Sinnott & Son*, Bristol; *Shield & Mackarness*.

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.]

ATLANTIC SHIPPING & TRADING CO. v. LOUIS
DREYFUS & CO.

[HOUSE OF LORDS (Lord Buckmaster, Lord Dunedin, Lord Atkinson, Lord Sumner and Lord Carson), March 7, 9, 10, April 4, 1922]

[Reported [1922] 2 A.C. 250; 91 L.J.K.B. 513; 127 L.T. 411; 38 T.L.R. 534; 66 Sol. Jo. 437; 15 Asp. M.L.C. 566; 27 Com. Cas. 311]

Shipping—Charterparty—Arbitration clause—Validity—Damage to cargo—Time limit for making claim—Damage due to unseaworthiness—Available to shipowners of breach of time limit as defence.

By a charterparty it was provided: "All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single arbitrator, be referred to the final arbitrament of two arbitrators . . . one to be appointed by each of the parties, with power to such arbitrators to appoint an umpire. Any claim must be made in writing and claimant's arbitrator appointed within three months of final discharge, and, where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred." The charter contained no express exception of liability for unseaworthiness.

Held: (i) the arbitration clause was not void as ousting the jurisdiction of the court and so being against public policy, for it did not exclude the charterers from such recourse to the courts as was always open, by virtue of the provisions of the Arbitration Acts, to a party who had agreed to arbitrate, but (ii) the clause was not available to the shipowners as an answer to a claim for damage caused to the cargo by the unseaworthiness of the ship.

Tattersall v. National Steamship Co., Ltd. (1) (1884), 12 Q.B.D. 297, applied.

Judgment—Judicial decision as authority—Reversal by subsequent court—Decision on commercial document—No reversal unless clearly wrong.

Per BANKES, L.J.: In commercial cases it is of the highest importance that authority should not be disturbed, and if the court finds that a certain doctrine has been laid down in former cases and presumably acted on in the framing of other contracts the court will not be disposed to alter that doctrine unless it thinks that it is clearly wrong.

Notes. Considered: *Czarnikov v. Roth, Schmidt & Co.*, [1922] 2 K.B. 478. Distinguished: *Pinnock v. Lewis & Peat*, [1923] 1 K.B. 690. Referred to: *Ford v. Compagnie Furness (France)*, [1922] 2 K.B. 797; *Cosmopolitan Shipping Co. v. Halton and Cookson, Ltd. (Liverpool)* (1929), 143 L.T. 296; *Re Wynn, Public Trustee v. Newborough*, [1952] Ch. 271; *Smeaton Hanscomb & Co. v. Setty, Son & Co.*, [1953] 2 All E.R. 1471.

As to claims for damage to cargo see 30 HALSBURY'S LAWS (2nd Edn.) 559 et seq; and for cases see 41 DIGEST 494 et seq.

Cases referred to:

- (1) *Tattersall v. National Steamship Co., Ltd.* (1884), 12 Q.B.D. 297; 53 L.J.Q.B. 332; 50 L.T. 299; 32 W.R. 566; 5 Asp. M.L.C. 206; 41 Digest 496, 3245.
- (2) *Scott v. Avery* (1856), 5 H.L. Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 2 Jur. N.S. 815; 4 W.R. 746; 10 E.R. 1121, H.L.; 2 Digest (Repl.) 465, 290.
- (3) *Bank of Australasia v. Clan Line Steamers, Ltd.*, [1916] 1 K.B. 39; 84 L.J.K.B. 1250; 113 L.T. 261; 13 Asp. M.L.C. 99; 21 Com. Cas. 13, C.A.; 41 Digest 472, 3036.
- (4) *Baxter's Leather Co. v. Royal Mail Steam Packet Co.*, [1908] 2 K.B. 626; 77 L.J.K.B. 988; 99 L.T. 286; 24 T.L.R. 537; 11 Asp. M.L.C. 98; 14 Com. Cas. 46, C.A.; 41 Digest 496, 3247.

- (5) *Wiener & Co. v. Wilsons and Furness-Leyland Line, Ltd.* (1910), 103 L.T. 168; 11 Asp. M.L.C. 413; 15 Com. Cas. 294, C.A.; 41 Digest 376, 2218. A
- (6) *Eldershe Steamship Co. v. Borthwick*, [1905] A.C. 93; 74 L.J.K.B. 338; 92 L.T. 274; 53 W.R. 401; 21 T.L.R. 277, 10 Asp. M.L.C. 24; 10 Com. Cas. 109, H.L.; 41 Digest 446, 2800.

Also referred to in argument:

- Jureidini v. National British and Irish Millers Insurance Co., Ltd.*, [1915] A.C. 499; 84 L.J.K.B. 640; 112 L.T. 531; 31 T.L.R. 132; 59 Sol. Jo. 205, H.L.; 2 Digest (Repl.) 444, 161. B
- Caledonian Insurance Co. v. Gilmour*, [1893] A.C. 85; 57 J.P. 228; 9 T.L.R. 146; 1 R. 110, H.L.; 2 Digest (Repl.) 473, 332.
- Spurrier v. La Cloche*, [1902] A.C. 446; 71 L.J.P.C. 101; 86 L.T. 631; 51 W.R. 1; 18 T.L.R. 606, P.C.; 2 Digest (Repl.) 448, 174. C
- Hamlyn & Co. v. Talisken Distillery*, [1894] A.C. 202; 71 L.T. 1; 58 J.P. 540; 10 T.L.R. 479; 6 R. 188, H.L.; 2 Digest (Repl.) 448, 173.
- Doleman & Sons v. Ossett Corp.*, [1912] 3 K.B. 257; 81 L.J.K.B. 1092; 107 L.T. 581; 76 J.P. 457; 10 L.G.R. 915, C.A.; 2 Digest (Repl.) 468, 306.
- Ford v. Beech* (1848), 11 Q.B. 852; 17 L.J.Q.B. 114; 11 L.T.O.S. 45; 12 Jur. 310; 116 E.R. 693, Ex.Ch.; 17 Digest (Repl.) 263, 676. D
- Moore v. Harris* (1876), 1 App. Cas. 318; 45 L.J.P.C. 55; 34 L.T. 519; 24 W.R. 887; 3 Asp. M.L.C. 173, P.C.; 41 Digest 310, 1708.
- Pompe v. Fuchs* (1876), 34 L.T. 800; 2 Digest (Repl.) 449, 182.
- Horton v. Sayer* (1859), 4 H.N. 643; 29 L.J.Ex. 28; 33 L.T.O.S. 287; 5 Jur. N.S. 989; 7 W.R. 735; 157 E.R. 993; 2 Digest (Repl.) 465, 292. E
- Kish v. Taylor*, [1912] A.C. 604; 81 L.J.K.B. 1027; 106 L.T. 900; 28 T.L.R. 425; 56 Sol. Jo. 518; 12 Asp. M.L.C. 217; 17 Com. Cas. 355, H.L.; 41 Digest 485, 3170.
- Joseph Thorley, Ltd. v. Orchis Steamship Co., Ltd.*, [1907] 1 K.B. 660; 76 L.J.K.B. 595; 96 L.T. 488; 23 T.L.R. 338; 51 Sol. Jo. 289; 10 Asp. M.L.C. 431; 12 Com. Cas. 51, 251, C.A.; 41 Digest 488, 3185. F

Appeal from an order of the Court of Appeal reversing a decision of ROWLATT, J.

The appellants were the owners of the steamship *Quantock*, and the respondents were the charterers of the vessel under a charterparty dated May 2, 1919, which provided that the vessel should proceed to Rosario, and there load a full and complete cargo of linseed for carriage to Hull. By cl. 39:

"All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single arbitrator, be referred to the final arbitrament of two arbitrators carrying on business in London, who shall be members of the Baltic and engaged in the shipping and/or grain trades, one to be appointed by each of the parties, with power to such arbitrators to appoint an umpire. Any claim must be made in writing and claimant's arbitrator appointed within three months of final discharge, and, where this provision is complied with, the claim shall be deemed to be waived and absolutely barred."

The *Quantock* duly proceeded with a cargo of linseed to Hull, where she arrived early in September, 1919. Shortly after her arrival the respondents gave notice to the appellants of their intention to put in a claim for damage alleged to have been caused to the linseed during the voyage, and in May, 1920, they brought an action against them claiming £2,233 damages. The appellants by their defence referred to cl. 39 of the charterparty and said that the charterers, having failed to appoint their arbitrator within three months of the final discharge of the ship, must be deemed to have waived their claim, and that no action could now be brought in respect thereof. The respondents, by their reply, pleaded that the ship was unseaworthy and unfit to receive the goods on board when they were loaded, and at the date of the commencement of her voyage with the goods on board, and remained in that

A condition throughout the voyage, and that the effect in law of the unseaworthiness was to prevent the operation in favour of the appellants of any of the special clauses of the charterparty. An order having been made after the delivery of the reply that the question of law whether the claim in the action was barred by cl. 39 in the charterparty should be tried as a preliminary question of law, ROWLATT, J., held (i) that the mode of procedure set out in the arbitration clause was a condition precedent to the bringing of any action at all; and (ii) that cl. 39 applied, and was binding upon the parties even though the ship was unseaworthy at the commencement of the voyage. The Court of Appeal reversed that decision on the ground that the arbitration clause was contrary to public policy and void on the ground that its object and effect were to oust the jurisdiction of the court. The shipowners appealed to the House of Lords.

C *Dunlop, K.C.* and *Jowitt* for the appellants.

Neilson, K.C. and *Clement Davies* for the respondents.

Their Lordships took time for consideration.

April 4. The following opinions were read.

D **LORD DUNEDIN.**—Under the old law an agreement to refer disputes arising under a contract to arbitration was often asserted to be bad as an ousting of the jurisdiction of the courts, but that position was finally abandoned in *Scott v. Avery* (1). As I read that case it can no longer be said that the jurisdiction of the court is ousted by such an agreement, on the contrary, the jurisdiction of the court is invoked in order to enforce it, and there is nothing wrong in persons agreeing that their disputes should be decided by arbitration. It follows that the clause here is not obnoxious in so far as it provides for arbitration. It goes on, however, to say that if the claim is not made and the arbitration started within a certain time the claim is to be held to be departed from. Now, if it were illegal to arrange that a claim should not be good unless made within a certain time I should understand the argument, but as it is admitted that it is perfectly legal to make such a stipulation—it is done, e.g., every day in insurance policies—then why should it be bad because it is tacked on to a provision for arbitration instead of to an action at law? All it comes to is this. I stipulate that you shall settle your differences with me by arbitration and not by action at law, and I stipulate that you shall state your differences and start your arbitration within a certain time or you shall be held to have waived your claim. For these reasons, I do not think the judgment of the Court of Appeal can be supported.

G We have, however, had another argument which does not really arise on the preliminary question as put, but which, as it has been dealt with in the courts below, your Lordships think should be disposed of here. The respondents aver that the vessel when starting on the voyage was unseaworthy, and that the damage for which they sue was caused by such unseaworthiness, and they say that, if they prove those two facts, the clause in question affords no protection. On this point we have no indication as to what the opinion of the learned judges of the Court of Appeal would have been. ROWLATT, J., rejected the contention upon the ground that the implied condition of seaworthiness had nothing to do with and was not in any way affected by a condition which was one of procedure only. There was, however, quoted to us a judgment of BAILHACHE, J., in the *Bank of Australasia v. Clan Line Steamers, Ltd.* (3), to the opposite effect. In that case there was a clause that no claim could be available which was not made at the port of delivery within seven days of the steamer's arrival there, and BAILHACHE, J., held that that clause was no bar to an action raised upon the averment that the ship was unseaworthy and that the damage which was sued for was caused by such unseaworthiness. His judgment was reversed by the Court of Appeal, but on the ground, which had not been noticed by BAILHACHE, J., that there was in the charterparty an express exception of damage caused

by unseaworthiness and that, that being so, the express clause must be read along with all other express clauses, of which the limitation of liability was one. It is pointed out by the respondents that in this case there is no express clause as to unseaworthiness, which is, therefore, left to be dealt with on the implied condition. A

In commercial cases it is, I think, of the highest importance that authority should not be disturbed, and if your Lordships find that a certain doctrine has been laid down in former cases and presumably acted on in the framing of other contracts you will not be disposed to alter that doctrine unless you think it is clearly wrong. Before the decision of BAILHACHE, J., there was the earlier case of *Tattersall v. National Steamship Co., Ltd.* (1), a judgment of DAY and A. L. SMITH, JJ., where it was held that, there being no express contract as to unseaworthiness, a clause limiting liability to £5 per animal (the goods shipped were cattle) did not apply to damage done by unseaworthiness. I think it clear that the learned judges of the Court of Appeal in the *Bank of Australasia Case* (3) approved of that case in terms, and, therefore, inferentially, though they do not actually say so, approved of BAILHACHE, J.'s, judgment if there had not been an express clause dealing with unseaworthiness. Does the present case fall into line with *Tattersall's Case* (1)? On the best consideration I can give to the matter, I think it does. D
It is quite true that the fact of unseaworthiness does not destroy the contract of affreightment in toto. Such a doctrine would lead to absurd consequences; the goods might be safely delivered and yet no freight be due under the contract, but only a quantum meruit for services rendered. The test seems to me to be whether the particular clause interferes with the liability which unseaworthiness creates. It is just here that I think ROWLATT, J., did not sufficiently distinguish between the two parts of the clause. So far as it dealt with the procedure, I agree with him, and if this clause had been a mere reference to arbitration and had stopped there, I do not think it would have been hit. But it goes on and, under certain conditions, destroys liability. If *Tattersall's Case* (1) is right that you cannot in such cases appeal to a limitation of liability, surely it is a fortiori to say you cannot appeal to its destruction. I think there is nothing in the waiver point. For these reasons I agree with the motion to be made by LORD BUCKMASTER. E F

LORD SUMNER.—This case turns upon cl. 39 of the charter. The first question is whether it means that, if the charterer does not make a claim or name an arbitrator within three months of the final discharge, he agrees that he is not in any way or in any circumstances to have any access to His Majesty's courts for the purpose of raising his claim. The Court of Appeal thought that it does. G
With great respect, I am unable to agree. The clause does not mean that in no circumstances shall a claimant be allowed to enter His Majesty's courts at all, but that the cause of action shall not be complete, and, therefore, cannot be made the subject of proceedings, unless the specified conditions have first been satisfied. The point, however, hardly admits of discussion; a view is formed of it, one way or the other, simply on the perusal of the words, for the question is purely one of interpretation. I think the words do not exclude the cargo-owner from such recourse to the courts as is always open, by virtue of the provisions of the Arbitration Act, to a party who has agreed to arbitrate. If so, as of course the Court of Appeal would have been the first to recognise, the jurisdiction of the courts is not ousted so as to make this arbitration clause bad altogether. Its terms can be enforced. H I

The second point is whether a term that a claim is to be absolutely time-barred after three months if certain conditions have not previously been satisfied is available for a shipowner where the claim is for damage to cargo arising because the ship was not reasonably fit to carry the goods, there being in the charter no express exception of unseaworthiness. Of course, the clause means that the ship is liable for proved unseaworthiness in certain circumstances—namely, if the

A claim and the nomination are made in time—but not otherwise. Can it be said that this recognition of liability sub modo prevents the clause from operating as an exception at all, and reduces it to a mere “procedural” provision, fixing the conditions under which liability will be established? With great respect to the opinion of ROWLATT, J., I do not think that it can. The point is not dealt with in the judgments of the lords justices. The question arose in this way. To

B save the great expense of going to trial upon an issue of fact, whether the cargo was damaged in consequence of the ship’s unseaworthiness or not, which might prove after all to be capable of a short answer under the charter by reason of the charterers’ non-compliance with the conditions of cl. 39, it was agreed between counsel that the construction of the charter should be decided as a preliminary question as if upon demurrer, it being assumed against the shipowner that the

C damage to the cargo arose in consequence of the ship’s unseaworthiness, and against the charterers, that they were out of time in making their claim. It is a pity that the agreement was not embodied in an order specifying the preliminary question and directing it to be tried. This ought to have been done, and, but for the fact that there is no reasonable doubt about either the agreement or the terms of it, your Lordships would, I apprehend, have declined, as well you might, to entertain the question. By the charter the shipowner undertakes to load and carry the cargo and to deliver it at the destination for a freight payable (except as to advances) on right and true delivery. The undertaking is, of course, subject to numerous exceptions of a usual character. Unseaworthiness itself is nowhere mentioned, nor is liability for the consequences of it excepted under any other term. The fact that the words in cl. 39, which are relied on—namely,

E “any claim must be made in writing and claimants’ arbitrator appointed within three months,” are in quite general terms, does not avail, for such mere generality has long been held, in connection with specific excepted perils, not to be inconsistent with liability for the particular cause of loss, namely, unseaworthiness.

The shipowners’ general liability in respect of damage due to the ship’s unseaworthiness, accordingly, remains where the law places it. Underlying the whole

F contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability, namely, that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners’ protection in such

G a case. This principle of construction has not been confined to excepted causes of loss; it has been extended to provisions which limit the amount to be paid in satisfaction of the loss, for these equally, though in another way, limit pro tanto the shipowners’ liability. There is no difference in principle between the words which save them from having to pay at all and words which save them from paying as much as they would otherwise have to pay. In *Tattersall v. National Steamship Co., Ltd.* (1) the words “under no circumstances shall they

H be held liable for more than £5 for each of the animals” were held inapplicable to protect the shipowners from liability for the full value of animals lost by the ship’s unseaworthiness, in spite of the apparently unrestricted generality of the words “under no circumstances,” and in spite of the fact that they recognised liability up to £5 a head, and did not purport to exclude it altogether. That

I such words do not avail where loss is due to unseaworthiness, was virtually recognised in *Baxter’s Leather Co. v. Royal Mail Steam Packet Co.* (4), and held in *Wiener & Co. v. Wilson’s and Furness Leyland Line, Ltd.* (5). BAILHACHE, J., expressly so held in *Bank of Australasia v. Clan Line Steamers, Ltd.* (3), and the Court of Appeal in reversing his decision recognised that it would have been correct, but for a circumstance which he had overlooked—namely, that unseaworthiness was the subject of an express provision, and, therefore, the underlying or implied provision with regard to it was ousted.

In principle I think that cl. 39 insofar as the parties, as it was said, provided their own statute of limitations, is unavailable to the shipowners as an answer to a claim for damage caused by unseaworthiness. It does not make any difference that the time allowed is considerable or the formality to be complied with not unreasonable, or that the clause, being a mutual clause, might apply to protect the charterer in certain events, for example, against a claim for demurrage. The effect is not that the clause is deleted from the charter altogether. The shipowners gain no advantage against the charterer from their neglect to make the ship seaworthy; they merely cannot pray the clause in aid in that case. Nor are the words in question inapplicable because they occur in a mutual arbitration clause and are partly procedural. Even if they are read as meaning: "I will be liable for three months and no longer, and then only in an arbitration," they still remain words, which except out of the shipowners' general liability certain losses, namely, losses the assertion of which is belated. There is the further contention that a clause relieving a shipowner from damage to cargo caused by breach of the conditions as to seaworthiness, to be effectual must be clear. Now to say that a claim is to be waived is incorrect. If a right has accrued, it must be released or discharged by deed or upon consideration. Waiver applies to an election as to something in futuro; it is not a term by which to describe the answer to a right, which is complete in presenti. It seems to me, however, that the words "shall be 'deemed to be absolutely barred'" are not obscure. Their meaning is plain; the only doubt is whether they are effective. Accordingly, I should not for myself regard these words as falling within the rule in *Elderslie Steamship Co. v. Borthwick* (6). For these reasons I think the appeal fails.

LORDS BUCKMASTER, ATKINSON, and CARSON concurred.

Appeal dismissed.

Solicitors: *Holman, Fenwick & Willan; Pritchard & Sons*, for *Andrew M. Jackson & Co.*, Hull.

[Reported by *E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

CHAMBERS AND OTHERS v. RANDALL AND OTHERS

[CHANCERY DIVISION (Sargant, J.), October 18, 1922]

[Reported [1923] 1 Ch. 149; 92 L.J.Ch. 227; 128 L.T. 507; 39 T.L.R. 6; 67 Sol. Jo. 61]

Sale of Land—Restrictive covenant—Enforcement—Covenant for benefit of land retained by covenantor—All land sold by covenantor before his death—Right of covenantor's trustees and executors to enforce covenant.

By a conveyance dated Mar. 15, 1884, B. conveyed land to the defendants' predecessor in title who covenanted that no building erected on the land should be used for any trade of a noisome or offensive nature and that until a dwelling-house was built on the land it should be used for garden purposes only. At the date of the conveyance B. owned nine houses which he had erected opposite the land conveyed. In 1889 B. conveyed to the plaintiffs three of those houses on certain trusts, the benefit of the covenant in the deed of 1884 not being assigned to them. B. died in 1896, having parted with all the houses in his lifetime. The plaintiffs had been appointed executors of his will. The defendants having erected garages on the land conveyed in 1884, the plaintiffs sought injunctions directing them to remove them, or, alternatively, not to use them so as to be or become a nuisance to the tenants of the houses vested in the plaintiffs.

Held: on the construction of the covenant its object was to enable B. to protect his property while he retained it and to enable him to dispose of it to the best advantage when he sold it, and he did not intend to annex the benefit of the covenant to each of the houses he then held; at the time of his death he had no property remaining for the advantage of which he could enforce the covenant, and so the equitable doctrine enabling a restrictive covenant to be enforced against an assign with notice did not apply; therefore, the covenant could not be enforced by his trustees and executors, the plaintiffs.

Notes. Approved: *Re Union of London and Smith's Bank, Ltd.'s Conveyance, Miles v. Easter*, [1933] All E.R. Rep. 355. Referred to: *Torbay Hotel v. Jenkins*, [1927] 2 Ch. 225.

As to restrictive covenants see 29 HALSBURY'S LAWS (2nd Edn.) 441 et seq.; and for cases see 40 DIGEST (Repl.) 328 et seq.

G Cases referred to :

- (1) *Rogers v. Hosegood*, [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 48 W.R. 659; 16 T.L.R. 489; 44 Sol. Jo. 607, C.A.; 40 Digest (Repl.) 340, 2769.
- (2) *Master v. Hansard* (1876), 4 Ch.D. 718; 46 L.J.Ch. 505; 36 L.T. 535; 41 J.P. 373; 25 W.R. 570, C.A.; 19 Digest 44, 239.
- (3) *Renals v. Cowlishaw* (1878), 9 Ch.D. 125; 48 L.J.Ch. 33; 38 L.T. 503; 26 W.R. 754; affirmed (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 28 W.R. 9, C.A.; 40 Digest (Repl.) 346, 2796.
- (4) *Formby v. Barker*, [1903] 2 Ch. 539; 72 L.J.Ch. 716; 89 L.T. 249; 51 W.R. 646; 47 Sol. Jo. 690, C.A.; 40 Digest (Repl.) 333, 2727.
- (5) *L.C.C. v. Allen*, [1914] 3 K.B. 642; 83 L.J.K.B. 1695; 111 L.T. 610; 78 J.P. 449; 12 L.G.R. 1003, C.A.; 40 Digest (Repl.) 328, 2698.
- (6) *Ives v. Brown*, [1919] 2 Ch. 314; 88 L.J.Ch. 373; 122 L.T. 267; 40 Digest (Repl.) 354, 2842.
- (7) *Lord Northbourne v. Johnston & Son*, [1922] 2 Ch. 309; 92 L.J.Ch. 12; 128 L.T. 496; 40 Digest (Repl.) 352, 2834.

Also referred to in argument :

Reid v. Bickerstaff, [1909] 2 Ch. 305; 78 L.J.Ch. 753; 100 L.T. 952, C.A.; 40 Digest (Repl.) 341, 2770.

Fletcher v. Bealey (1885), 28 Ch.D. 688; 54 L.J.Ch. 424; 52 L.T. 541; 33 W.R. 745; 1 T.L.R. 233; 28 Digest (Repl.) 784, 344. A

Action for a mandatory injunction directing the defendants to remove certain garages, or, alternatively, an injunction to restrain the defendants from using them so as to be or become a nuisance to the tenants of, or prejudicial to the value of, houses vested in the plaintiffs.

By a deed, dated Mar. 15, 1884, J. Bullbrook conveyed land at the side of Cambridge Terrace, Chatham, to one Wood, the defendants' predecessor in title. Wood thereby covenanted for himself, his heirs, executors, and administrators : B

"That no dwelling-house to be erected on the said piece of land hereby conveyed shall be used as a shop, and every such dwelling-house shall be of not less value than £300. . . and [that he, Wood] shall not nor will carry on or permit to be carried on in or upon the said piece of land or any messuage or other building to be erected thereon any trade or business of a noisome or offensive nature, and will not do nor permit to be done on the said premises any act, matter or thing which may be or become a nuisance to the tenants or prejudicial to the value of the houses belonging to the said John Bullbrook in Cambridge Terrace, adjacent to the said premises, and that except and until the said piece of land is built upon either as hereinbefore provided for or by the erection thereon of a greenhouse the same shall be used as and for garden purposes only." C

Before the date of the conveyance John Bullbrook had erected eleven houses on the other side of Cambridge Terrace, of which he still retained at that date all except two. In 1889 he conveyed to the plaintiffs and J. S. Benton, now dead, three of the remaining houses upon certain trusts therein set out. The benefit of the covenants contained in the deed of Mar. 15, 1884, was not assigned. Bullbrook died in 1896, having parted with all the houses in his lifetime. The plaintiffs were the surviving trustees under the deed of 1889 and also executors of Bullbrook's will. D

Greene, K.C. and *Church* for the plaintiffs.

Alexander Grant, K.C. and *Harman* for the defendants. E

SARGANT, J.—The plaintiffs, who are the owners of the freehold of three houses numbered 8, 9, and 10, Cambridge Terrace, Chatham, are suing the defendants, the owners of a strip of land opposite, which was formerly garden ground, for two purposes. The first purpose is to cause the defendants to pull down four lock-up motor-houses or garages which have been built opposite the plaintiff's houses. The second object of the action is to restrain the defendants from using the buildings in question for the purposes for which they were built, so as to constitute a nuisance to, or prejudicially affect the value of, the houses belonging to the plaintiffs. The whole relief is based not on common law right, but on the special terms of a covenant contained in a conveyance dated Mar. 15, 1884, which was made by the plaintiffs' predecessor in title to the defendants' predecessor in title. The defences raised by the defendants are several in number. The first defence is that, whether or not what has been done by the defendants is a breach of the covenant contained in that conveyance, the plaintiffs have no right to sue the defendants on the covenant. That is a pure question of law. The second defence is that the erection of the buildings in question by the defendants is not a breach of any covenant contained in that indenture on its true construction. That is a question of the construction of the covenant. If the defendants are right in their second contention and wrong in the first, the plaintiffs will not be entitled to a mandatory injunction calling upon the defendants to pull the buildings down. The defence to the other claim for an injunction is that the intended user in the future of these garages will not be a nuisance to the plaintiffs, and F

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A will not prejudicially affect the value of the houses in question. That is a contention with reference to the future. I should say that, although the buildings have been erected, pending the trial of the action they have not been let or used as lock-up garages by virtue of an arrangement made between the plaintiffs and the defendants and an undertaking by the plaintiffs to be responsible, if they fail in the action, for the damage occasioned to the defendants by the non-user.

B It seems to me that I had better deal with the defence on the question of law first, for the reason that if I dealt with the case on the facts and decided adversely to the plaintiffs I might not be disposing finally of the claims of the plaintiffs against the defendants. It might still be that, although the plaintiffs were not entitled to any immediate injunction against the defendants, yet the defendants would be open to attack in the future, should the actual user of their buildings

C prove to be a greater nuisance or more prejudicial than they say is likely to be the case. Having come, therefore, to the conclusion that the defendants are right upon the first branch of the defence I think I ought to deal with it first. [His LORDSHIP then stated the facts, and after pointing out that Cambridge Terrace was situated in a central part of Chatham, but that the roadway in question was a cul-de-sac, so that the houses in it enjoyed great quiet, continued:] The covenant in the conveyance of Mar. 15, 1884, was only an obligation as between the parties to that document. That being so, how does the law stand? Are the plaintiffs entitled to the benefit of this restrictive covenant and to enforce it, not against the covenantor, but against his assignees taking with notice of the covenant? The way in which it is first put on behalf of the plaintiffs is that

D the terms of the covenant in the indenture of Mar. 15, 1884, are such as to point out definitely the nine houses of John Bullbrook, including the three now owned by the plaintiffs, as the land to which the benefit of the covenant was definitely annexed. It is said, therefore, that the covenant would operate by way of equitable easement and would enure for the benefit of each one of the owners of the nine houses retained by Mr. Bullbrook at the date of the conveyance, or, to put it

E more technically, that this is a case within the doctrine of the well-known case of *Rogers v. Hosegood* (1). That is a question depending on the construction of the covenant. In my judgment, this case is not one in which the benefit of the covenant was intended to be or was annexed to the nine houses in question. It seems to me to be a case, on the clear language of the document, where Mr. Bullbrook was not intending to annex the benefit of the covenant to these definite

F houses so that it would pass to any purchaser from him of any one of the houses, but was obtaining a covenant which would be of use to him for the protection of his houses in his own hands and for enabling him to dispose of the houses advantageously to anybody with whom he might deal in the future. It seems to me that the case is one exactly within the principle of *Master v. Hansard* (2). The effect of the language on my mind resembles that employed by BRAMWELL,

G L.J., in that case :

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“But when I look at the facts of this case I am satisfied that the restrictive covenant was not put in for the benefit of this particular property, but for the benefit of the lessors, to enable them to make the most of the property which they retained.”

I So it seems to me that in this case the object of the covenant was to enable Mr. Bullbrook to protect his property while he retained it and make the most of it when he disposed of it. Of course, in that state of things, it might have been competent for Mr. Bullbrook to get the benefit of the covenant by stipulating with the purchaser of any of the houses from him that he, the purchaser, should have the benefit of the covenant assigned, and he might, in that way, have obtained a better price from the purchaser. The possibility of that being done is recognised in *Renals v. Cowlishaw* (3). But that Mr. Bullbrook did not intend

definitely to annex the benefit of this covenant to each one of these nine houses A
I am perfectly satisfied.

The next way in which it is put is that, as the plaintiffs happen to be both B
the assigns of Mr. Bullbrook by virtue of the settlement of 1889 and also the
legal personal representatives of Mr. Bullbrook, they are entitled to be placed in
the same position as Mr. Bullbrook was in, and themselves to sue in respect of
the covenant. I am assuming now that the case is within *Renals v. Cowlishaw* B
(3) and that the covenant is one which could be assigned and might have been
made to pass to a purchaser of the land. This point is dealt with, or, at any rate,
is very nearly dealt with, in *Formby v. Barker* (4) and *L.C.C. v. Allen* (5), because,
be it observed, at the time when Mr. Bullbrook died he had entirely disposed of
all the property for the benefit of the development and disposal of which he had,
on the view I have taken of the covenant, caused the covenant to be entered into. C
The covenant having been entered into enabled him to dispose to advantage of
the property, that result had, in fact, been obtained. He had disposed of the
whole of the property at the time of his death, and, therefore, at the time of
his death he had no real estate for the advantage of which it was that he should
enforce the covenant. In that state of things does the equitable doctrine that D
a restrictive covenant can be enforced against an assign of the covenantor apply?
Is it applicable to a case where the covenantee has, in process of time, got rid
or disposed of the whole of the property which he had at the date of the covenant,
and for the benefit of his dealing with which he caused the covenant to be entered
into? *Formby v. Barker* (4) and *L.C.C. v. Allen* (5) were both cases in which,
at the date of the covenant, the covenantee retained no property at all to be aided E
by the enforcement of the covenant. In *Formby v. Barker* (4) the vendors had
land and sold the whole of it without retaining any portion. In *L.C.C. v. Allen*
(5) the London County Council had never had any land; they were not selling
any land, but were in the position of persons taking a merely personal covenant.
This case differs from both of those in that at the date of the covenant the
covenantee retained the property for the development of which he was causing
the covenant to be entered into, and it was only subsequently that he disposed F
of the land. But although there is that marked distinction between *Formby v.*
Barker (4) and *L.C.C. v. Allen* (5), on the one hand, and this case, on the other,
yet I think that both *Formby v. Barker* (4) and *L.C.C. v. Allen* (5) apply to the
present case. I think that the effect of the reasoning in both those cases, if it
is considered carefully, is that the equitable doctrine enabling restrictive covenants
to be enforced against assigns with notice ought not to be extended in derogation G
of the ordinary rights at common law of purchasers, and that it ought to be applied
only where it is sought to enforce the covenant in connection with the enjoyment
of the land that the covenant was intended to protect. That appears to me to
apply quite as much to a case where the original covenantee retained land at
the date of the covenant and he or his successors got rid of the whole of it H
afterwards, as to a case where the original covenantee either had no land or had no
land which he was retaining. It is pointed out in *Formby v. Barker* (4) that
otherwise the result might be that a covenant, which had ceased to have any
value in the hands of the covenantee or his express assigns for the purpose of
protecting land, might go down through an infinite series of successions to legal
personal representative after legal personal representative without there being I
during the whole of that time any land in respect of which the benefit of the
covenant was enforceable, and it is pointed out that, if this were possible, it
would be an enormous extension of anything that was ever contemplated when
the doctrines of equity with regard to the enforcement of restrictive covenants
were laid down.

I will not go at length through the reasoning either in *Formby v. Barker* (4) or
L.C.C. v. Allen (5); but that seems to me to be the result of that reasoning.

A They differ indeed in one respect. *Formby v. Barker* (4) would only prevent the executors of a covenantee who has disposed of his land from suing an assign of the covenantor; *L.C.C. v. Allen* (5) would prevent the covenantee himself, after he had disposed of his land, from suing such an assign. If the second view be correct, so that in this case Mr. Bullbrook himself could not have proceeded on the covenant after he had disposed of his houses in Cambridge Terrace, then

B it seems to me that a fortiori it is impossible for his executors subsequently to sue on the covenant. But assuming that Mr. Bullbrook himself could have sued, it by no means follows—and *Formby v. Barker* (4) lays the contrary down quite clearly—that his executors could sue after his death, seeing that he did not possess at the time of his death any of the land for the benefit of the development of which he had caused the covenant to be entered into. Against the view that I

C am expressing counsel for the plaintiffs has pressed upon me two decisions of my own: *Ives v. Brown* (6) and *Lord Northbourne v. Johnston & Son* (7), but after having carefully considered those cases I do not think they really apply to the case now before me. In each of those cases the covenants were entered into for the purpose of subsequent beneficial development of a large estate, and at the time when the person entitled to the estate and to the benefit of the covenants died there was a large amount of property still remaining undeveloped. For its development it would be necessary to make use of the covenants. That seems to differ altogether from a case where at the time when the covenantee dies the whole of the estate in respect of which the covenant was entered into has been dealt with and disposed of by the covenantee, and he has no further

E interest in the enforcement of the covenant so far as any land is concerned. That difference between those two cases and the present case appears to be vital, and in my judgment the two cases in question afford no reason for saying that either Mr. Bullbrook just prior to his death, or his executors after his death, could successfully sue to enforce the benefits of the covenant against assigns of the covenantor. It has been said that a difference is made by the circumstances

F that the plaintiffs happen to be not only the executors of John Bullbrook, but also the trustees of three of the houses in Cambridge Terrace, so that the land and the benefit of the covenant are re-united in the same persons. I do not think that really makes any difference. When once Mr. Bullbrook and his executors as such had ceased to be entitled to enforce the covenant by reason of his having parted with the whole of the houses in Cambridge Terrace, I do not think any subsequent re-union of the executorship to John Bullbrook and the ownership

G of the houses in the same persons could affect the position. It could not put them in any better position than if the executors and the assignees of the land were two separate sets of people and they combined to sue on the covenant. If they had come to sue together there would have been a pretty effective answer to each set of plaintiffs, and the fact that the two sets of plaintiffs are in fact

H united in the same two individuals, does not, in my judgment, make any difference. I hold, therefore, that the plaintiffs have no right to sue on the covenant.

That really disposes of the action, but, of course, there may be an appeal, and I think it right, therefore, that I should express my view on the rest of the plaintiffs' case on the basis that I am wrong in the conclusion to which I have

I come and that there is a right to sue. I have, therefore, to consider whether the defendants have done anything which is a breach of the covenant. As I have said, there are two breaches of the covenant which are sought to be enforced—one, the alleged breach of the prohibition against building, and the other, the probate future breach, of the prohibition in regard to the user of the buildings. [His LORDSHIP considered the words of the covenant and held that on its true construction the erection of the motor houses did not constitute a breach, and, further, that there was no sufficient evidence that the user of the garages would be

permanently prejudicial to the value of the plaintiffs' houses, so as to entitle the plaintiffs to an injunction quia timet to restrain the defendants from using them so as to affect prejudicially the value of the plaintiffs' houses.] In my judgment, therefore, I ought to dismiss this action, with costs. A

Solicitors: *W. A. E. Headley*, for *Norman & Stigant*, Chatham; *F. J. Berryman*, for *W. A. Watson*, Chatham. B

[Reported by *L. MORGAN MAY*, Esq., Barrister-at-Law.]

THE HERMIONE C

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J., and Elder Brethren), December 10, 17, 19, 29, 1921, February 15, 1922]

[Reported [1922] P. 162; 91 L.J.P. 136; 126 L.T. 701; 15 Asp. M.L.C. 493; sub nom. *H.M.S. Daffodil*, 38 T.L.R. 381] D

Shipping—Salvage—Settlement of claim—Authority of agent.

The authority of an agent for the officers and crew of a ship is not wider than that of a solicitor, and, therefore, does not extend to the settlement of claims by the ship's officers and crew without their authority. Thus a ship's agent who settles a claim for salvage reward by the officers and crew of a King's ship contrary to the express prohibition of his principals is guilty of a breach of duty and liable in damages to his principals assessed at the difference between the amount received under the settlement and the amount of the award which his principals would have received if the salvage claim had been duly prosecuted. This is so even if the agent acts on the opinion of counsel and on the bona fide view that the settlement he obtains is to the advantage of his principals. E

Notes. As to agreements as to salvage see 30 HALSBURY'S LAWS (3rd Edn.) 895-900, and for cases see 41 DIGEST 883. F

Case referred to:

(1) *The Otway*, unreported.

Salvage Action brought by Commander Noakes, R.N., on behalf of himself and the officers and crew of *H.M.S. Daffodil*, against Stillwell & Sons, at all material times the duly appointed ship's agents for *H.M.S. Daffodil*, under the Naval Agency and Distribution Act, 1864 (repealed). The plaintiff's claim was for a declaration fixing the amount of salvage award proper for salvage services performed by them to the steamer *Hermione* in April, 1917, and for an order that the defendants should pay to them such sum less £100, which the plaintiff had already received under a settlement of his claims in respect of these services which had been effected by the defendants, as the plaintiff alleged, within his authority. G

The plaintiff, by his statement of claim, alleged that on April 14, 1917, and subsequent days, the officers and crew of the *Daffodil* performed salvage services to the steamer *Hermione*, which resulted in benefit to her and in her cargo, to the value of £76,359, being saved. The statement of claim further alleged that by letter dated April 23, 1917, the plaintiff, on behalf of himself and the officers and crew of *H.M.S. Daffodil*, instructed the defendants to put forward a claim for salvage in respect of these services. In or about June, 1917, the permission of the Admiralty to put forward the claim was received, and was forwarded by the plaintiff to the defendants on June 18, 1917. The defendants employed as their agent Mr. Arthur Tyler, a solicitor, to act for the commander, officers, and crew of the *Daffodil*, and on June 23, 1917, a writ in rem was issued in the H
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A Admiralty Division of the High Court against the owners of the steamship *Hermione*, her cargo and freight. Service of the writ was accepted by Messrs. William A. Crump & Sons, solicitors for the defendants in the said action, and Messrs. Crump gave an undertaking to appear, but refused to give an undertaking to prove values or put a bail. Upon receipt of the plaintiff's instructions to put forward a claim for salvage and/or after the refusal of Messrs. Crump to prove values or to put in bail, the defendants and/or their agent, Mr. Tyler, negligently and in breach of their duty failed to take the necessary or any steps to arrest the cargo which had been salvaged from the *Hermione*, and/or to obtain security for the claim of the plaintiff and/or to enforce the said undertaking to appear and/or to proceed in personam against the defendants. On or about Nov. 18, 1919, the defendants and/or their agent, Mr. Tyler, without communicating to the plaintiff the offer of settlement, negligently and in breach of their duty, and contrary to the express instructions of the plaintiff, contained in letters to the defendants dated July 5 and Aug. 14, 1919, accepted the sum of £100 and £10 10s. costs in full satisfaction and settlement of the plaintiff's claim, which sum of £100 did not represent a fair and reasonable remuneration for the said services. The defendants, by their defence, admitted that at all material times they were the duly appointed ship's agents for H.M.S. *Daffodil* under the Naval Agency and Distribution Act, 1864. They denied that the plaintiff rendered services to the *Hermione* as alleged, or that the cargo of the *Hermione* was saved or that the *Hermione* was benefited, saying that the plaintiff acted negligently in handling her. The defendants admitted that they received a letter from the plaintiff dated April 23, 1917, but denied that it contained any instructions to put forward a claim for salvage. No instructions to put forward a claim and no information upon which to base such a claim was received by the defendants until the receipt of a letter from the plaintiff dated June 18, 1917. The defendants admitted that they took no steps to arrest the cargo salvaged from the *Hermione*, or to obtain security for the claim of the plaintiff or to proceed in personam against the defendants in the said action. Such failure did not in the circumstances of the case amount to or constitute negligence or breach of duty. By letter dated Feb. 28, 1918, Mr. Tyler requested Messrs. Crump, the solicitors for the owners of the *Hermione* to give an undertaking to prove values. Messrs. Crump refused to give any such undertaking and stated that there were no values to prove. The plaintiff had acted negligently in failing to obtain a salvage bond from the master of the *Hermione*, or otherwise preserve his claim against the *Hermione* and her cargo, as it was his duty in the interest of his officers and crew to do.

G Appearance was entered by Messrs. Crump on Mar. 6, 1918. Upon the advice of counsel the defendants took no steps to proceed to search for an arrest with a view to appraisal of the cargo alleged by the plaintiff to have been saved by the officers and crew of H.M.S. *Daffodil*, and they did not abandon the said action in rem against the ship, cargo, and freight, and proceed in personam against the owners of the cargo alleged by the plaintiff to have been saved. In the circumstances then known to the defendants they acted reasonably, and without negligence and bonâ fide in the best interests of the plaintiff, his officers and crew. The defendants further admitted that they settled the action against the *Hermione*. In so doing they acted upon the advice of counsel, who advised that the plaintiff had no chance of success against the owners of the *Hermione*, and had no prospect of success in the circumstances of the case against the owners of the cargo. The sum of £100 was a fair and reasonable remuneration for the services rendered by H.M.S. *Daffodil*. The defendants denied that they accepted the offer of £100 in settlement without communicating it to the plaintiff, or that they were negligent or guilty of breach of duty in accepting it, or that they accepted it contrary to the express instructions of the plaintiff. The letters of July 5, 1919, and Aug. 14, 1919 contained no express instruction as alleged. In

reply to the plaintiff's letter of Aug. 14, 1919, the defendants, acting under the advice of counsel, informed the plaintiff by letter dated Sept. 4, 1919, that they were in agreement with the opinion of counsel, which had previously been sent to the plaintiff, and advised the plaintiff, in reply to his specific inquiry, to accept the sum of £100 in settlement, failing an increased offer. The plaintiff failed to reply to the letter, whereby he intimated his agreement with the advice given by the defendants and his willingness that the defendants should settle the action. The defendants, acting as reasonable men and without negligence and in good faith, were entitled to believe, and in fact did believe, that they were authorised by the plaintiff expressly to negotiate for a settlement of the action on the basis of £100 as a minimum figure. The defendants did in fact, through their agent, Mr. Tyler, endeavour to get an increased offer from Messrs. Crump, but on their failure to get any increase in the offer, on Nov. 18, 1919, no communication having been received from the plaintiff either instructing them to the contrary, or at all, they accepted the sum of £100 together with £10 10s. costs, in full settlement and satisfaction of the plaintiff's claim in the action.

Dunlop, K.C. and G. P. Langton for the plaintiff.

Bateson, K.C. and Wilfrid Lewis for the defendants.

Alfred Bucknill held a watching brief for the Salvage Association.

Cur. adv. vult.

Feb. 15. **HILL, J.**, read the following judgment.—In this action the plaintiff, a former commander of H.M.S. *Daffodil*, suing on behalf of himself and those who were her officers and crew on April 14, 15, 1917, claims damages against the defendants, alleging that the defendants, by themselves and their agent, Mr. Arthur Tyler, were negligent in the prosecution of a salvage claim, and further, that they compromised that claim for the sum of £100 and £10 10s. costs, contrary to the express prohibition of the plaintiff. The defendants were appointed by the plaintiff to be ship's agents under the Naval Agency and Distribution Act, 1864. Mr. Tyler was a solicitor; he died on April 30, 1919, in the course of the proceedings, and was succeeded by the firm of Arthur Tyler & Co., Mr. Arthur Tyler was instructed by the defendants in the salvage proceedings which were instituted on the plaintiff's instructions, and appeared on the writ as solicitor for the plaintiffs in those proceedings, who were described as the commander, officers and crew of H.M.S. *Daffodil*. It is admitted in the pleadings in the present case that Mr. Tyler acted as agent for the defendants. But for that admission I should have been of the opinion that he was not an agent of the defendants, but only of those persons whose solicitor he was, having been appointed by the defendants in their capacity as ship's agents, and acting, not for the defendants, but for the plaintiffs upon the record. In view of the admission, I deal with the case on the basis that Mr. Tyler was the agent of the defendants, but on the facts as I find them, this point is not of importance in the present case. I may say that there is no action brought against Mr. Tyler.

There are two distinct breaches of duty alleged: (i) Negligence in the prosecution of the salvage action; (ii) settling it contrary to an express prohibition. I have come to the conclusion that there was no negligence on the part of either the defendants or Mr. Tyler or his successors in the prosecution of the salvage action. As to the charge of settling it contrary to an express prohibition, there is no doubt at all that Messrs. Tyler & Co. had the authority of the defendants to settle as they did; and the only question left is, whether the defendants gave that authority contrary to the express prohibition of the plaintiff. I base my finding that Messrs. Tyler & Co. had the defendants' authority to settle upon the correspondence, which shows a previous authority [the learned judge referred to the correspondence] and a ratification (if there was not a previous authority which there was). As regards the defendants I have, with some hesitation, come to the conclusion that they authorised the settlement contrary to an express prohibition, and that, while in

A the absence of such prohibition, they could not, in all the circumstances of the case, have been held negligent to settle as they did, yet they were guilty of a breach of duty in settling contrary to an express prohibition and are liable in damages for the consequences. Their duty under the Act, and apart from the Act as plaintiff's agents, was to do all things necessary or proper in the course of the salvage claim. That, in my view, included an authority to settle a salvage claim, provided it
B was done reasonably, but the authority to settle in a ship's agent is not wider than that of a solicitor, and does not extend to a settlement on terms forbidden by the principal.

The main facts of the case are as follows. On April 14, 1917, the steamship *Hermione*, homeward bound with a cargo of wheat, frozen meat, and other goods, was mined in the neighbourhood of the *Coningbeg* light vessel. Her crew took
C to the boats. The *Daffodil*, a sloop of 868 tons, with a complement of ninety-one was on duty near by, and went to the assistance of the *Hermione*. The *Hermione* was badly holed. No. 1 hold was full of water, No. 2 had 18 ft. of water, there was also a crack in the upper part amidships, the windlass was disabled; she was badly by the head. An officer, engineer, and men from the *Daffodil* boarded her, as did the master and the boatswain of the *Hermione*. The pumps were got to work and pre-
D vented the water from increasing. The *Daffodil* took the *Hermione* in tow, and brought her to an anchorage in Dunmore Bay. The *Hermione*'s own crew returned, and the *Daffodil* left for duty outside. An armed trawler remained alongside. The intention of the plaintiff was to return and take the *Hermione* further in on the following morning and beach her. About half-past ten in the evening the bulk-
E head between Nos. 1 and 2 holds was heard cracking, and the water in No. 2 rapidly increased, with the result that the *Hermione* sank forward, and the engine and stokehold were flooded. On the following morning the *Daffodil* returned, and her men spent the day in breaking out a quantity of rubber and ipecacuanha, which formed part of the cargo. This the *Daffodil* landed. A number of horses on board were landed by the steamship *Arklow*. The ship and the rest of the cargo were
F subsequently taken in charge by the Salvage Association acting for the underwriters. The bulk of the cargo, including all the frozen meat and most of the wheat, was worthless, but other parts of the cargo were landed and forwarded to destination. The value of the salvaged portion was considerable. The ship became a constructive
G total loss, but a few moveables were saved. Expenses were incurred by the Waterford Harbour Commissioners in breaking up the wreck, and apparently these were in part recouped out of the value of the cargo salvaged, I presume under powers of the Waterford Harbour Commissioners to treat ship and cargo as a common fund for recouping expenses.

What the *Daffodil* succeeded in doing was to bring the *Hermione* from a place where she would have sunk in deep water to a place where she sank in shallow water, so that part of her cargo could be salvaged. The *Daffodil* further broke out and
H landed the rubber and ipecacuanha. That is the only part of the cargo which they completed the salvage. The services were short, the towage seven hours, the distance was twenty-five miles, the weather was fine. The *Daffodil* was exposed to some extra risk from mines and possibly submarines while towing. She had three armed trawlers acting as escort. As between the *Daffodil* and the *Hermione*, each accuses the other of negligence. The *Daffodil* says that the *Hermione* was
I negligently allowed to sink at anchor in Dunmore Bay. The *Hermione* says the *Daffodil* ought to have taken assistance of a pilot which was offered and ought to have beached the *Hermione* at once. Now that the case has been tried out, and the facts investigated, I am unable to find negligence. I am unable to find that these charges of negligence are made out. No. 2 hold was full of wheat. The bulkhead between Nos. 1 and 2 must have been damaged by the explosion, for water was flowing in to No. 2. I am advised that the wet wheat in No. 2 would rapidly swell and be likely to cause the damaged bulkhead to give way. I accept the evidence of

the master of the *Hermione* that there was a sudden increase of water which no pumps could have controlled. It was said that the master ought to have used the trawler alongside to beach the ship but it is very doubtful whether there was time to do anything effective. I cannot find that the sinking was due to the negligence which is charged against the master and crew of the *Hermione*. On the other hand, the master was satisfied to have the *Hermione* brought to anchor where she was, and the plaintiff, who did not know that the cargo in No. 2 was wheat, was not negligent in bringing the ship to an anchor instead of immediately beaching her, and, except to assist in beaching, the help of a pilot was not required. There was no negligence of the plaintiff or his men. The sinking was a misfortune, both for the owners and underwriters and for the plaintiff and his officers and crew. Had the service been completed up to the point of beaching, it would have been valuable. As regards the cargo, whether the *Hermione*, which was twenty-eight years old, would in any event have escaped becoming a constructive total loss, is more doubtful, but much more of the cargo would have been saved. The sinking turned the service into one of very moderate success whereby a comparatively small part of the whole cargo was brought into greater comparative safety, and of that again a small part was actually brought into final safety by being landed by the *Daffodil* at Waterford. Even of what was actually saved, the commander, officers, and crew of a King's ship could look for no reward as to part, for the wheat was the property of the Crown, and in respect of it no action would lie in this court and no claim would be recognised by the Crown for services rendered by servants of the Crown.

Such on the facts as now ascertained, was the service in respect of which the plaintiff was anxious to prosecute a claim. It was a good claim for what it was worth. In my opinion, the suggestion that it had been lost by the failure of the plaintiff to hand over the rubber and ipecacuanha to the receiver of a wreck is without foundation. The receiver of wreck in his letter makes no complaint of it, and I can see no ground for saying that when there are people representing the owners on the spot, as there were shipowners' agents at Waterford, the salvor forfeits his claim because he does not hand over the property salvaged to the receiver of wreck. On the other hand, it was not a certain claim, for it was always open to the suggestion, which, in fact, was made by Messrs. Crump & Son for the underwriters and owners as early as July 25, 1917, that the plaintiff had improperly failed to beach the ship at once, a suggestion which we now know to be unsound, but which had to be considered by anyone who was advising the plaintiff.

I now come to the prosecution of the claim. A good deal of complaint was made as to delay in issuing a writ, failure to arrest and obtain bail and have values proved, and so forth. I need not investigate this closely. I do not find that there was any just cause of complaint in these respects. By the time the plaintiff gave adequate instructions all or nearly all the salvaged cargo of any substantial value had been landed and forwarded to destination. But I do not think it is necessary to consider that matter further because I am clearly of opinion that no damage resulted from any such delay, if delay there was. A writ was issued; an undertaking to appear was given on Mar. 6, 1918; appearance was entered by Messrs. Crump & Son on the instructions of the Salvage Association, which represented both the owners of the *Hermione* and of the cargo interests other than the government. The plaintiffs were, therefore, put in a position to proceed in personam and to obtain discovery, and the values would have been ascertained, and a judgment in personam would have resulted in payment of award and costs. Mr. Tyler twice took the opinion of counsel. The plaintiff does not complain of the particular counsel chosen. He frequently appeared for commanders, officers, and crews of King's ships. The first instructions consisted of the writ, which bore upon it the endorsement of undertaking to appear, a statement of the services with the log and chart, a bundle containing the Admiralty consent and the reports by the plaintiff, and correspondence. They were put before counsel. The first opinion, given on

- A April 13, 1918, treated the case against the ship as hopeless, because she had become a total loss, and, as to the cargo, assumed that only certain small values had been saved. Upon this opinion being submitted to the plaintiff, he wrote a long letter on June 10, 1918, giving his views of the facts and referring to portions of the cargo salvaged as of the value of at least £10,000. This letter, with the other papers, was put before counsel by a letter of June 18, 1918, and counsel gave a second opinion dated
- B June 24, 1918. He advised that there was no chance of success in respect of the ship, and that as to the salvaged cargo, apart from the difficulties of appraisal of a dispersed cargo, the plaintiff had lost his claim by not taking the necessary steps at the time of the salvage, by informing the receiver of wreck and obtaining a bond before the cargo was dispersed. Counsel, in coming to this opinion, was apparently misled by a prize salvage case of *The Otway* (1), and an Admiralty war order relating thereto. *The Otway* had no bearing at all, so far as I can see, upon a case in which a claim in personam had been made effective by the appearance of the owners of the property alleged to have been salvaged. In view of these opinions of counsel, I am of opinion that Mr. Tyler and the defendants were justified in thinking that it was to the plaintiff's interest that the action should be settled upon any terms that could be obtained; and if, in the unfettered exercise of their authority as solicitor and as ship's agents respectively, they had settled for £100 and payment of £10 10s. costs, I do not think it could be said that they had acted negligently. It is said that they ought to have done more to ascertain the value of the cargo saved, but if the opinion of the counsel was sound, it made no difference whether the cargo was worth more or less, and money spent in continuing the action until values were ascertained would only have been money thrown away. The settlement was not made until
- E November 1919, when it was obvious that Messrs. Crump would make no better offer.

Now comes the question whether the settlement was not made contrary to the express prohibition of the plaintiff. The answer depends on some half a dozen letters which appear in the correspondence. In his long letter of June 10, 1918, the plaintiff had said :

- F "I still wish to prefer my full claim . . . and I request that you will not interpret the foregoing to any relinquishment of our claim. . . . I think these small values amount to a very considerable sum: I should say at least £10,000 without taking the wreck into consideration. I should be very much obliged if you would carefully consider these remarks, and it is for you to say if there is any prospect of success in the High Court."

- G Later on he expressed the hope

"that you will be able to get some offer from the people who, without doubt, have made considerable gain out of the risks and labours of the *Daffodil's* crew.

Without prejudice as to any further action we may take, we are of course entirely in your hands as to the legal position."

- H The defendants wrote to the plaintiff on the second opinion of counsel. There were often delays in the correspondence because by this time the plaintiff was serving, I think, in the eastern Mediterranean. On May 28 the defendants wrote to the plaintiff :

"Our solicitors inform us today that the defendant's solicitors have made a suggestion that if you are prepared to accept £100 they will advise their clients to agree to this proposal. Would you kindly let us know whether this would be agreeable to yourself and the crew of H.M.S. *Daffodil*?"

- I On July 5, he replied to that :

"I do not think I should be justified in accepting the offer of £100. In order to avoid a lot of expensive litigation, I would accept an offer of £10,000 . . . I cannot agree with [counsel's opinion]. If you have no objection, I propose on my return to England to obtain independent advice, unless something better can be done, with reference to this claim."

On July 26, Messrs. Stilwell write acknowledging receipt of the letter of the 5th inst. : A

"With reference to your estimate of the value of your claim for salvage, we regret that this is far in excess of the amount that the High Court or any arbitrator now awards, and venture to suggest that when you return to England you should call on our solicitors. . . . Of course, if you prefer to take an independent opinion, you are quite at liberty to do so." B

On Aug. 4, Commander Noakes wrote, first of all :

"I definitely withdraw my offer on behalf of the ship's company of H.M.S. *Daffodil* to accept £10,000";

and then :

"I request that you will be good enough to inform me the exact position in which this claim now stands : (a) If you are in complete agreement with your counsel's opinion or not? (b) What further steps, if any, you propose to take? (c) If I have been informed of all the steps already taken? (d) If you recommend me to accept the £100 offered by the owners?" C

He ends :

"I will at once inform you on my return to England, which I expect will be shortly, so that this claim may be proceeded with." D

On Sept. 4, Messrs. Stilwell wrote to him in reply to that :

(i) "We agree with our counsel's opinion. He is now Attorney-General at Gibraltar; (ii) the only step that we can suggest is to try to screw the owners to a more liberal offer; (iii) we have informed you of all the steps so far taken; (iv) failing any increased offer the £100 had better be accepted." E

That letter was received by the plaintiff in the Mediterranean towards the end of September. He sent no reply, and it was in that state of their instructions that the defendants authorised Messrs. Tyler to settle, and they did settle, giving up most of their own claim for costs, getting £10 10s. for costs from the other side and the £100 which had originally been offered. The result was that the plaintiff got £100 and no costs at all chargeable to them because Messrs. Tyler gave up the difference between their own costs, which were said to have amounted in out-of-pockets to £60 at this time, and the £10 10s. Messrs. Tyler accepted the £10 10s. in satisfaction of their costs. On Nov. 19, Messrs. Stilwell wrote to Commander Noakes reporting the settlement. Again he sent no reply, came to England early in the following year, and the next letter from him was a letter from his present solicitors complaining of the settlement. F

Taking all these letters up to Sept. 4, 1919, coupled with the fact that the plaintiff sent no reply, can it be said that the plaintiff authorised the defendants, or by his conduct induced the defendants to believe that he had given them authority to settle or to make a settlement of the kind which was made? I think not. He had refused to accept £100, and proposed on his return to England to obtain independent advice, "unless something better can be done with reference to this claim." He has later on withdrawn his own absurd figure of £10,000, and asked whether the defendants recommended him to accept £100. He did not assent to the accepting the £100, and in that letter said he expected to be in England shortly, so that the claim might be proceeded with. The defendants expressed in reply their opinion as to the wisdom of accepting the £100, but without receiving a reply, although the time for reply in the ordinary course had gone by, authorised a settlement. I cannot find in those matters, first of all, that the plaintiff authorised the settlement. It is, to my mind, quite clear he did not. Did he by his silence induce the defendants to believe that he had authorised it? Again, in face of the specific prohibition in the letters, I cannot find that by not replying to the last letter he led the defendants to suppose that they had authority. On this matter I may also add that it was G H I

A not the want of a reply to their last letter which induced the defendants to do anything, because they had begun the final settlement before any reply could have been received. I think, though, as I say, I come to the decision with some hesitation, I must find that the defendants settled in breach of their duty towards the plaintiff. It was said with truth that the defendants were agents, not only of Commander Noakes, but of his officers and crew, and they were also entitled to have some regard to this fact, that Commander Noakes was apparently a person who sometimes expressed very rash opinions, because in one of his letters he stated he did not mind if the whole of the award recovered was used up in costs, he still wanted to fight. It is also quite true that as agents for the officers and crew, the defendants had their interests to consider, but that gave them no authority to settle Commander Noakes's claim against his prohibition. Their only alternative, if they thought he was a wholly unreasonable man, would seem to me to be to communicate with him and the other people for whom they were acting and say: "We cannot go on: we must cease to act as your agent." Therefore, I can see no way by which I can acquit them of a breach of duty.

Then I have to consider what are the damages. This again is a different point. The damages are the difference between the £100 received and the sum which would have been recovered, less perhaps the difference between solicitor and client and party and party costs which the plaintiffs might have had to bear, had the salvage action been continued, and of course that might have been not a wholly negligible amount if the issue of negligence had been raised in the salvage action had been fought out. The amount which would have been recovered, on the facts as we now know them, would not have been large in my judgment, but it would have been substantially more than £100. It is not possible now to ascertain with exact precision the values of the property saved, and I must say that the plaintiff has given me very little assistance in ascertaining what they probably were. An official from the office of the Salvage Association was called, but he spoke only of the value of certain wheat and cases of preserved meat sold by the Salvage Association. He also produced the manifest and statement of insured values. Besides that, an officer of the Salvage Association was called who superintended the salvage operations, and his report was put in. There was also a statement by the receiver of wrecks of the values declared to the Customs and the goods landed. I should have thought that, long before this, the adjustment of the general average and salvage expenses must have been completed and the saved values proved. But I was not given the benefit of anything of the sort. I am left very much to conjecture. The wheat and frozen meat represented, according to the manifest, 2,806 tons out of the total weight on board. The wheat was government wheat and does not come into account. The frozen meat was only a cause of expense in getting rid of it; it was absolutely worthless. What was saved was fifty-seven horses landed by the steamship *Arklow* at a salvage cost of £710. Their value was put forward as £3,000. If one deducts the £710, one gets about £2,300 left after deducting the salvage paid to the *Arklow*. There were twenty-four bales of rubber, consisting of 24½ tons landed by the *Daffodil* or one of the ships. The evidence was given of its value—that it was of good quality—and it was said only good quality rubber was being shipped at that time. I took that at about £8,000. There were thirty-six packages of ipecacuanha, of which no evidence was given, which was put forward as being worth £500. I accept that. There were 179 bales of wool. Thirty-six are described in the manifest as arriving at Liverpool on April 27, "more or less damaged by sea water and heating"; and others were described in evidence as being wet and black. The costs of breaking them out and landing varied from 10s. to £40 a bale. The insured value was £70 a bale, and the declared value of the 130 bales at the Customs was £48 all round. One must write these down very heavily from their damaged condition. I took about £4,000 as the value of the wool. There were 250 barrels of Premier Jus described in the manifest as arriving at Liverpool on April 27 "apparently sound."

The cost of breaking out and landing was 10s. a barrel. There were twenty-nine casks of sterine, which have been similarly described; and five casks of pickled meat similarly described. There is nothing to assist in arriving at these values. I tried to identify these particular items with the goods mentioned in the receiver's letter giving the values declared to the Customs and with any particular items in the statement of insured value, but one cannot identify them. A large quantity of packing house products are mixed up which probably include the Premier Jus and sterine, but I cannot get my feet on to any sure ground in ascertaining the value of these particular things. I think £1,000 was their value. Then there were 7,585 cases of preserved meat, which were from the 'tweendecks and were landed at Dunmore East at a cost of 1s. 3d. per case, and were there loaded on the steamship *Pine* on May 2, 3. There were 3,014 more cases, part of 5,337 cases, which were sold to a Mr. Mann at 20s. a case, as they lay on the ship, but these were under water. He gave £1 a case and paid the owners £3,014. I took that figure as certain. The balance of the 5,000 odd cases to be sold to him were seized or their proceeds were seized by the harbour authorities for wreck raising expenses. Apart from those cases there are 7,595 cases which had not been badly under water; they are spoken of as wet. Again, I have tried to get at either the insured value or the landed value of those. To my mind, it is exceedingly difficult. The documents do not agree, and the matter has not been cleared up by the plaintiff. Taking the evidence of what was landed as £7,585 and adding to that £5,000, I get £12,900, but the receiver gives £13,000 odd as landed. There were on board altogether, according to the manifest, £18,000. The insured value of the total was £39,900. I have done the best I could to get any results out of these figures, but I cannot; I am only making a guess. I take the values at £2, which is double what Mr. Mann paid for his, which were not so good. That gives £15,000 for these. Adding up all these figures it will be found that what was saved comes to something over £35,000, or £36,000, or £37,000; it does not matter; it is substantially under £40,000. I take that. No doubt there would have to be very considerable deductions made from that, but no claim has been made in respect of freight; it may be none was saved. Very likely it is not claimed because the expenses of forwarding the small parcels of cargo that were saved would eat up any freight there was upon them. I ignore the expenses on the one side and the freight on the other, and take it that the plaintiffs completed the salvage of property worth £8,500; that is the rubber and ipecacuanha brought into greater comparative safety. In taking the property as being worth something under £40,000, I think I am being generous to the plaintiff.

What, in such circumstances, would the court have awarded the commander, officers and crew of a King's ship, remembering that nothing had to be awarded to the *Daffodil* as the instrument of salvage, and that only a personal award had to be made for the personal risk and exertions of the commander, officers and crew, and that in a case in which, by the misfortune of the salvors and of everybody, the service had turned out to be one which saved only a small portion of the property at risk. I think the amount would necessarily have been a very moderate amount. At the outside I think, if I had been trying the case, I should not have given more than something between £500 and £600. I think something would have had to come off that for costs incurred by the plaintiff which would not have been recovered; and if (and I do not see why it should not) the issue of negligence had been fought, that might well have run into £50. I think I shall be dealing with the plaintiff quite fairly if I say that, if the case had been continued and had been fought out the net result would have been to give the plaintiff £500 instead of £100. The damages, therefore, are £400, and for that amount I give judgment.

Solicitors: *Parker, Garrett, & Co.; Wooley, Tyler & Bury.*

[Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.]

HOWARD HOULDER & PARTNERS, LTD. v. MANX ISLES STEAMSHIP CO., LTD.

[KINGS BENCH DIVISION (McCardie, J.), June 21, 26, 1922]

[Reported [1923] 1 K.B. 110; 92 L.J.K.B. 233; 128 L.T. 347; 38 T.L.R. 757; 66 Sol. Jo. 682; 16 Asp. M.L.C. 95; 28 Com. Cas. 15]

Agent—Remuneration—Commission—Payment if option exercised to purchase ship for £125,000—Ship sold by principal for £65,000—Right of agent to payment on quantum meruit.

A charterparty, dated Dec. 23, 1919, by which the defendants chartered a steamship to charterers for five years, contained the following clause: "Charterers have option of purchasing steamer at any time between the date of signing charter and the completion of charter period, for the sum of £125,000 . . ." By a commission note of the same date the defendants agreed to pay to the plaintiffs, steamship agents and brokers, who had rendered the plaintiffs services in connection with the hire, five per cent. brokerage on the hire as earned and paid, and it was further provided: "Should the option of purchase contained in the charter be availed of the brokerage on purchase to be $3\frac{1}{2}$ per cent. payable on the final completion of purchase." In July, 1921, the defendants sold the vessel to the charterers for £65,000.

Held: it was a settled rule for the construction of commission notes and the like documents which referred to the remuneration of an agent that an agent could not recover unless he showed that the conditions of the written bargain had been fulfilled, and it mattered not that he proved expenditure of time, money, and skill; the option in the present case was to purchase at a price expressly fixed at £125,000, and that option was never exercised; and, therefore, the plaintiffs were not entitled either to commission at $3\frac{1}{2}$ per cent. on the £65,000 or on a quantum meruit.

Notes. Referred to: *Bental, Horsley and Baldey v. Vicary*, [1931] 1 K.B. 253; *Geo. Trollope & Sons v. Martyn Bros.*, [1934] 2 K.B. 436.

As to an agent's right to remuneration see 1 HALSBURY'S LAWS (3rd Edn.) 196-205; and for cases see 1 DIGEST 488 et seq.

Cases referred to:

- (1) *L. French & Co. v. Leeston Shipping Co., Ltd.*, ante, p. 314; [1922] 1 A.C. 451; 91 L.J.K.B. 655; 127 L.T. 169; 38 T.L.R. 459; 15 Asp. M.L.C. 544; 27 Com. Cas. 257, H.L.; 12 Digest (Repl.) 687, 5280.
- (2) *Alder v. Boyle* (1847), 4 C.B. 635; 16 L.J.C.P. 232; 9 L.T.O.S. 246; 11 Jur. 591; 136 E.R. 657; 1 Digest 513, 1771.
- (3) *Bull v. Price* (1831), 7 Bing. 237; 5 Moo. & P. 2; 9 L.J.O.S.C.P. 78; 131 E.R. 91; 1 Digest 503, 1726.
- (4) *Battams v. Tompkins* (1892), 8 T.L.R. 707, C.A.; 1 Digest 508, 1751.
- (5) *Clark v. Wood* (1882), 9 Q.B.D. 276; 47 L.T. 144; 30 W.R. 931, C.A.; 1 Digest 510, 1755.
- (6) *Mason v. Clifton* (1863), 3 F. & F. 899; 1 Digest 506, 1746.
- (7) *Martin v. Tucker* (1885), 1 T.L.R. 655; 1 Digest 515, 1783.
- (8) *Green v. Mules* (1861), 30 L.J.C.P. 343; 1 Digest 517, 1793.
- (9) *Barnett v. Isaacson* (1888), 4 T.L.R. 645; 1 Digest 501, 1718.
- (10) *Lott v. Outhwaite* (1893), 10 T.L.R. 76, C.A.; 1 Digest 514, 1775.
- (11) *Toulmin v. Millar* (1887), 12 App. Cas. 746; 57 L.J.Q.B. 301; 58 L.T. 96; 3 T.L.R. 836, H.L.; 1 Digest 505, 1739.
- (12) *Millar, Son & Co. v. Radford* (1903), 19 T.L.R. 575, C.A.; 1 Digest 505 1740.
- (13) *Nightingale v. Parsons*, [1914] 2 K.B. 621; 83 L.J.K.B. 742; 110 L.T. 806, C.A.; 1 Digest 505, 1741.

Action tried by McCARDIE, J.

The plaintiffs, steamship agents and brokers, sued the defendants, shipowners, for brokerage at the rate of $3\frac{1}{2}$ per cent. on the purchase price of the defendants' steamship the *Manx Isles*, which was sold by the defendants to the charterers during the period of a charterparty which had been negotiated by the plaintiffs. The plaintiffs claimed under the terms of a commission note, whereby it was agreed that they were to receive $3\frac{1}{2}$ per cent. brokerage on purchase price "should the option of purchase contained in the charter be availed of." By a clause in the charterparty the charterers had the

"option of purchasing steamer at any time between the date of signing charter and the completion of charter period for the sum of £125,000."

During the currency of the charterparty the defendants sold the steamship to the charterers for £65,000. The plaintiffs claimed brokerage, or alternatively, a quantum meruit for services rendered. The defendants denied liability.

W. A. Jowitt, K.C. and H. Claughton Scott for the plaintiffs.

A. Neilson, K.C. and P. Vos for the defendants.

Cur. adv. vult.

June 26. **McCARDIE, J.**, read the following judgment.—The plaintiffs are steamship agents and brokers. They seek to recover commission from the defendants, who formerly owned a steamship, the *Manx Isles*. The claim springs from the sale of that ship by the defendants in circumstances which can be stated with brevity.

In 1913 the plaintiffs effected a seven-years charter of the vessel. For this service on behalf of the defendants the plaintiffs received commission. The charter period would expire about October, 1920. In 1919 the plaintiffs began an active negotiation between the defendants and a limited company which was associated in business with the former charterers for a fresh charterparty to begin when the former ended. The first proposals related to a suggested purchase of the vessel by the limited company. Much discussion took place with regard to price. Then the question turned to a proposal for a fresh charterparty for a long period. Discussion occurred with regard to the terms. Finally, correspondence took place with respect to a charterparty for a long period, conjointly with an option by the charterers to purchase. At length terms were agreed and the arrangements were embodied in a charterparty between the defendants, of the one part, and the limited company (the British Molasses Co., Ltd.), of Liverpool, of the other part. The charter was signed on or about Jan. 8, 1920. It was dated Dec. 23, 1919. It was for five years from the expiration of the 1913 charter. The monthly hire was £4,750. The following was the clause as to purchase:

"Charterers have option of purchasing steamer at any time between the date of signing charter and the completion of charter period, for the sum of £125,000 without oil burning installation, but if such installation has in the meantime been fitted charterers are to pay cost of fitting same less a reasonable amount for depreciation."

It is clear that the plaintiffs took a very active and effective part in bringing about this bargain. Before the charterparty was signed, the plaintiffs and the defendants had discussed the question of the plaintiffs' remuneration. No agreement was then arrived at. On the day, however, when the charterparty was signed, the defendants signed and gave to the plaintiffs a commission note which was made of like date as the charterparty, namely, Dec. 23, 1919. It represented the bargain between the plaintiffs and the defendants as to the plaintiffs' reward. It is as follows:

A Dear Sirs,—S.S. *Manx Isles*. We hereby agree to pay to you under the five-years charter completed to-day per above steamer with the British Molasses Co., Ltd., Liverpool, 5 per cent. brokerage on hire as earned and paid. Should the option of purchase contained in the charter be availed of the brokerage on purchase to be $3\frac{1}{2}$ per cent., payable on the final completion of purchase."

B The remaining facts are few. For about eight months after it came into operation the charterparty was duly fulfilled. Hire was paid to the defendants, and upon this hire the plaintiffs received their commission as bargained. At the beginning of July, 1921, the defendants sold to the charterers the *Manx Isles* for £65,000. Thus the charterparty ceased to exist. The plaintiffs then made certain claims on the defendants for commission. The defendants denied liability. In the statement of claim the plaintiffs have set out several distinct heads of demand. First, they claim against the defendants that they deprived them of their future commission by selling the vessel to the charterers. Under this head they asked for five per cent. on the total hire which would have been earned. The total is £247,000. Thus they claim £12,350. Secondly, they claim (alternatively) $3\frac{1}{2}$ per cent. (the rate named in the commission note) on £65,000, the price given by the charterers for the vessel. Thirdly, they claim (alternatively) a reasonable remuneration as on a quantum meruit for their services as above indicated, which they assert to have resulted in the sale of the vessel for £65,000. The first head of claim must, of course, fail. It is met by the decision of the House of Lords in *L. French & Co. v. Leeston Shipping Co., Ltd.* (1). I do not propose to enquire whether that opinion be consonant with various weighty decisions which will be familiar to those who have had to consider this branch of the law, but which were not cited to the House of Lords. Nor is it necessary to consider here the limits which legal principle may impose on the operative extent of the conclusion reached by the House of Lords on the particular circumstances of *French's Case* (1). It will suffice to say that the facts of this present litigation are so similar to those in the House of Lords' case as to defeat the first head of the plaintiffs' claim. The writ in this case was issued before the House of Lords had announced their opinion in *French's Case* (1). It must be taken that there was nothing in law to prevent the defendants from selling the ship, although the result was that the plaintiffs lost any chance of earning further commission under the terms of the commission note. In view of the dictum of LORD DUNEDIN in *L. French & Co. v. Leeston Shipping Co., Ltd.* (1) I may add that there is here no evidence and no suggestion that the defendants sold the vessel to the charterers in order to escape the payment to the plaintiffs in respect of the charter hire. That dictum of LORD DUNEDIN may call for consideration in some other case. I express no opinion on it.

F I must now consider the second and third heads under which the plaintiffs formulate their case. I think that so far as the plaintiffs seek to rely on the commission note they must fail. The words of the note are :

H "Should the option of purchase contained in the charter be availed of, the brokerage on purchase to be $3\frac{1}{2}$ per cent., payable on the final completion of purchase."

I The option of purchase in the charter was an option to purchase pursuant to express terms which fixed the price at £125,000. That option was never exercised. The owners and the charterers made a wholly distinct bargain whereby the charterers bought at £65,000 only. The plaintiffs took no part in negotiating this fresh bargain, which was made when shipping conditions had greatly changed and vessels had heavily fallen in value. It is a settled rule for the construction of commission notes and the like documents which refer to the remuneration of an agent that a plaintiff cannot recover unless he shows that the conditions of the written bargain have been fulfilled. If he proves fulfilment he recovers.

If not, he fails. There appears to be no halfway house, and it matters not that the plaintiff proves expenditure of time, money, and skill. This rule is well illustrated by *Alder v. Boyle* (2), where commission was not payable until abstract of conveyance was drawn out; *Bull v. Price* (3), where the commission was only payable on money actually "obtained"; *Battams v. Tompkins* (4), commission payable on "completion" of purchase; *Clack v. Wood* (5), commission payable "subject to the title being approved by my solicitor"; and by such illustrative decisions as *Mason v. Clifton* (6) (commission to be paid if money is raised on specified terms) and *Martin v. Tucker* (7) (commission to be paid on "the amount of the capital brought into the business"). It, therefore, seems clear that the plaintiffs cannot recover upon the actual terms of the commission note. I may add that it may well be that an owner would be willing to pay $3\frac{1}{2}$ per cent. if he sold his ship for £125,000, but exceedingly unwilling to do so if he sold at £65,000 only.

Counsel for the plaintiffs, however, rested his able and ingenious argument not so much on the actual terms of the commission note as upon the suggested right of the plaintiffs to recover upon a quantum meruit for services performed and resulting (so it is said), either directly or indirectly, in the sale for £65,000 of the vessel. This raises a question of interest and importance to all agents who rely on the payment of commission as their means of income. The commission note before me represented the result of discussion between the plaintiffs and the defendants. It embodied their bargain. They reduced their agreement to writing. There was no collateral arrangement whatever. The rights of the plaintiffs are to be found in the commission note alone, and so the parties intended. If this be so, then it follows that the rule *expressum facit cessare tacitum* here applies. There is no scope on the present facts for the operation of the quantum meruit principle. If I were to rule in the plaintiffs' favour I should ignore the well-established rule and a substantial body of authoritative decision. In *Mason v. Clifton* (10) COCKBURN, C.J., when summing up to the jury, said (3 F. & F. at p. 901):

"If . . . B. is employed to procure money upon certain terms, and does not procure it upon those terms, but upon other and different terms, then A. will not be liable to him for commission. Nor can B., in such a case, claim to recover a reasonable remuneration for trouble and labour, for he has not done what he was employed to do."

So, too, in *Green v. Mules* (8), WILLES, J., in speaking of the commission agreed there in question, said:

"The substance of the matter was, 'If the letter is effectual, I (the defendant) will pay you £100, though not liable; if it is not effectual, I will pay you nothing.'"

These cases will illustrate the *expressum facit cessare tacitum* rule, though that rule was not especially mentioned in them. The matter was clearly put in *Martin v. Tucker* (7) in the judgment of LORD COLERIDGE, C.J., when he said (1 T.L.R. at p. 655) that the plaintiffs

"could not claim on a quantum meruit because they had chosen to tie themselves down by the express terms of the agreement."

Much the same view was expressed by the Court of Appeal in *Barnett v. Isaacson* (9), where LORD ESHER said (4 T.L.R. at p. 646):

"The plaintiff was only to be paid in case of success, no matter what labour and trouble he had devoted to the matter."

Finally, I may mention *Lott v. Outhwaite* (10), where LINDLEY, L.J., stated:

"It was said that there was an implied contract to pay the agent a quantum meruit for his services. The answer was that there could be no implied contract when there was an express contract."

A The authorities cited in SMITH'S LEADING CASES (12th Edn., vol. 2, p. 24 et seq.) do not, I think, assist the plaintiffs. The point in favour of the defendants is clearly and correctly set forth in HALSBURY'S LAWS OF ENGLAND (1st Edn., vol. 1, p. 193) [see now 3rd Edn., vol. 1, pp. 196, 198]. For these reasons I must hold that the plaintiffs cannot recover upon a quantum meruit. It, therefore, is not strictly needed that I should inquire whether the plaintiffs were the "efficient cause" of the sale of the vessel for £65,000. As, however, the question was argued before me, I briefly express my opinion. Bearing in mind *Toulmin v. Millar* (11), and applying the tests laid down in *Millar, Sons & Co. v. Radford* (12), and in *Nightingale v. Parsons* (13), I should hold that the plaintiffs were not the "efficient cause" in bringing about the sale of the vessel for £65,000. They took no part whatever (as I have said) in the independent negotiation which led to that result, and the sale was made under conditions and in view of circumstances wholly distinct from those contemplated by the option in the charter of Dec. 23, 1919. I must, therefore, give judgment for the defendants.

Judgment for defendants.

Solicitors: *W. A. Crump & Son; Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

[Reported by T. W. MORGAN, Esq., Barrister-at-Law.]

E

JACKSON v. SIMONS

[CHANCERY DIVISION (Romer, J.), November 28, 29, 30, December 1, 21, 1922]

F [Reported [1923] 1 Ch. 373; 92 L.J.Ch. 161; 128 L.T. 572; 39 T.L.R. 147; 67 Sol. Jo. 262]

Landlord and Tenant—Covenant against parting with or sharing possession of part of premises—Licence given to use part—Forfeiture of lease—Need for notice—Conveyancing Act, 1881 (44 & 45 Vict., c. 41), s. 14 (1), (6) (i).

G By an underlease, dated Dec. 4, 1906, and granted to the defendant by the predecessors in title of the plaintiff, the defendant covenanted not to assign or underlet or part with the premises demised or any part thereof or part with or share the possession or occupation thereof without consent of the lessors, such consent not to be withheld in the case of a responsible tenant. The underlease contained the usual proviso for re-entry. Without the consent or knowledge of the plaintiff, the defendant, who carried on a tobacconist's business on the premises, entered into a verbal arrangement whereby he allowed B. the use of the front part of the premises, which for that purpose were screened off from the rest of the premises from 10 p.m. till 2 a.m. each day, in consideration of the payment of £7 a week. It was admitted that that arrangement constituted a sharing of the possession of part of the premises. When the plaintiff became aware of the arrangement he commenced this action to recover possession by reason of the breach of the covenant referred to, but he did not serve the notice specifying the breach required by sub-s. (1) of s. 14 of the Conveyancing Act, 1881.

I **Held:** (i) the arrangement between B. and the defendant did not confer on B. any estate or interest in the premises in law, and the defendant retained the legal possession of the whole of the premises; therefore, all that was conferred on B. was a privilege or licence to use a part of the premises, and such a privilege or licence did not constitute an assignment, underletting, or

parting with the premises or any part thereof or a parting with or sharing the possession or occupation thereof within the covenant: (ii) a covenant against sharing the possession of premises did not fall within s. 14 (6) (i) of the Conveyancing Act, 1881; and, therefore, the plaintiff, not having brought the case within the covenant and not having served on the defendant the notice prescribed by s. 14 (1), was not entitled to possession.

Notes. Section 14 (1) of the Conveyancing Act, 1881, has been replaced by s. 146 (1) of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 427), and s. 14 (6) (i) by s. 146 (8) (i) which confines the exception relating to covenants against assigning, etc., to cases where the breach occurred before January 1, 1926.

Considered: *Russell v. Beecham*, [1923] All E.R. Rep. 318. Applied: *Chaplin v. Smith*, [1926] 1 K.B. 198. Considered: *Pincott v. Moorstons, Ltd.*, [1937] 1 All E.R. 513. Referred to: *Abrahams v. MacFisherries, Ltd.*, [1925] All E.R. Rep. 194.

As to covenants against assignment, &c., and forfeiture see 23 HALSBURY'S LAWS (3rd Edn.) 629-637, 665-683; and for cases see 31 DIGEST (Repl.) 410 et seq., 512 et seq.

Cases referred to:

- (1) *Daly v. Edwardes* (1900), 83 L.T. 548; 49 W.R. 244; 17 T.L.R. 115, C.A.; affirmed sub nom. *Edwardes v. Barrington* (1901), 85 L.T. 650; 50 W.R. 358; 18 T.L.R. 169, H.L.; 31 Digest (Repl.) 413, 5423.
- (2) *Frank Warr & Co. v. L.C.C.*, [1904] 1 K.B. 713; 73 L.J.K.B. 362; 90 L.T. 368; 68 J.P. 335; 52 W.R. 405; 20 T.L.R. 346; 2 L.G.R. 723, C.A.; 30 Digest (Repl.) 534, 1702.
- (3) *Peebles v. Crosthwaite* (1897), 13 T.L.R. 37, 198, C.A.; 31 Digest (Repl.) 417, 5458.
- (4) *Church v. Brown* (1808), 15 Ves. 258; 33 E.R. 752, L.C.; 31 Digest (Repl.) 409, 5384.
- (5) *Dumpor's Case* (1603), 4 Co. Rep. 1196; 76 E.R. 1110; 31 Digest (Repl.) 436, 5639.
- (6) *Grove v. Portal*, [1902] 1 Ch. 727; 71 L.J.Ch. 299; 86 L.T. 350; 18 T.L.R. 319; 46 Sol. Jo. 296; 31 Digest (Repl.) 414, 5436.

Also referred to in argument:

- Greenslade v. Tapscott* (1834), 1 Cr.M. & R. 55; 4 Tyr. 566; 3 L.J.Ex. 328; 149 E.R. 991; 31 Digest (Repl.) 249, 3835.
- Selby v. Greaves* (1868), L.R. 3 C.P. 594; 37 L.J.C.P. 251; 19 L.T. 186; 16 W.R. 1127; 31 Digest (Repl.) 243, 3769.
- Roe d. Dingley v. Sales* (1813), 1 M. & S. 297; 105 E.R. 111; 31 Digest (Repl.) 412, 5421.
- Crusoe d. Blencowe v. Bugby* (1771), 3 Wils. 234; 2 Wm. Bl. 766; 95 E.R. 1030; 31 Digest (Repl.) 435, 5630.
- Wilson v. Rosenthal* (1906), 22 T.L.R. 233; 31 Digest (Repl.) 418, 5469.
- Hancock v. Austin* (1863), 14 C.B.N.S. 634; 2 New Rep. 243; 8 L.T. 429; 10 Jur. N.S. 77; 11 W.R. 833; 143 E.R. 593; 31 Digest (Repl.) 234, 3690.
- Taylor v. Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 30 Digest (Repl.) 527, 1649.
- Ayers v. Hanson, Stanley & Prince* (1912), 58 Sol. Jo. 735; 30 Digest (Repl.) 536, 1710.
- Smallwood v. Sheppards*, [1895] 2 Q.B. 627; 64 L.J.Q.B. 727; 73 L.T. 219; 44 W.R. 44; 11 T.L.R. 586; 39 Sol. Jo. 735; 31 Digest (Repl.) 311, 4488.

A **Action** for possession of demised premises for a breach of covenant.

By an indenture of underlease dated Dec. 4, 1906, the predecessors in title of the plaintiff demised to the defendant the ground floor shop No. 141, Charing Cross Road, London, for a term of twenty-one years from Sept. 29, 1906, at a yearly rent, after the first fourteen years of the term, of £300. The underlease contained a covenant by the defendant not to assign or underlet or part with the demised premises or any part thereof or part with or share the possession or occupation thereof without the consent in writing of the landlords previously obtained, such consent not to be withheld in the case of a respectable and responsible tenant. The lease contained in addition the usual proviso for re-entry by the landlords in the event of a breach, non-performance, or non-observance, of the lessee's covenants. After the date of the indenture the defendant carried on upon the demised premises the business of a retail tobacconist in partnership with one of his brothers, Maurice Simons, who managed the business, the defendant carrying on a tobacconist's business on his own account at 95, Shaftesbury Avenue. The basements of No. 141 Charing Cross Road, and of some of the adjoining houses which also belonged to the plaintiff were in the occupation of a Mr. Barron who was carrying on there the business of a night club. Access to these basements was obtained by an entrance from Charring Cross Road adjoining No. 141 thereof and a staircase leading down from that entrance. Up to July, 1920, the sale of tickets to persons desirous of entering the night club were sold upon a landing on the staircase in question, but in that month, in consequence of some objection on the part of the police authorities, Mr. Barron found it necessary to make other arrangements for the sale of these tickets. His manager, accordingly, approached Mr. Maurice Simmons and ultimately came to a verbal arrangement with him under which Mr. Barron was to have the right of selling such tickets in the front part of the tobacconist's shop, for which privilege he was to pay £7 per week. Soon after this arrangement had been come to Mr. Barron, in consequence of the desire of Mr. Maurice Simons to have the shop protected, caused to be constructed a partition or screen for the purpose of cutting off the front part of the shop in which the tickets were to be sold from the back part of the shop where the shop counter was situated. The screen was a removable one but, when once in position, could only be removed by unlocking a padlock. The cost of erecting the screen was defrayed by Mr. Barron, but the key of the padlock was retained by Mr. Maurice Simons who, or whose assistants, erected the screen every evening when the day's business at the shop had concluded and removed it on the following morning when the shop was re-opened. In the space between the screen and the front window of the shop tickets for Brett's night club were sold every evening from July, 1920, to the end of March, 1922, by Mr. Barron's cashier, assisted by a porter named Langrishe, between the hours of 10.30 p.m. and 2 a.m. For this purpose Mr. Barron caused a table and chairs to be brought up to the shop every evening from the night club premises, and taken back to the club when the sale of tickets was finished. Access to the place was obtained by means of the front door of the shop, of which Mr. Barron had been provided with a key. The weekly rent for the accommodation thus afforded was paid by cheques drawn in favour of "Messrs. A. & M. Simons," and, in two cases, in favour of "Mr. A. Simons" and "A. Simons" respectively, such cheques, down to the month of September, 1921, being drawn by Mr. Barron, and, from September, 1921, to the end of March, 1922, being drawn by a Mr. Hugh Wetherley, who had been appointed receiver and manager of Brett's night club in an action which had been brought against Mr. Barron by a gentleman claiming to be a partner with him in the business. The rent reserved by the underlease of Dec. 4, 1906, was paid by the defendant to the plaintiff down to Christmas, 1921, but on Mar. 22, 1922, the plaintiff, who alleged that until January of that year he was unaware of the

arrangement made with Mr. Barron and of the use to which the front part of the shop had been devoted under it, issued his writ in this action, and received no further rent from the defendant. The plaintiff did not before beginning his action serve upon the defendant any such notice as is mentioned in s. 14 (1) of the Conveyancing Act, 1881. A

J. H. Cunliffe, K.C. and Chetwynd Leach for the plaintiff.

J. W. Manning, K.C. and Russell Gilbert for the defendant. B

Cur. adv. vult.

Dec. 21. **ROMER, J.**, read a judgment in which he stated the facts and continued : In answer to the plaintiff's claim the defendant has raised the following four defences. In the first place he says that the acts of which the plaintiff complains were the acts of Mr. Maurice Simons, of which the defendant himself was entirely ignorant and for which he is in no way responsible; and the second place he says that the plaintiff himself was at all material times aware of what was being done, and that by his acceptance of rent between July, 1920, and Christmas, 1921, he must be deemed to have waived any breach of the defendant's covenant if any such breach had in fact been committed. Thirdly, he says that the acts to which I have referred did not in any case amount to either an underletting or a parting with the possession of the demised premises or any part thereof. He admits, however, that they constituted a sharing of the possession of part of the demised premises. Finally, he says that, in the absence of a preliminary notice under s. 14 (1) of the Conveyancing Act, 1881, this action is not maintainable, the covenant, so far as it relates to the underletting or parting with or sharing the possession of part only of the demised premises, not being within the exception contained in sub-s. (6) (i) of that section. C D E

The first two defences are purely questions of fact, upon which a considerable body of evidence was adduced before me. After hearing such evidence, I have come to the very decided conclusion that these two defences fail. I have in my own mind no doubt whatever that the defendant at all material times knew perfectly well what was being done, and I accept the plaintiff's evidence to the effect that he did not know of the user of the shop, of which he now complains, until January, 1922, and I do not accept the evidence to the contrary adduced by the defendant. F

I now turn to the consideration of the question whether the arrangement made between Mr. Maurice Simons and Mr. Barron's manager, and the acts done in pursuance of that arrangement, constituted an underletting or a parting with the possession of a part of the demised premises. I have come to the conclusion that they did not. If the arrangement constituted an underletting, it must have conferred upon the proprietor of the club some estate or interest in law, and, this, in my opinion, was not the effect of the arrangement. All that was conferred upon Mr. Barron was, as it seems to me, a mere privilege or licence to use a part of the demised premises: see *Daly v. Edwardes* (1) affirmed by the House of Lords sub nom. *Edwardes v. Barrington* (1); and *Frank Warr & Co. v. L.C.C.* (2). The defendant, moreover, retained the legal possession of the whole of the premises at all material times and, as pointed out by **ROMER, J.**, in *Peebles v. Crosthwaite* (3) a lessee who retains such possession does not commit a breach of a covenant against parting with possession by allowing other people to use the premises. The defendant did not, therefore, in my judgment, commit any breach of the covenant against underletting or parting with the possession of the demised premises or any part thereof. G H I

It is, however, admitted, as already pointed out, that the acts for which I have held the defendant to be responsible amounted to a sharing of the possession of part of the demised premises, and it becomes, therefore, necessary to consider the defence based upon s. 14 of the Conveyancing Act, 1881, for the defendant contends that a covenant not to share the possession of the demised premises is not within the exception contained in sub-s. 6 of that section. [His LORDSHIP read s. 14 (1) and

A (2).] Those sub-sections so far apply in the event of a breach of any covenant or condition without any exception. Passing over sub-ss. (3), (4), and (5), which are not, I think, material for the purpose, sub-s. (6) so far as material is in these terms:

B "This section does not extend—(i) to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased. . . ."

It is clear that this exception is not confined to a covenant or condition by which all the things referred to are forbidden; obviously a covenant against assigning the demised premises is within the exception, although the covenant does not go on to mention underletting or parting with the possession. The sub-section, therefore, includes a covenant or condition against any or all of the following things, namely, the assigning, the underletting, the parting with the possession, the disposing of the land leased. Does it also include a covenant or condition against sharing the possession of the land leased? The plaintiff says that it does for the following reasons: (i) That it cannot have been intended to except covenants against parting with the possession of the demised premises and to let the section operate in cases where a breach of covenant consists in a sharing of the possession, and that, unless I read the sub-section in the way he desires, I shall be defeating the intention of the legislature; (ii) that the sub-section is merely describing by general words a class of covenant of which the covenant against sharing the possession of the demised premises is as much a member as a covenant against assigning or underletting or parting with the possession. As to the first of these contentions I know nothing of the reasons that induced the legislature to make the exceptions which are admittedly covered by the sub-sections. The plaintiff says, and perhaps truly, that the legislature considered a breach of a covenant against assignment or underletting or parting with the possession of the demised premises such a serious matter that the landlord's right to re-enter for such a breach ought not to be restricted in any way. He further says that the sharing the possession of the demised premises is or might be equally serious to the landlord (though I do not think that this is so), and that the legislature must, therefore, have intended to treat all these breaches on an equal footing, but why am I to assume that the legislature intended this? Why, for instance, should a covenant against sharing the possession of the demised premises be excepted and a covenant for insurance against fire not be excepted? The seriousness to the landlord of a breach of the latter covenant, when once a fire has occurred, would seem to be as great and might be very much greater than a breach of the former. It seems to me just as probable that the legislature intended covenants against sharing the possession of the demised premises to be excluded from sub-s. (6) as that it intended such covenants to be included. Indeed it must be remembered that s. 14 only precludes a landlord from enforcing his right of re-entry or forfeiture for a breach of any covenant or condition to which the section applies in cases where the lessee after notice fails to remedy the breach, if it is capable of remedy, and to make reasonable compensation for the breach: and the legislature may well have thought it right to impose this restriction upon landlords just as much in cases where the covenant or condition broken is one against sharing the possession of the demised premises as in cases where the covenant or condition broken is one for insurance against fire or against using the demised premises for the purpose of carrying on some offensive trade. In the circumstances it is safer to assume that the intention of the legislature is that which the words of the sub-section, when properly construed, would imply rather than to endeavour to ascertain that intention by any process of *a priori* reasoning.

As to the contention that the sub-section in question is describing a well-known class of covenant in language wide enough to include all members of that class, I should have expected if that had been the intention of the legislature to find a much more general description such as "covenants against alienation" rather than

the detailed description used by the sub-section. It is well settled that a covenant not to assign the demised premises is not broken by a mere declaration of trust of the lessee's interest or by a parting with the possession of the demised premises. In *Church v. Brown* (4) LORD ELDON had to consider the question whether a covenant restraining the assignment, underletting, or parting with the demised premises, or any part thereof (compendiously referred to, it is worth noting, by the learned reporter in his marginal note as a covenant restraining alienation) was a "usual covenant" and expressed himself as follows (15 Ves. at p. 264):

"How does the history of the law, with reference to this subject, stand? There may be a covenant for almost anything, and this covenant against alienation without licence is as old as *Dumpor's Case* (5); but how does the fact, that there was such a covenant in that case, where it was held to be gone by alienation with licence, prove, that this is a usual, general covenant in a lease? The conclusion is rather the other way; that this is a special and particular covenant. Consider, how this grows. This covenant, which is represented to be usual, would not prevent under-letting. Then is a covenant against under-letting a usual covenant? And is it proved to be so by the authorities, that it is not restrained by the other covenant? Further, if the landlord has a covenant against both assigning and under-letting, the tenant might by an agreement, neither assigning nor under-letting, put another person in possession of the premises; and parting with the possession in that manner would not be a breach of those covenants. Is a covenant, therefore, not to part with the possession of the premises, to be given, as a usual covenant? That would not have restrained the tenant from parting with a part of the premises: these covenants having been always construed by courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation. The court will have to consider whether all these covenants are also included under the terms 'usual and proper covenants,' in the construction of an equitable agreement, where the law would regard the instrument with that jealousy."

See, too, *Grove v. Portal* (6).

A covenant against assigning the demised premises, a covenant against underletting the demised premises, and a covenant against parting with the possession of the demised premises are, therefore, three distinct covenants, though all belonging to the same class, and, if there be any other method of disposing of the demised premises, that would not amount to an assignment, underletting, or parting with possession. A covenant not to dispose of the demised premises would be another and a different covenant of the same class, though including, perhaps, all three of the covenants already mentioned. In the same way a covenant against sharing the possession is another distinct covenant, for, as already pointed out, a covenant against parting with the possession of the demised premises is not broken by sharing the possession with another. In these circumstances I do not think that I am justified in treating the sub-section as describing that class of covenant to which all the various species of covenant that I have mentioned belong. The sub-section appears to me to be an enumeration of some particular members of that class which it was intended should be excepted from the provisions of the sub-section to the conclusion of the other members of that class. I cannot believe that the legislature, while taking care to make it clear that covenants against underletting or against parting with the possession of the demised premises should be as much within the exception as covenant against assigning the demised premises, would have omitted the words "sharing the possession" otherwise than intentionally. I come, therefore, to the conclusion that the words in sub-s. (6) of s. 14 of the Conveyancing Act, 1881, to which I have referred, cannot be construed so as to include a covenant or condition against sharing the

A possession, and, accordingly, that the plaintiff's right of re-entry or forfeiture for the breach of the covenant against sharing the possession of the demised premises or any part thereof is not at the present moment enforceable having regard to the provisions of sub-s. (1) of s. 14 of the Conveyancing Act, 1881. In these circumstances I have no option but to dismiss the plaintiff's action, but without costs.

B Solicitors: *Whitgreave, Mack & Co.; Windsor & Browne.*

[*Reported by J. P. LANGWORTHY, ESQ., Barrister-at-Law.*]

C

Re DAVID ALLESTER, LTD.

[CHANCERY DIVISION (Astbury, J.), May 2, 3, 1922]

D [Reported [1922] 2 Ch. 211; 91 L.J.Ch. 797; 127 L.T. 434; 38 T.L.R. 611; 66 Sol. Jo. 486; [1922] B. & C.R. 190]

Bill of Sale—"Declaration of trust without transfer"—"*Document used in ordinary course of business*"—Pledge of goods—Authority by pledgee to pledgor to sell—Undertaking by pledgor to hold goods or proceeds in trust for pledgee—Bills of Sale Act, 1878 (41 & 42 Vict., c. 31), s. 4.

E *Company*—Charge on property—Registration—"Charge on book debts"—Pledge of goods—Authority by pledgee to pledgor to sell—Undertaking by pledgor to hold goods or proceeds in trust for pledgee—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93 (1), (2) (c) (e).

F A company, carrying on business as merchants, in accordance with usual commercial custom borrowed money from a bank on the security of documents of title to goods, which documents they deposited with the bank. When the time to sell the goods arrived the bank returned the documents of title to the company who gave to the bank a document in these terms: "We have to acknowledge the receipt of invoice, bill of lading [or delivery order], and copy of insurance policy representing . . . We receive the above in trust on your account, and we undertake to hold the goods when received, and their proceeds when sold, as your trustees . . . and to remit you direct the entire proceeds when realised, but not less than [the amount of the loan] within twenty-eight days from this date." The company went into liquidation when some of these transactions were uncompleted, and the bank claimed priority in respect of the moneys representing the proceeds of realisation in those cases.

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I **Held:** the rights of the bank as pledgees were complete on the handing over to them of the documents of title and did not arise under the document given to the bank by the company, which merely acknowledged the authority to sell given by the bank and recorded the terms on which the company was to hold the goods and their proceeds, when received, and so the document was not a "declaration of trust without transfer" within s. 4 of the Bills of Sale Act, 1878, and did not require registration as such (in any case it was a document "used in the ordinary course of business as proof of the possession or control of goods" within the exceptions to s. 4 of the Act of 1878); nor was the document a "mortgage or charge on book debts" within s. 93 (1) (e) of the Companies (Consolidation) Act, 1908 [see now s. 95 (2) (e) of the Companies Act, 1948]; therefore, the document was not void as against the liquidator for want of registration as a charge under s. 93 of the Act of 1908 [s. 95 of 1948], and the bank was entitled in priority to the goods or their proceeds so far as they could be traced.

Notes. Referred to: *Madras Official Assignee v. Mercantile Bank of India, Ltd.* A [1934] All E.R. Rep. 237; *Lloyd's Bank, Ltd. v. Bank of America National Trust and Savings Assocn.*, [1938] 2 All E.R. 63; *Mercantile Bank of India, Ltd. v. Chartered Bank of India, Australia and China and Strauss & Co. (No. 2)*, [1937] 4 All E.R. 651.

As to the registration of charges affecting a company's property see 6 HALSBURY'S LAWS (3rd Edn.) 491-500; and for cases see 10 Digest (Repl.) 810 et seq. For B Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

- (1) *Re Hardwick, Ex parte Hubbard* (1886), 17 Q.B.D. 690; 55 L.J.Q.B. 490; 59 L.T. 172, n.; 35 W.R. 2; 2 T.L.R. 904; 3 Mon. 246, C.A.; 7 Digest 20, 90. C
- (2) *North Western Bank Ltd. v. Poynter, Son and Macdonalds*, [1895] A.C. 56; 64 L.J.P.C. 27; 72 L.T. 93; 11 R. 125, H.L.; 3 Digest 277, 865.
- (3) *Re Hamilton Young & Co., Ex parte Carter*, [1905] 2 K.B. 772; 74 L.J.K.B. 905; 93 L.T. 591; 54 W.R. 260; 21 T.L.R. 757; 12 Mans. 365, C.A.; 7 Digest 27, 138.
- (4) *Dublin City Distillery, Ltd. v. Doherty*, [1914] A.C. 823; 83 L.J.P.C. 265; 111 L.T. 81; 58 Sol. Jo. 413, H.L.; 10 Digest (Repl.) 814, 5285. D
- (5) *Ladenburg & Co. v. Goodwin, Ferreira & Co., Ltd. and Garnett*, [1912] 3 K.B. 275; 81 L.J.K.B. 1174; 107 L.T. 587; 28 T.L.R. 541; 56 Sol. Jo. 486; [1922] B. & C.R. 190; 10 Digest (Repl.) 813, 5280.

Also referred to in argument:

- Tennant v. Howatson* (1888), 13 A.C. 489; 57 L.J.P.C. 110; 58 L.T. 646, P.C.; 7 Digest 27, d. E

Adjourned Summons.

David Allester, Ltd., was a company carrying on business as wholesale seed merchants. In the course of its business it was in the habit, according to established commercial custom, of borrowing money from Barclays Bank, Ltd., and other banks by way of overdraft, as security for which it deposited the documents of title to assignments of seed which it had bought. It was the custom, where merchants had pledged goods with banks in accordance with this custom, that when the time for realisation arrived the banks should allow the pledgors to realise the goods as agents or trustees of the banks, as in that way a more satisfactory realisation could be effected, owing to the expert knowledge of the pledgors. For G the purpose of such realisation the documents of title in the possession of the bank were handed back to the pledgors, who gave to the bank a letter of trust or similar document. Various forms of such letters or documents were used by different banks, but their purport was the same. The letter used by Barclays Bank and David Allester, Ltd., in their transactions was in the following form:

"To Barclays Bank, Ltd.—Gentlemen,—We have to acknowledge receipt of invoice, bill of lading [or delivery order], and copy of insurance policy representing —. We receive the above in trust on your account, and we undertake to hold the goods when received, and their proceeds when sold, as your trustees. We further undertake to keep this transaction separate from any other, and to remit you direct the entire net proceeds as realised, but not less than [the amount of the loan] within twenty-eight days from this date. We undertake to cover the goods by insurance and to hold the policy or policies on your behalf."

This document was held by the bank until the goods had been realised and the proceeds paid over. David Allester, Ltd., went into liquidation on Feb. 25, 1921, and at that time several of these trust letters were outstanding, the goods not having been then sold or the proceeds not having been then paid to the bank.

A The transactions were afterwards completed. The total amount outstanding was £3,540. Barclays Bank claimed priority in the liquidation for either (a) the full amount of the proceeds of sale of goods pledged to the bank and released by the bank for sale by the company before the liquidation, or (b) the amount of money standing to the credit of the company or the liquidator representing these proceeds. The liquidator contended that the trust letters were invalid as not having been

B registered either (a) as bills of sale, or (b) as mortgages or charges on book debts under s. 93 1 (c) and (e) of the Companies (Consolidation) Act, 1908, and he took out this summons for the direction of the court as to admitting the priority claimed.

By the Bills of Sale Act, 1878, s. 4 (so far as material) :

C "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer . . . and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt . . . but shall not include the following documents; that is to say . . . any . . . documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise,

D either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented."

By the Companies (Consolidation) Act, 1908, s. 93 [see now Companies Act, 1948, s. 95 (1) and (2)] :

E "(1) Every mortgage or charge created after July 1, 1908, by a company registered in England . . . and being either . . . (c) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; . . . or (e) a mortgage or charge on any book debts of the company . . . shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidence, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation. . . ."

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Clauson, K.C., and F. K. Archer for the liquidator.

MacKinnon, K.C. and Dighton Pollock for Barclays Bank.

G **ASTBURY, J.**—This is a summons by the liquidator to determine the rights of the parties in the proceeds of sale of certain goods. The question is whether the giving of the letter of trust so operated as to deprive the bank of the security which it undoubtedly had under the previous pledge of the goods.

H The liquidator has raised two points, namely, that the document was void in default of registration under s. 93 of the Companies (Consolidation) Act, 1908, either as being under sub-s. (1) (c) "a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale," or as being under sub-s. (1) (e) "a mortgage or charge or any book debts of the company." As regards the first point, it was contended on behalf of the liquidator, that the document, if given by an individual, would require registration as a bill of sale, under the definition in s. 4 of the Bills of Sale Act, 1878, as being "a declaration of trust without transfer," and that it was not covered by the exception in that section as being "a document used in the ordinary course of business as proof of the possession or control of goods." In my judgment, the document does not fall within the definition of a bill of sale at all. The rights of the bank as pledgees were complete upon the handing over to them of the bills of lading or other documents of title. The document in question was merely an acknowledgment by the company of the authority by which the bank authorised

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the company to sell the goods. The rights of the bank did not arise under this document which only recorded the terms under which the pledgors were to sell and hold the proceeds in trust for the pledgees, and, therefore, it did not require registration: see *Re Hardwick, Ex parte Hubbard* (1). The bank as pledgees had the right to realise the pledged goods from time to time and it was more convenient for them to do this by means of experts, in this case the pledgors, and for that purpose they were entitled to hand over the goods to the pledgors, under the decision in *North Western Bank, Ltd. v. Poynter, Son, and Macdonalds* (2).

If I am right as to this, it is unnecessary for me to consider whether the document falls within the exception in the definition of bills of sale in s. 4 of the Bills of Sale Act, 1878; but, if it were necessary, I think that *Re Hamilton, Young & Co., Ex parte Carter* (3) is sufficient authority for saying that such documents are "used in the ordinary course of business as proof of the possession or control of goods." The liquidator relied on *Dublin City Distillery, Ltd. v. Doherty* (4), but the trust authority in the present case is wholly different from the documents in that case, which is no authority to guide in the present case. The evidence of Mr. Foster, the assistant manager of Barclays Bank, is sufficient, in my opinion, to show that these documents are used in the ordinary course of business as such proof. Here the security already existed, and the document was only an authority to the pledgors to sell. In my opinion, the point raised to the bill of sale fails, and fails primarily because the document is not within the definition of a bill of sale in s. 4 of the Bills of Sale Act, 1878.

As regards the second point, whether the document is a mortgage or charge of any book debts of the company, the intention of s. 93 of the Companies (Consolidation) Act, 1908, is quite plain. Counsel for the liquidator did not disguise the fact that, if he succeeded on the language of the section, he would upset a long-established custom in the city of London and other commercial centres. The answer, however, to the contention appears to be that the document is not a mortgage of, or charge on, book debts in any true sense. The bank had a prior charge on the goods; the document was not intended to give a charge, but to enable these goods to be realised as for years and years goods have been realised. It was suggested that the case came within the judgment of the present Master of the Rolls in *Ladenburg & Co. v. Goodwin Ferreira & Co., Ltd. and Garnett* (5). But the facts of that case were very different from those in the present case. In that case the bank had no pledge until the transaction in question, and the document was in fact a charge over book debts. There was no previous right existing in the bank; the charge in the document was explicit, and the company had nothing to charge except book debts. It does not appear to me that that case has any bearing upon the present case. Here the bank, being already pledgees of the goods, by this document created a trust agency for the purpose of the realisation of their security. The document is in no sense a mortgage or charge of book debts within s. 93. I decide against both the contentions of the liquidator, and there will be a declaration that the documents are good and valid, and that the bank is entitled in priority to the goods or to their proceeds so far as they can be traced.

Solicitors: *Rawle, Johnstone & Co.; Durrant & Hambling.*

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

A

BOYCE v. WASBROUGH AND OTHERS

[HOUSE OF LORDS (Viscount Birkenhead, L.C., Lord Buckmaster, Lord Atkinson, Lord Sumner and Lord Parmoor), February 3, March 7, 1922]

[Reported [1922] 1 A.C. 425; 91 L.J.Ch. 369; 38 T.L.R. 493]

B

Settlement—Marriage settlement—Trust for statutory next of kin—Settlement on second marriage—Exclusion of issue of first marriage.

A woman divorced her husband by whom she had had one child. In contemplation of a second marriage she executed a settlement by which, in the events which happened, she vested in trustees a fund on trusts in favour of herself and her second husband, and, in the event of this husband surviving her (as he did), "in trust for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto at the decease of [the settlor] had she died possessed thereof intestate and without having been married."

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Held by VISCOUNT BIRKENHEAD, L.C., LORD ATKINSON, and LORD SUMNER, LORD BUCKMASTER and LORD PARMOOR dissenting: in the absence of any context or surrounding circumstances pointing to the view that the words "without having been married" in the settlement meant "without having entered into the marriage then contemplated" they must be given their ordinary, plain grammatical meaning which was equivalent to "without ever having been married," and, therefore, the child of the first marriage was excluded from participating in the fund created by the settlement.

E

Re Brydone's Settlement, *Cobb v. Blackburn* (1) [1903] 2 Ch. 84, approved. Decision of Court of Appeal, [1921] 1 Ch. 230, affirmed.

Document—Construction—Ambiguity—Words reasonably capable of bearing more than one sense.

Per LORD SUMNER: For the purpose of legal construction ambiguity means that, within the limits of ordinary English usage and the rules of correct grammar, and without ceasing to be accepted and correct English, a word or a phrase is reasonably capable of bearing more than one sense.

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Notes. As to trusts for statutory next of kin, see 29 HALSBURY'S LAWS (2nd Edn.) 611–614; and for cases see 40 DIGEST (Repl.) 631 et seq. As to construction of deeds and documents see 11 HALSBURY'S LAWS (3rd Edn.) 381 et seq.; and for cases see 17 DIGEST (Repl.) 253 et seq.

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Cases referred to:

- (1) *Re Brydone's Settlement*, *Cobb v. Blackburne*, [1903] 2 Ch. 84; 72 L.J.Ch. 528; 88 L.T. 614; 51 W.R. 497; 47 Sol. Jo. 490, C.A.; 40 Digest (Repl.) 632, 1249.
- (2) *Wilson v. Atkinson* (1864), 4 De G.J. & Sm. 455; 4 New Rep. 451; 33 L.J.Ch. 576; 11 L.T. 220; 46 E.R. 995 L.J.J.; 40 Digest (Repl.) 633 1252.
- (3) *Re Ball's Trust* (1879), 11 Ch.D. 270; 48 L.J.Ch. 279; 40 L.T. 880; 27 W.R. 409; 40 Digest (Repl.) 633, 1254.
- (4) *Upton v. Brown* (1879), 12 Ch.D. 872; 48 L.J.Ch. 756; 41 L.T. 340; 28 W.R. 38; 40 Digest (Repl.) 602, 1040.
- (5) *Emmins v. Bradford, Johnson v. Emmins* (1880), 13 Ch.D. 493; 49 L.J.Ch. 222; 42 L.T. 45; 28 W.R. 531; 40 Digest (Repl.) 632, 1248.
- (6) *Re Arden's Settlement*, [1890] W.N. 204; 25 J.C.N.C. 147; 40 Digest (Repl.) 634, 1262.
- (7) *Stoddart v. Saville*, [1894] 1 Ch. 480; 63 L.J.Ch. 467; 70 L.T. 552; 42 W.R. 361; 10 T.L.R. 120; 38 Sol. Jo. 79; 8 R. 372; 40 Digest (Repl.) 633, 1255.
- (8) *Re Forbes, Errington v. Semfell*, [1899] W.N. 6; 40 Digest (Repl.) 633, 1260.
- (9) *Re Mare, Mare v. Howey*, [1902] 2 Ch. 112; 71 L.J.Ch. 649; 87 L.T. 41; 46 Sol. Jo. 230; 40 Digest (Repl.) 633, 1256.

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- (10) *Re Smith's Settlement, Wilkins v. Smith*, [1903] 1 Ch. 373; 72 L.J.Ch. 184; 87 L.T. 740; 41 W.R. 217; 40 Digest (Repl.) 633, 1253. A
- (11) *Clarke v. Colls* (1861), 9 H.L. Cas. 601; 11 E.R. 864, H.L.; 40 Digest (Repl.) 634, 1266.

Appeal from an order of the Court of Appeal, reported [1921] 1 Ch. 230.

By a settlement dated Oct. 26, 1892, and expressed to be made in consideration of a marriage intended to be solemnised between Thomas Mullett Ellis and Mary Boyce, the settlor, Mary Boyce, covenanted to pay the sum of £12,000 to trustees to be held by them upon certain trusts for the spouses during their joint lives and the life of the survivor of them. There were the usual trusts in favour of the children of the marriage, and then it was declared that, if there should be no child of the intended marriage who, being a son, should attain the age of twenty-one years or, being a daughter, should attain that age or marry, which event happened, the trust premises should be held subject to a power of appointment given to the wife which was not exercised, in trust, if the husband survived her, which event happened, B

"for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto on the decease of the said Mary Boyce had she died possessed thereof intestate and without having been married . . ." C D

On Mar. 13, 1893, the wife died. There were no children of the marriage. On Aug. 20, 1919, the husband died. The wife had one son, the appellant, Charles E. S. Boyce, by a former husband, Charles Louis Boyce, whom she had divorced. A summons was taken out by the trustees of the settlement of 1892 for the determination of the question whether, upon the true construction of the settlement, and in the events which happened, the trust funds thereby settled were held in trust for the appellant, or for the persons or the respective assigns of the persons who under the statutes for the distribution of the estates of intestators would have been entitled thereto at the decease of the wife had she died possessed thereof intestate, and without having been married to Charles Louis Boyce or any other husband as tenants in common in the shares to which they would have been entitled under the same statutes. The Court of Appeal (LORD STERNDALÉ, M.R., and WARRINGTON, L.J., YOUNGER, L.J., dissenting) held that where there was no context or surrounding circumstances pointing to the view that the words "without having been married" in a marriage settlement meant "without having entered into the marriage then contemplated" they would be taken to mean "without ever having been married," and, therefore, the appellant was excluded from the benefit of the distribution under the intestacy. The appellant appealed. E F G

J. F. W. Galbraith, K.C. and *Dighton Pollock* for the appellant.

Grant, K.C. and *Harman* for the respondent.

Cecil Turner for the trustees.

Their Lordships took time for consideration. H

Mar. 7. The following opinions were read.

VISCOUNT BIRKENHEAD, L.C.—Mary Ellis on Oct. 26, 1892, executed a settlement in contemplation of her marriage with Thomas Mullett Ellis, which took place on the following day. She had been previously married to Charles Louis Boyce, by whom she had one child, the appellant, but the first marriage had been dissolved in 1889 by decree absolute. She had executed a marriage settlement on the occasion of her former marriage, and on Oct. 26, 1892, she executed a voluntary settlement. These settlements do not influence my judgment. I mention them to make it plain that I have not omitted to notice their existence. There was no issue of the second marriage. Mary Ellis died on Mar. 13, 1893, but her husband survived until Aug. 20, 1919, when the settled fund fell to be distributed under the I

A trusts of the settlement. This document, in the events which happened, vested in trustees a fund of £12,000 upon trusts in favour of Mary Ellis and Thomas Mullett Ellis for their lives, then for "the issue of the said intended marriage" in accordance with an appointment, and, in default of appointment, for the children of the intended marriage, and in default of any child who should become entitled, Mary Ellis was empowered to appoint anyone she pleased. The final trust in the event

B of T. M. Ellis surviving Mary Ellis (as he did) was in these words:

"in trust for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto at the decease of the said Mary Boyce had she died possessed thereof intestate and without having been married."

C At the crucial date the appellant was her next-of-kin, and the question is whether he is or is not excluded by the expression "had she died possessed thereof intestate and without having been married."

The general rules of construction are well known and too well settled to be disturbed. It is elementary that the main purpose of those rules is to ascertain the intention of the party, having regard no doubt to the circumstances in which the

D document in question was executed or made, but, more important still, having regard to the language used and the context in which it is used. The expression "without having been married" is, in my judgment, plain and unambiguous. To say of a person that she died without having been married conveys and conveys only the meaning that she died a spinster unless the context clearly shows that some other meaning was intended. For example, to say of B. that she became a widow in 1900

E and died in 1920 "without having been married," can only mean that she remained a widow, but the expression in that connection is inapt for it should have been stated that she died "without having been married again." I can find in this settlement no context which calls for any modification of the meaning which I must attach to these words. The settlement is executed in contemplation of a particular marriage and provision is made for the issue of that marriage in terms which limit the

F benefits to the issue of that marriage and no other, but when the clause in question is framed, the words used are no longer limited so as to apply only to the contemplated marriage. They are general and apply to any marriage. It would have been a simple matter if the marriage with T. M. Ellis were alone meant, to have used a form of words, as in the preceding clauses, which would have made it clear. To have done so would not, in my opinion, have "explained the words actually used,

G but, on the contrary, have altered or modified their meaning."

I should have contended myself with the above reason were it not for the authorities that have been cited, and the distinction of the judges—commencing with KNIGHT BRUCE and TURNER, L.JJ., and ending with YOUNGER, L.J.—who have, or have been thought to have, held a contrary opinion. It has been argued that in the case of marriage settlements at least there is a rule or principle whereby the

H words in dispute must be interpreted as excluding merely the husband of the settlor and not as excluding a child, whether by that or any other husband. The rule was supposed to have been established in *Wilson v. Atkinson* (2), but so far as the courts below are concerned it was settled that no such rule exists by *Re Brydone's Settlement*, *Cobb v. Blackburne* (1). *Wilson v. Atkinson* (2) was a case where the clause containing the words which appear in the present settlement was

I followed by a declaration as to an existing child of the settlor, which clearly could only have effect if the children of the settlor were not to be excluded. It is an obvious example of the context requiring a modification of the ordinary meaning of the words used so as to give effect to the intention of the settlor. The lords justices so held, but their judgments were expressed in wider terms. KNIGHT BRUCE, L.J., said (4 De G.J. & Sm. at p. 460) that the construction "without having been married to anyone" was forbidden "independently of the following declaration," and TURNER, L.J., was more emphatic. He said (*ibid.*, at p. 461):

"Even if it be necessary to construe the terms of the trust for the next-of-kin independently and without qualifying them by the subsequent declaration, still in my judgment the trust for the next-of-kin ought not to be so construed as to exclude children."

FRY, J., with some hesitation, in *Re Ball's Trust* (3), and without any expressed doubt in *Upton v. Brown* (4) followed that decision, as indeed he was bound to do, if, as he believed, *Wilson v. Atkinson* (2) did lay down a definite rule of construction that such words

"merely . . . exclude any husband of the wife and not . . . any person who may be the descendants."

The next case, *Emmins v. Bradford, Johnson v. Emmins* (5), was tried by JESSEL, M.R., who was then a judge of first instance. The words in question there were, "without ever having been married." It seems that the Master of the Rolls did not think that the additional word "ever" made any difference and I agree with that view. He examined *Wilson v. Atkinson* (2) with great care and came to the conclusion that it was a mere case of construction and did not lay down a principle of construction. He, therefore, construed the settlement as one where

"the words are free from ambiguity and there is no context whatever to control them. It is said that you must look at the spirit and meaning of the instrument, but I have nothing to do with the intention of the parties not expressed, but with the plain meaning of the words used."

In his judgment the terms of the trust excluded the children of the wife. *Re Arden's Settlement* (6), was decided by STIRLING, J., who, in the conflict of authorities, preferred the view of FRY, J., to that of JESSEL, M.R., as to the effect of *Wilson v. Atkinson* (2). The same observation applies to the decision of CHITTY, J., in *Stoddart v. Saville* (7). *Re Forbes, Errington v. Sempell* (8), is hardly in point as the words were "a spinster and intestate." The case is noted in the WEEKLY NOTES, and in my opinion, was not rightly decided, and I have the more confidence in saying so, from the fact that ROMER, L.J., was a party to the decision in *Re Brydone's Settlement, Cobb v. Blackburne* (1) to which I refer later. KEKEWICH, J., followed *Wilson v. Atkinson* in *Re Mare, Mare v. Howey* (9).

So far the only case in which *Wilson v. Atkinson* (2) had not been regarded as laying down a binding rule was *Emmins v. Bradford, Johnson v. Emmins* (5) but in 1903, SWINFEN EADY, J., in *Re Smith's Settlement, Wilkins v. Smith* (10), after reviewing all the authorities came to the same conclusion as JESSEL, M.R. Almost immediately the Court of Appeal in *Re Brydone's Settlement, Cobb v. Blackburne* (1) considered a settlement in which the words, unlike those in the cases decided by JESSEL, M.R., and SWINFEN EADY, J., were "without having married," KEKEWICH, J., had followed his own decision in *Re Mare, Mare v. Howey* (9) without any additional comment. The Court of Appeal before whom the effect of the decision in *Wilson v. Atkinson* (2) now came for the first time, held that that case did not lay down any general rule of construction, and as there was "nothing in the context or in any presumption which would justify us in giving to the words in question any other than their natural meaning," held that the children of the wife were not entitled. This decision is not, of course, binding upon your Lordships, and, therefore, this House will not follow it unless in its opinion it correctly expresses the law. I think that it does so express the law. When a person executes a marriage settlement, no doubt primarily to provide for the married couple and their issue, it is open to the settlor to make such other provision for such other persons as he or she intends. The intention is to be gathered from the words of the instrument. If, as may well be the case, the settlor has intended only to make provision for the marriage, then there would be no need to go on to provide for events in which neither the married couple nor their issue might be in existence to take an interest in the fund. On the other hand, if the settlor has determined to make a complete

A disposition of the fund, there is no warrant for assuming that existing interests or expectancies are not to be affected. It depends upon the settlement whether that is so or not, and it is not legitimate to infer from the circumstances that the settlor did not intend what is set down in the document. There may be many reasons why she might prefer collaterals to her own children, and, if she did, then effect must be given to the trust.

B Nor do I assent to the proposition that the words in question are inserted merely for the purpose of excluding the husband. As was pointed out by LORD WENSLEYDALE in his dissenting judgment in *Clarke v. Colls* (11), the husband was already excluded. Indeed no small part of LORD CRANWORTH's judgment was directed to explaining why their decision should be what it was, although in his view also the word there used was unnecessary for the purpose of excluding a husband, and therefore superfluous. The settlement in that case used the ambiguous word "unmarried," but it would appear that this House would have decided otherwise had the words used been those which are found in the indenture now before your lordships. Indeed, as has been pointed out by every judge who has criticised the supposed rule in *Wilson v. Atkinson* (2), the supposition that these words would exclude a husband but not a child is untenable, as the husband might easily, where the child has died before obtaining a vested interest, come in under the very trust in question which is ex hypothesi drawn so as to exclude him. For the reasons I have given, I am of opinion that the appellant is excluded by the plain meaning of the words in question, and that there is no context or rule which modifies or alters that meaning so as to include him, and I, accordingly, move that this appeal be dismissed with costs.

E **LORD ATKINSON.**—I concur with the judgment which has just been delivered by the LORD CHANCELLOR. By the express terms of Mrs. Ellis's marriage settlement, a provision is made for the contemplated children of the union she was about to enter into. The trustees were, in the events mentioned, to hold the trust funds and the income thereof,

F "in trust for all or any such one or more of the issue of the said intended marriage in such manner and form in every respect as [her intended husband and she herself should] by deed jointly appoint And in default of and subject to any such appointment as the survivor of them shall by deed or will or codicil appoint And in default of and subject to any such appointment in trust for all the children or any child of the said intended marriage who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry, and if more than one, in equal shares."

G She thus expressly excluded these children from all benefit arising from the trust funds put in this settlement in default of appointment, or in so far as an appointment should not extend, unless they fulfilled the conditions stated, namely, that if boys they should reach twenty-one years of age, and if girls they should reach that age or marry under that age. The settlement goes on to provide what is to become of the trust funds should all the contemplated children fail to fulfil this condition, namely that the trustees should hold the trust funds and the annual income thereof, or so much thereof as shall not have become vested or been applied under any of the trusts and powers contained in the settlement, or implied by statute, in trust for such persons or purposes, and such manner as the lady, when discoverd by deed, or whether covert or discoverd by will, appoint, and in default of and subject to any such appointment if she should survive her husband in trust for herself without power of anticipation, but if he should survive her, then in trust for such person or persons as should, under any statute of distribution of the effects of intestates, have become entitled thereto at her decease had she died possessed thereof "intestate and without having been married."

I I confess I feel insuperable difficulty in coming to the conclusion that behind this ultimate limitation there lies concealed an intention in the mind of this lady that

the contemplated children of the union she was about to form should, if boys though dying under twenty-one years of age, and if girls dying under that age unmarried should ever become absolute owners of this trust fund in equal shares. On the contrary, I am very much of the same opinion as that expressed by COZENS-HARDY, L.J., in *Re Brydone's Settlement*, *Cobb v. Blackburne* (1). That learned judge, speaking of a similar ultimate limitation, said ([1903] 2 Ch. at p. 97):

"The plain intention, as it seems to me, was that the provision actually made in the prior part of the settlement for the children of the marriage was all that was intended to be made for the issue of the marriage."

The trust with which we are dealing was to become operative only in the event of there being no child who should attain twenty-one, or if a daughter should attain that age or marry, and indeed it would be strange if the effect of the subsequent limitation was to give to children who did not take any vested interest under the prior trust an absolute interest in the fund. So I, in the present case, am of opinion that it never could have been the intention of this lady to give to the children of her intended marriage who did not take any vested interest in the trust funds under the earlier limitation an absolute interest under the final limitation in these very trust funds. But if, by the express provision of the settlement, the children of the intended marriage are excluded from taking interests in the trust funds under the ultimate limitation, where is one to find the proof of an intention that the very young child, as he then was, who in the settlement is never alluded to, who was the offspring of a marriage which is never there alluded to, and on whom she had by a deed contemporaneous with this settlement bestowed a sum equal to nearly half the trust funds, should under this ultimate limitation take an absolute interest in the fund which the children of the intended marriage would be precluded from taking? It would certainly be a strange intention if it existed. Whatever force there may be in the argument that it should be presumed that it was not intended that the children of an intended marriage should be excluded by the limitation of a settlement made in contemplation of the marriage of which they are the offspring from all benefit from the funds put in settlement, it cannot, I think, apply to the offspring of an earlier marriage already fully provided for. The fact that the limitation is found in the marriage settlement of this child's mother made in contemplation of a marriage with someone other than his father, and that the trust fund was contributed by his mother, cannot, I think, per se, afford sufficient evidence of such an intention. No doubt, if in construing a written document one finds that, looking at the context of some phrase or provision used or contained in it, and also at the surrounding circumstances, a non-natural meaning must be given to that phrase or provision in order to carry out the intentions of the parties to the instrument, then that meaning should be given to them, and the instrument construed accordingly. But I think the authorities establish that the mere fact that the words "without having been married" are used does not in a marriage settlement, though the trust fund was contributed by the lady, afford any presumption that the parties intended to use the words in other than their ordinary grammatical sense, and, therefore, as equivalent to the words "without ever having been married."

In *Re Brydone's Settlement*, *Cobb v. Blackburne* (1) the words in the ultimate limitation of the trust fund were there, as here,

"to such person or persons as, under the statute for the distribution of the effects of intestates, would have become entitled thereto at the decease of Sophia M. Crofton if she had died possessed thereof intestate and without having been married."

This lady died intestate on April 22, 1871, having previously given birth to twins. These children only survived their mother by about eight months. In October, 1872, H. G. Brydone, the husband of the deceased lady, married again. He died on Dec. 26, 1901, having made a will. A summons was taken out by the trustees of the

A settlement as plaintiffs against the sole next of kin of the first wife, and the executors of H. G. Brydone, deceased, as defendants asking the determination by the court of the question whether the trust funds belonged to next of kin of the first wife or to the legal personal representative of the deceased infant children. On appeal from the decision of KEKEWICH, J., in favour of H. G. Brydone as legal personal representative of the deceased children and next-of-kin of their mother, the earlier authorities having been cited and examined, it was held: (i) that it must not be taken to have been laid down as a general rule in *Wilson v. Atkinson* (2) that in an ultimate trust of a wife's property contained in a marriage settlement for her statutory next-of-kin as if she had died intestate and "without having been married," the words must always be construed so as not to exclude issue of the wife; (ii) that the words in question ought *prima facie* to be construed according to their natural meaning, which would exclude the issue of the wife, unless there was something in the context or in the circumstances of the case which would show that these words were not intended to bear that meaning. This is not, I think, affected by the fact that the lady in this case was a spinster when she formed the union in reference to which the settlement was made; (iii) that the sole statutory next-of-kin of the wife at the time of her death (excluding the infant children) was entitled to take. It was pointed out by VAUGHAN-WILLIAMS and COZENS-HARDY, L.JJ., that LORD CRANWORTH's observation in *Clarke v. Colls* (11) that the clause there to be construed was the same as that in the present case except that the word "unmarried" was used instead of "without having been married," which, LORD CRANWORTH said, "might either without ever having been married," or "not having a husband living at her death." If the former construction were adopted, then, if the wife should survive her husband and afterwards marry and have children, her collateral relatives would take the fund, to the exclusion of her own issue. If the latter construction were adopted, then no such result would follow. This seems to me conclusive. It is impossible to suppose that the framer of the settlement intended to use the word in a sense which would exclude the possible issue of the wife in favour of her "collateral relations." LORD CRANWORTH, who, with LORD CAMPBELL, formed the majority, expressly said that the result would have been different if the words had been "without having been married." I cannot find any authority later in date than *Re Brydone's Settlement*, *Cobb v. Blackburne* (1) inconsistent with it. I think the reasoning on which the judgments in that case are based is quite convincing and the conclusion right. And I think it is impossible to distinguish the present case from it. I think, therefore, that the decision of the Court of Appeal, which is really based upon *Re Brydone's Settlement*, *Cobb v. Blackburne* (1), was right, and this appeal fails and should be dismissed. I approve of the suggestion made by the LORD CHANCELLOR that the costs should be paid out of the assets.

LORD SUMNER.—The seven words "had she died . . . without having been married," which are to be construed in this case, are simple enough, nor does it affect the question to recall that they are commonly used. It cannot be predicated of a dead woman that she died without having been married if in her lifetime she had ever gone through a legal and binding ceremony of marriage. "To be married" has no other "ordinary," or, for that matter, extraordinary, meaning. Anyone who uses these words, meaning thereby that the lady had been married once but died without having been married again, simply fails to express his meaning.

I desire to give all due weight to the context, in which the words occur, and to the circumstances in which the settlement was executed. The first is the more important matter. I agree that, in a settlement on a second marriage where there are children by the first, the principle object is to provide for that alteration in the settlor's property and position, which will follow from the marriage and its contemplated issue, and that changes in the position of the children of the former marriage in relation to their parent's property as next of kin are quite a minor object

and need not be expected, except in so far as they are involved in such arrangements as the intended marriage itself necessitates. Changes may, however, be intended and may be given effect to by the settlement over and above what the occasion itself would require, and the whole question always comes back to the conventional problem of penetrating the settlor's mind through the artificial language used by the draftsmen. This is legally a question of construction of that language. The most that the context in this case can do for one is to incline one against the exclusion of the appellant, and I think the degree of this inclination is but slight. It was a matter for his mother to decide. A court of law has nothing to do with it except to gather her decision from her words. I understood it to have been admitted in argument, and, if so, it was rightly admitted, that the appellant's case fails unless what the law recognises as ambiguity is to be found in the words in question. As to the words being "flexible," I do not know what that means. The legal rule of construction, at any rate, is not flexible. No one contends that the words cannot bear the sense which is fatal to the appellant's claim; the first step for him to take is to show that they can bear any other. Only after that is shown need it be argued that this other sense is preferable, and is the true one.

For the purpose of legal construction ambiguity means that, within the limits of ordinary English usage and the rules of correct grammar, a word or a phrase is reasonably capable of bearing more than one sense, and that without ceasing to be accepted and correct English. Terms of art I leave aside, for there is none here. The words are only plain English, though they are words which, in this connection, conveyancers often use. In my opinion, there is no word here that is or can be used in two senses. The expression is not "dies unmarried," but "without having been married." Now a person has been married or has not, and there is an end of the matter. Nor do I see how this phrase can have two senses as it stands, context or no context. To read the words as meaning "without having been married again," or "without having been married, as aforesaid," or "without having been married to Thomas Mullett Ellis," or "without having been married to any one but Charles Louis Boyce," is not reading the words in an alternative sense, but is altering their meaning by adding more words. The real reason for adding more words is not that the meaning of the words, as they stand, is doubtful, but because their effect is thought to be unusual and possibly harsh. The real doubt that arises thereon is, not what the settlor's words mean, but whether she fully appreciated what she was doing. I cannot say that I feel any such doubt. Matters dehors the deed ought not to control its construction, but they may, at any rate, be used to lay a doubt of this kind. The settlor had independently provided for the appellant whether handsomely or not, I cannot say, though the amounts mentioned are large. She might have done something more for him in this deed by name, but she did not. *Ex hypothesi* this change in his position, against which he appeals, only arises in the event of his mother not having cared to exercise an express power of appointment, which would, at any rate, have put an end to any controversy. I see no reason to suppose that the words, as construed by the Court of Appeal, are not the result of full comprehension on the settlor's part. On the face of the deed itself, I notice, that wherever the word marriage is used in reference (as it always is) to this intended marriage, the marriage is so described. "Discover," used without qualification, occurs in one clause, but "intended coverture" occurs in the next one, and the use of the unqualified word discover raises, in any case, the same question as that now in debate, is open to the same answer, and, therefore, carries matters no further.

As for the authorities, I am entirely satisfied with LORD STERNDALÉ's convincing review of them. The rule, which was supposed to have been established in *Wilson v. Atkinson* (2), was shaken to its foundations by *JESSEL, M.R., in Emmins v. Bradford, Johnson v. Emmins* (5), and was finally disestablished in *Re Brydone's Settlement, Cobb v. Blackburne* (1). I do not know that your Lordships were asked

A to restore it. With the rule in *Wilson v. Atkinson* (2) go the cases, in which judges of first instance, high as their authority stands, merely applied a decision, which they conceived to bind them. TURNER, L.J.'s words: "the trust for the next-of-kin ought not to be so construed as to exclude children," whether he so intended it or not, were taken in these earlier cases to lay down a principle that no legal child could be excluded from the next-of-kin in this kind of clause, which is really treating the supposed purpose of conveyancers in inserting it, viz., the exclusion of the other spouse only, as equivalent to the settlor's own meaning. The actual deed construed in *Wilson v. Atkinson* (2) differed from that in the present case, nor are the decisions in point in which there was question of a first marriage only. Being quite unlearned in these matters I merely think it my duty to express an opinion on the construction of plain English words, but the hesitation which I should naturally feel in differing, if it be differing, from TURNER, L.J., FRY, J., and ROMER, J., is removed by recalling the authority to the contrary of JESSEL, M.R., COZENS-HARDY, L.J., and of the majority in the Court of Appeal in the present case.

I ought not, however, to pass by the judgment of YOUNGER, L.J., without the close examination to which all his learned and careful opinions are entitled. Agreeing that the words necessarily mean "without ever having been married," in the absence of a context he finds in the context, which is simply that they occur in a settlement on an intended second marriage, ground for saying, that the words are susceptible of another interpretation, owing to a reasonable ambiguity about them. Presuming that the purpose of the instrument is to provide for the proposing husband and wife and the issue of their intended marriage, that purpose would, he says, be defeated, if the position of a child of the earlier marriage were modified under merely general terms contained in it. I think this argument is only valid if the presumption made is that the only purpose is that stated, and I should have thought in the first place, that plain words prevailed against a presumption and not a presumption against the words, and, in the second place, that this argument confuses the purpose of the draftsman (who, no doubt, frames these common clauses for marriage settlements generally), with the purpose of the settlor, who is deemed to intend whatever the language of his deed says. YOUNGER, L.J., very justly points out that, in the cases which purported to follow the supposed rule in *Wilson v. Atkinson* (2) the courts were led to the conclusion adopted by the view they took that, the object of the clause being to defeat the husband only, it was permissible to construe it in a way which would have that result, a construction which he truly says is impossible. Yet the process he himself adopts is substantially the same. The assumed object of the settlement being to provide only for the intended marriage and its consequences and not otherwise to disturb existing interests, he puts on plain words a limited construction "which would have that result." He then asks:

"Can it be supposed that this lady intended to give this property in any event to collateral relatives in preference to her own son by her first marriage?"

H To this I can only say that I do not see why it cannot, for, when you come to feeling towards near relations in connection with money, it is unsafe to presume anything. The lord justice proceeds:

"Why she should choose the occasion of a further marriage . . . to divert the residue from her own existing children . . . to remoter relatives, it is difficult indeed to see. Can it be doubted that any such diversion is entirely foreign to the transaction in hand, and in the normal case, beyond contemplation?"

I I can only say to the first question, that, if she had some reason for it (and I could guess at half-a-dozen) I do not see why she should not do so, and to the second, that the diversion is not foreign to the transaction in hand, if that is what she wanted to do by the transaction. It is really only by begging the question, if I may say so without offence, that we get the context which is admittedly the basis of the supposed ambiguity. The argument would have been cogent in support of a proposal to substitute the word "re-married" for "married" in the draft but, as a

ground for discovering an ambiguity, which does not exist, in the actual words used. on the strength of the purpose, with which "a common form clause . . . is so framed as to be suitable for insertion in a marriage settlement without reference, so far as it goes, to any particular circumstances," I think it is too hypothetical to give a sure foothold. It is true that the former marriage is not mentioned in this settlement elsewhere, if it be not referred to in this passage; in fact, any more specific allusion to it is rather obviously kept off the deed, no doubt for personal reasons; but really this carries the matter no further, for, if it is sufficiently referred to in the words in question, that is enough without its being referred to again, and the reference must have effect, even though it might have been made with a particularity, which the lady precisely desired to avoid.

If the interpretation adopted by both courts below had been one which involved any repugnancy, or defeated the scheme of the settlement or reduced the transaction to an absurdity, different considerations would arise. Such cases logically bear more resemblance to rectifying a mistake in the deed than to construing an ambiguity. If the strict integrity of the principle of giving effect to the words used in their ordinary and grammatical sense were sincerely adhered to, it might have seemed better to say that, if parties will make their deed talk nonsense, a nonsensical decision is all that can be given to them, but, at any rate, whatever it is called, the rule is well settled, that the absurd results of the better construction, i.e., grammatically the better one, may compel the adoption of another and a worse one. It is enough for the present to say that no case of this kind is made here. I think the appeal fails.

LORD BUCKMASTER.—The facts of this case and the relevant portions of the settlement have been fully explained; no further repetition is, therefore, necessary. The question for decision is merely whether the clause relating to the disposition of the settled property in the event of the decease of Mrs. Boyce intestate and "without having been married" is equivalent to her having died a spinster, or whether it relates only to the marriage that was in contemplation when the settlement was executed. The question is one upon which opinions may well vary, and I have the misfortune to differ from the judgment which has just been delivered by the LORD CHANCELLOR in the conclusion that I have reached. The words themselves cannot, in my opinion, be regarded as unambiguous. They do not possess the same meaning in what ever context they are found, and no violence is done to the actual language by referring it to a particular contemplated ceremony. If, for example, the lady whose fortunes are the subject of Mr. THOMAS HARDY'S novel *A LAODICEAN* had been a widow and the book had ended without her marriage, it would not, to my mind, be inaccurate for anybody to say that the tale closed without the heroine having been married. It is needless to multiply illustration, for the proposition appears to me only to form part of a wider and less controversial statement that words often depend for their meaning upon the place where they are found. But if it be accepted, all that is left is to determine, not what is the meaning of the words taken alone, but what is their true meaning in this document.

The settlement is one disposing of the lady's property. It was entered into in contemplation of the new relationship of marriage, and to regulate the results of this change with its immediate consequences, as well as its future possibilities in relation to the devolution of her estate. It is worth while to consider what that change might be. If immediately before the marriage the lady had died intestate, her son by her former marriage would have taken all her estate. If she had so died immediately after her marriage with the property unsettled, her husband would have taken all her personal estate to the exclusion of her son, and it is only with personal estate that the settlement deals. Every provision required for securing the benefits of the settled property to her future children is inserted, and it is only in the event of there being no child who attains twenty-one and no exercise of a power of appointment that the clause operates. It is in that event that the whole

A consequences of the relationship then contemplated are destroyed, and if no disposition is made of the property it is to pass as though she died intestate and "without having been married." I cannot help thinking those words can only mean without the marriage then in contemplation having been solemnised, for it is upon that marriage that the trusts of the settlement are called into being, and, in my opinion, it is to destroy the effects of that union, the chief of which was the dis-
B inheritance of the lady's own son, that the clause is introduced. It is unnecessary to contemplate the consequence of the opposite view if the words are plain, but it is certainly grotesque, for, if the lady died intestate leaving no child to attain twenty-one in her husband's life, her brothers and sisters exclude her son, but, if she so dies after her husband, her son again inherits.

I turn to see if there can be anything in the authorities to cause a modification of
C the view I have expressed, for most particularly in matters relating to conveyancing, it is important not to disturb a long current of decision in obedience to which it may well be that people have regulated the disposition of their property. Apart from the present case, there is no single authority which has given to the actual words that are here in use a meaning adverse to the view I hold, and none that, in my opinion, affects their construction. In the earliest case of *Wilson v. Atkinson* (2) the words
D were construed so that the children of the then intended marriage were not excluded, and KNIGHT BRUCE, L.J., and TURNER, L.J., suggested a rule of construction by which such words in a marriage settlement should not be considered as directed to children at all. This was followed with some hesitation by FRY, J., in *Re Ball's Trust* (3) and again, upon reflection, in *Upton v. Brown* (4), where the actual words now under discussion were used, and the marriage was a second one, but it was a
E childless union and it was held that the child of the former marriage took the whole estate. The learned judge pointed out that, were he excluded, so also would be children of a possible third marriage. This circumstances also influenced the decision of LORD CRANWORTH in *Clarke v. Colls* (11) (9 H.L. Cas. at p. 612), and the contrast he there gives as to the two meanings if unmarried is as between "without
F ever having been married" or not having a husband living at the lady's death, a contrast, the first branch of which LORD WENSLEYDALE translates as equivalent to never having been married. In this illustration I see nothing adverse to the opinion I hold, and the reason that induced the acceptance of the last of the two alternatives also exists here. In *Emmins v. Bradford*, *Johnstone v. Emmins* (5), which was the case of the marriage of a widow, the words used were "without having ever been married" and the Master of the Rolls held that this plainly excluded children of the
G first marriage. It may well be said that the words "without ever having been married" are equivalent to never having been married as LORD WENSLEYDALE appears to have thought, and themselves suggest the hypothesis that no ceremony of marriage had ever taken place. The words are certainly not identical with the more limited phrase used here, and no meaning can be given to the word "ever" if
H it be not intended to exclude any marriage at all. Notwithstanding this, in *Re Arden's Settlement* (6), STIRLING, J., obeyed the direction in *Wilson v. Atkinson* (2); and in *Stoddart v. Saville* (7), CHITTY, J., held that on the marriage of a spinster the words "ever having been married" did not exclude the children of the marriage. In *Re Forbes*, *Errington v. Sempell* (8), ROMER, J., on the marriage of a widow, where the words were "if she died a spinster and intestate," held that the
I children of the former marriage were not excluded, an instance of obedience to authority rather than of trust in the English language. It appears, however, that in that case *Emmins v. Bradford*, *Johnson v. Emmins* (5), was not quoted, but it shows how strongly the current of decision was running, even as late as 1899 (after the date of the present settlement), in favour of the liberal construction of the words. In *Re Mare*, *Mare v. Howey* (9), KEKEWICH, J., again followed *Wilson v. Atkinson* (2). In *Re Smith's Settlement*, *Wilkins v. Smith* (10), on the marriage of a spinster, the words being identical with those in *Emmins v. Bradford* (5), SWINFEN EADY, J.,

followed that decision and this again was accepted by the Court of Appeal in *Re Brydone's Settlement, Cobb v. Blackburne* (1). A

As this latter case appears to have influenced the decision of the Court of Appeal, it demands close attention. The marriage was that of a spinster and the words used were the same as those in the present settlement, but the question was wholly different, for it necessarily related to the exclusion of the children of the contemplated marriage, and this was effected by giving the words what I regard as their natural meaning, namely, without the intended marriage having been solemnised. B
The judgment of VAUGHAN WILLIAMS, L.J., shows that in part at least he was influenced by considering the circumstances and provisions attaching to those children alone ([1903] 2 Ch. at p. 93). Similar considerations affected the judgment of ROMER, L.J. (see *ibid.* at p. 94), and, though not so materially, the judgment of COZENS-HARDY, M.R. I think that case was rightly decided, but it does not, in my opinion, touch the present issue. C
It may well be argued, however, that these authorities show that a more robust method of construction has now been adopted by the courts in determining the meaning of wills and settlements than that which formerly obtained. I do not find myself out of agreement with such a view. Plain words should be given their plain meaning, and confusion is often caused and litigation multiplied by attempting to impose upon clear language a meaning depending upon the assumptions of what any party must be supposed to have meant. D
The only way of testing that intention is to see what has been said. But I confess that in a case like the present, where I have the misfortune to find myself at variance with other members of the House and also with three of the learned judges who have tried this case, I find some consolation in the belief that the view I hold would have commended itself to many of the most eminent men who during the last fifty years have sat in the Court of Chancery or in the Court of Appeal. E
I have not referred to the settlement made on the lady's son shortly before her second marriage, for it appears to me irrelevant on the real issue, which is whether the settlement shows and carries out an intention to benefit the lady's brothers and sisters at the expense of her own offspring. LORD PARMOOR desires me to say he concurs in the opinion I have just read.

Appeal dismissed.

Solicitors: *Vizard, Oldham, Crowder & Cash; Sharpe, Pritchard & Co., for William Walker, Manchester.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

A MANCHESTER LINERS, LTD. v. REA, LTD.

[HOUSE OF LORDS (Lord Buckmaster, Lord Dunedin, Lord Atkinson, Lord Sumner, and Lord Carson), March 7, April 3, 1922]

[Reported [1922] 2 A.C. 74; 91 L.J.K.B. 504; 127 L.T. 405; 38 T.L.R. 526; 66 Sol. Jo. 421; 27 Com. Cas. 274]

B *Sale of Goods—Implied condition of fitness—Purpose for which goods required made known—Reliance by buyer on seller's skill or judgment—Matter of reasonable inference to seller and court—No reasonable opportunity to seller to exercise skill or judgment in selecting goods—Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 14.*

C If goods are ordered for a special purpose and that purpose is disclosed to the seller so that in accepting the contract he undertakes to supply goods which are suitable for the object required, such a contract is sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment so as to render the contract subject to the condition to be implied in it by s. 14 (1) of the Sale of Goods Act, 1893, that the goods shall be reasonably fit for the purpose for which they are required.

D Per LORD BUCKMASTER: Section 14 of the Act of 1893 completely incorporates the common law and in no way limits its operation.

Per LORD SUMNER: The words of s. 14 (1) are satisfied if the reliance by the buyer on the seller's skill and judgment is a matter of reasonable inference to the seller and to the court. The implication by which the buyer makes known to the seller the purpose for which the goods are required can arise although the circumstances are such that the seller has no reasonable opportunity of exercising his skill and judgment towards selecting the goods.

E **Notes.** Applied: *Cammell Laird & Co. v. Manganese Bronze and Brass Co.*, [1934] All E.R. Rep. 1. Considered: *Griffiths v. Conway*, [1939] 1 All E.R. 685.

F As to the implied condition of fitness in a contract for the sale of goods see 29 HALSBURY'S LAWS (2nd Edn.) 63-66; and for cases see 39 DIGEST 440-449. For Sale of Goods Act, 1893, s. 14, see 22 HALSBURY'S STATUTES (2nd Edn.) 993.

Cases referred to:

- (1) *Jones v. Just* (1868), L.R. 3 Q.B. 197; 9 B. & S. 141; 37 L.J.Q.B. 89; 18 L.T. 208; 16 W.R. 643; 39 Digest 434, 632.
- G** (2) *Gillespie Bros. & Co. v. Cheney, Eggar & Co.*, [1896] 2 Q.B. 59; 65 L.J.Q.B. 552; 12 T.L.R. 274; 40 Sol. Jo. 354; 1 Com. Cas. 373; 39 Digest 448, 759.
- (3) *Jones v. Bright* (1829), 5 Bing. 533; Dan. & Ll. 304; 3 Moo. & P. 155; 7 L.J.O.S.C.P. 213; 130 E.R. 1167; 39 Digest 449, 766.
- (4) *Drummond v. Van Ingen* (1887), 12 App. Cas. 284; 56 L.J.Q.B. 563; 57 L.T. 1; 36 W.R. 20; 3 T.L.R. 541, H.L.; 39 Digest 454, 813.
- H** (5) *Preist v. Last*, [1903] 2 K.B. 148; 72 L.J.K.B. 657; 89 L.T. 33; 51 W.R. 678; 19 T.L.R. 527; 47 Sol. Jo. 566, C.A.; 39 Digest 444, 727.
- (6) *Bristol Tramways, etc. v. Fiat Motors*, [1910] 2 K.B. 831; 79 L.J.K.B. 1107; 103 L.T. 443; 26 T.L.R. 629, C.A.; 39 Digest 418, 512.
- (7) *Chanter v. Hopkins* (1838), 4 M. & W. 399; 1 Horn & H. 377; 8 L.J.Ex. 14; 3 Jur. 58; 150 E.R. 1484; 39 Digest 447, 753.
- I** (8) *Shepherd v. Pypus* (1842), 3 Man. & G. 868; 4 Scott, M.R. 434; 11 L.J.C.P. 101; 133 E.R. 1390; 39 Digest 441, 700.
- (9) *Jacobs v. Scott & Co.* (1899), 2 F. (Ct. of Sess.) H.L. 70; 39 Digest 443; 720.
- (10) *Frost v. Aylesbury Dairy Co.*, [1905] 1 K.B. 608; 74 L.J.K.B. 386; 92 L.T. 527; 34 Digest 445, 733.

Appeal from an order of the Court of Appeal reversing a decision of SALTER, J., in an action tried by him without a jury.

The plaintiffs owned the steamship *Manchester Importer*. The defendants were coal merchants and contractors at Liverpool, and were in the habit of supplying coal for the bunkering of steamers. On or about Oct. 8, 1919, it was verbally agreed by and, between the plaintiffs and the defendants that the defendants should supply to the plaintiffs 500 tons of South Wales coal for bunkering the steamship *Manchester Importer* at Partington on the Manchester Ship Canal where the coal tips for bunkering in the port of Manchester were situated. That contract was confirmed by letter on the same day. By their statement of claim the plaintiffs alleged that in placing the contract with the defendants they relied upon the skill and knowledge of the defendants, and it was in an implied term of the said contract that the coal supplied by the defendants should be reasonably fit for the purpose for which it was to be used. The coal thus supplied was not fit for the purpose for which it was intended to be used by reason whereof the steamship *Manchester Importer*, after proceeding down the Manchester Ship Canal and putting to sea, was compelled to put back to port and unload the coal, and the plaintiffs, accordingly, claimed damages. By their defence the defendants said that the coal supplied answered the description of the coal which they contracted to supply, and was in all respects suitable for bunkering steamers. Alternatively, they said that the agreement was made at a time when (as the plaintiffs well knew) the only coal available to the defendants for supply as bunker coal to steamers was coal requisitioned by the Coal Controller, and that it was an implied term of the agreement that the coal supplied by the defendants to the plaintiffs should be coal so requisitioned and made available for bunkering by the Coal Controller, that the 500 tons formed part of a cargo which had been thus requisitioned, and made available for bunkering in the conditions of emergency then existing, and that no other warranty was implied by statute or otherwise on the sale of the 500 tons except that such coal had been requisitioned by the Coal Controller and made available for bunkering. *SALTER, J.*, held that the coal which had been supplied by the defendants was not reasonably fit for the purpose of being used to drive an average natural-draught steamer like the steamship *Manchester Importer* in the hands of average officers and crew, that there was no evidence that the plaintiffs knew that the defendants had only one source of supply of coal, and that the plaintiffs would reasonably expect that the defendants, who had contracted to deliver bunkering coal for the steamship *Manchester Importer*, would deliver suitable coal which they either had in their possession or could obtain by getting all necessary permission. That decision was reversed by the Court of Appeal who held that the implied condition insisted upon by the plaintiffs never arose. The plaintiffs appealed.

Langdon, K.C. and *E. C. Burgis* for the appellants.

Sir John Simon, K.C., *A. T. Miller, K.C.* and *Gilbert Jordan* for the respondents.

The House took time for consideration.

April 3. The following opinions were read.

LORD BUCKMASTER.—When the circumstances in which this appeal has arisen are examined, it will be found that its determination really depends upon the proper aspect of the facts rather than on an examination of uncertain principles of law.

The appellants are the owners of the steamship known as the *Manchester Importer*, and the respondents are coal merchants of Liverpool who are in the habit of supplying coal for bunkering steamers. In the autumn of 1919 the position of shipowners anxious to obtain coal for their steamers was one of peculiar difficulty. The coal supply was in the hands of the Coal Controller who had authority to restrict and direct supplies as he thought right, and, in addition, a railway strike had begun on Sept. 27, lasting until Oct. 7, with the result that the loading of vessels in the South Wales ports ceased, so that in October the only coal available for bunkering purposes at Manchester was the coal in stock at Partington or on

A vessels then at sea. In October the appellants' steamer was at Partington waiting to be coaled, and shortly before Oct. 7 one of the directors of the plaintiffs' company saw Mr. Bradley, who was agent for the Controller, and discussed with him the position of supplies. He was told as to the stock that was then in hand, which was 300 tons of South Wales coal, and 300 local tons, and that it was quite inadequate to satisfy the demand; he was also informed that the Coal Controller was doing his best to divert a collier that would bring some 4,000 to 5,000 tons more coal into the port. Relying upon the prospect of this latter source, a form was obtained by the appellants from the Coal Controller known as a "pre-entry form," without which they would be unable to obtain coal. That was dated Oct. 8 and was passed, entitling the appellants to obtain Welsh coal at Partington. On the same day, following a telephonic communication, they sent an order to the respondents in these terms:

"Referring to conversation with Mr. Edwards please supply five hundred tons South Wales coal for the steamship *Manchester Importer* at Partington on Friday, and oblige."

D This order was accepted and coal was delivered under it which had been brought in by the vessel referred to by Mr. Bradley which turned out to be the steamship *Penrhys*. Unfortunately the furnaces of the *Manchester Importer* were natural-draught furnaces, for which the coal supplied was wholly unsuitable, so that the steamer was obliged to return to port. An action was then brought by the appellants claiming damages against the respondents for breach of implied warranty as to the character of their goods, which succeeded before SALTER, J., and failed in the Court of Appeal.

E The grounds upon which the judgment of the Court of Appeal depend are that the agent for the appellants, who acted for them in obtaining the contract, knew, both by general knowledge and by special information, all about the coal position at the time when he made the contract, and, he knowing that the only coal that could be obtained was the coal from the steamship *Penrhys*, his order must be regarded as an order for satisfaction from that source, and this order was satisfied. Both these propositions need to be modified in the light of the evidence. The knowledge possessed by the plaintiffs was undoubtedly that the coal supplies in Manchester were short and inadequate to the demand, and that a steamship, which turned out to be the steamship *Penrhys*, was expected into port containing coal. What the quality or character of that coal was they did not know, and they certainly did not order any coal as coal from that steamship.

G It then remains to be considered whether in the circumstances there was any warranty that the coal was suitable for the purpose for which it was required. It is plain that the order was expressed for the use of a particular steamship, and it must, therefore, be assumed that the respondents knew the nature of its furnaces and the character of the coal she used, for it was this coal they contracted to supply. H On this assumption however, the respondents have argued that, by virtue of s. 14 of the Sale of Goods Act, 1893, no warranty can be implied unless

"the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill and judgment,"

I and this the order in question fails to effect. This is, in my opinion, a misunderstanding of the statute, for the section embraces and re-states the common law doctrine in the form which was clearly derived from *Jones v. Just* (1). If goods are ordered for a special purpose, and that purpose is disclosed to the vendor so that in accepting the contract he undertakes to supply the goods which are suitable for the object required, such a contract is, in my opinion, sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment. The view taken by LORD RUSSELL in *Gillespie Bros. & Co. v. Cheney, Eggar & Co.* (2), appears slightly at variance with this conclusion, though the result is the same, for he

regards the common law as partly incorporated in the statute and partly remaining outside. In my opinion, the section completely incorporates the common law, and in no way limits its operation.

There was, therefore, a warranty in this case, and the circumstances from which it is suggested that such a warranty can be negatived cannot be found. At the best the facts amount to no more than this—that the buyer knew that the sources of supply of the vendor were limited, and they might, indeed, be confined to the cargo of a particular vessel. That does not negative an implication drawn from the face of the contract that the coal supply must be of a certain quality or it would be useless for the purpose in hand. The respondents themselves may well have been unaware of what was the character of the coal on the steamship *Penrhys* until her cargo was discharged, but its general description of South Wales coal certainly included coal that might be suitable and would have satisfied the contract, and if the respondents found that its actual cargo was unsatisfactory for this purpose it was their duty to have informed the vendor at once. I think the judgment of SALTER, J., is correct, and that the judgment of the Court of Appeal should be reversed.

LORD DUNEDIN.—In this case I am entirely satisfied with the judgment of SALTER, J. It is only the fact that that judgment was reversed by the Court of Appeal that makes it necessary to say anything. The case has been argued upon the application to the facts of the provisions of s. 14 (1) of the Sale of Goods Act, 1893, and as there has been some discussion as to the function of that section I should like to state my opinion on that point.

So far as a contract of sale, be it written or verbal, specifies the thing to be sold and bought, the terms of the contract rule. The tender of anything that does not tally with the specified description is not compliance with the contract. But when the article tendered does comply with the specific description, and the objection on the buyer's part is an objection to quality alone, then I think s. 14 (1) settles the standard, and the only standard by which the matter is to be judged. As the section provides, "there is no implied warranty as to quality except as follows . . ." The requirement made essential by this section is that the buyer makes known to the seller the particular purpose for which the goods are required, and then comes the additional qualification "so as to show that the buyer relies on the seller's skill or judgment." I agree with SALTER, J.'s view of what was held by RUSSELL, C.J., in *Gillespie Bros. & Co. v. Cheney, Eggar & Co.* (2). SALTER, J., said:

"Really LORD RUSSELL seems to say clearly that the mere disclosure of a purpose may amount to sufficient evidence of reliance on the skill and judgment of the seller."

That disclosure of purpose we have in this case; the contract clearly discloses it: "Please supply 500 tons South Wales coal for steamship *Manchester Importer*." And this was confirmed by the seller.

This, as it stands, fulfils the requirements of the section, but then it is said, and it is this argument that has prevailed with the Court of Appeal, that when all the circumstances of the case are looked at it will be seen that the ordinary inference from such a contract ought not to be drawn. I do not doubt that the whole circumstances of the case may be looked at, and that it would be possible that there should be circumstances which would prevent the ordinary inference being drawn. Just as if there had not been a mention of the purpose for which the coal was wanted in the contract itself, it would have been legitimate to have proved by means of writing or conversations at the time of the making of the contract that the purpose was disclosed, so would other meetings or conversations at that time have been legitimately brought forward to show that the ordinary inference was not to be drawn. For instance, if there had been a conversation in which the seller had said: "I have only got such and such Welsh coal and I cannot guarantee

A it to be fit for bunkering for steamer, but I think it may do; you can have that if you like," and if, on top of that, the contract had been made, then I think the ordinary inference of trust would have been displaced. But in this case there is nothing of that sort. The sole reason alleged is that owing to the Coal Control and the railway strike the supply of coal available for Manchester was very small, that the only chance of it being supplied was from the cargo of a steamer called the

B *Penrhys*, and that the buyer must be taken, as he was in the trade, and as one of his partners had had a talk with the Coal Controller, to have known these facts, so that the true interpretation of the contract was: "I will take such Welsh coal as is in the *Penrhys*, or such as the Coal Controller will give you." The person who made the contract was Mr. Watts. There is not a word in his cross-examination as to the *Penrhys*. He is merely asked as to the general situation, and he admits

C that he knew coal was short, and that the Coal Controller was master of the situation. But why is that inconsistent with the idea that he should trust to the judgment of the seller? It was not the buyer who was going to find the coal. He says to the seller: "I want 500 tons for a special purpose, will you give it me?" The seller could easily have guarded himself, but he merely answers "Yes," by confirming the proposal as made. Not only so, but he came into court asserting that

D he did supply Welsh coal of suitable quality. In his judgment what he had given was sufficient. No doubt the fact is found against him, but that fact does not in any way destroy his attitude vis-à-vis to the buyer. For these reasons I cannot agree with the learned judges of the Court of Appeal. I think the appeal should be allowed and the judgment of *SALTER, J.*, restored.

E **LORD ATKINSON.**—The facts have already been sufficiently stated, and it is unnecessary for me to repeat them.

In their statement of claim the appellants set forth their causes of action in these words: (i) That in placing their contract with the respondents they relied on the skill and knowledge of the latter and that it was an implied term of this contract that the coal supplied by the respondents should be fit for the purpose for which it was intended to be used: and (ii) that the coal actually supplied by the respondents was not fit for the purpose for which it was intended to be used, by reason whereof the said steamship, after proceeding down the Manchester Canal and putting to sea, was compelled to put back to port and unload this coal. The respondents in their defence admitted the making of the contract relied upon, but alleged that the coal supplied by them was Nixon's navigation coal of merchantable quality and answered the description of the coal which they contracted to supply, and was in all respects suitable for bunkering steamers. Then they put forward in the alternative in the words following the substantial defence on which they relied.

H "Alternatively that the agreement referred to in para. 1 hereof was made at a time when (as the plaintiffs well knew) the only coal available to the defendants for supply as bunker coal to steamers was coal requisitioned by the Coal Controller. That it was an implied term of the agreement referred to in para. 1 hereof that the coal supplied by the defendants to the plaintiffs should be coal so requisitioned and made available. That the said 500 tons of coal formed part of a cargo laden upon the steamship *Penrhys*, which cargo was requisitioned by the Coal Controller and made available for bunkering in the conditions of emergency then existing. That by reason of the premises the defendants would contend that no other warranty was implied by statute or otherwise on the sale of the 500 tons of coal, except that (as was the fact) it had been requisitioned by the Coal Controller and made available for bunkering as aforesaid."

I *SALTER, J.*, who tried the case without a jury, found that the 500 tons of coal actually delivered was not reasonably fit for an ordinary average Manchester

steamer like the *Manchester Importer* in the hands of average officers and crew. There was ample evidence given before him to sustain that finding, and it is not really impeached. He also found that there was a warranty impliedly given by the respondents that the coal supplied should be fit for a Manchester steamer of the ordinary class in the hands of the ordinary class of the Manchester crew, and that the *Manchester Importer* was an ordinary type of Manchester vessel and was handled by an ordinary Manchester crew and officers with fair and ordinary competence.

It has been long well established at common law that if a man knowingly sells an article for a particular purpose he impliedly warrants that it shall be reasonably fit for that purpose: *Jones v. Bright* (3). It is by no means necessary at common law that the buyer at the time he contracts or proposes to buy should state the purpose for which he requires the goods. If the seller knows from past transactions with the buyer or otherwise what is the purpose for which the buyer requires the goods, it will equally be implied that the seller warrants them to be reasonably fit for that purpose: *Drummond v. Van Ingen* (4). It was contended, however, on the part of the respondents, that the Sale of Goods Act, 1893, had, by s. 14, qualified and narrowed this doctrine of the common law. This statute is entitled, "An Act for codifying the law relating to the sale of goods." Codification and nothing more, is its declared object and function. That fact, to which I shall refer more at length hereafter, should, I think, be borne in mind in construing its language. So much as is relevant of s. 14 runs as follows:

"Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under contract of sale, except as follows:—(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose . . ."

It was argued that this sub-section throws upon the buyer the burden of showing not only that he has made known to the seller—expressly or by implication—the particular purpose for which the goods are required, but also that he relies upon the "skill and judgment of the seller" in selecting the goods to be supplied. Three questions arise upon this contention: (i) Does not the buyer by (as in the present case) expressly stating in the contract of purchase the purpose for which he requires the goods *primâ facie* at all events show to a seller whose business it is to supply goods of the description required that he relies upon the latter's skill and judgment sufficiently to satisfy the provisions of this sub-section? (ii) Would not the same result follow if the seller was, before or at the time of purchase, by implication made aware by the purchaser of the purpose for which he (the buyer) required the goods? (iii) May there not be a class of cases lying outside the ambit of s. 14 which are yet covered by the common law doctrine? These three questions are dealt with by LORD RUSSELL, C.J., in *Gillespie Bros. & Co. v. Cheney, Eggar & Co.* (2). In that case the written contract of purchase and sale did not contain any mention of the particular purpose for which the goods were required. The plaintiffs, who were commission agents, had received from their principals in Barbados a letter requesting them to send to Barbados to these correspondents a cargo of the best coal they could get, suitable for the bunkering of steamers and ships of war, and standing well with the British and Foreign Admiralty Lists. The defendants were coal merchants, whose business it was to supply coal of the kind required. The plaintiffs gave to the defendants this letter and left it with them. About a month later the plaintiffs entered into a written contract with the defendants for the purchase of 500 tons of coal described on the invoice as Cyfarthfa Merthyr steam coal to be shipped

A to their correspondents in Barbados who were named in the contract. The coal was found to be quite unfit for the purpose for which it was bought. An order was made at chambers that the question of liability should first be tried on the assumption that the coals in question were not fit for bunkering purposes. At the trial of this question, defendants' counsel objected to the admission in evidence of the letter received by the plaintiffs from their correspondent in Barbados. The Lord
B Chief Justice admitted this letter in evidence. He is represented as saying ([1896] 2 Q.B. at p. 64):

"I come to the conclusion that the plaintiffs, the buyers, by showing to the defendants the letter of May 18, 1895, from the plaintiffs' principals stating what was wanted and for what purpose it was wanted, did by clear intimation
C make known to the defendants the particular purpose for which the coals were required, and in that statement there is, I think, the further consequence involved that the buyers were relying upon that intimation to the sellers, and relying on the seller's skill and judgment in supplying an article which should be reasonably suitable for the purpose in question. . . . It is clear also, to my mind, that s. 14 is intended to deal with cases in which there is nothing in the
D contract itself from which it appears that the buyer made known to the seller the particular purpose for which the goods are required, or that he relied on the seller's skill and judgment. Those are facts which are to be supplied ab extra by other evidence."

The following authorities, I think, establish that (i) and (ii) of the above-stated questions should be answered in the affirmative. They do not, however, support, but
E are, on the contrary, irreconcilable with the proposition laid down by RUSSELL, C.J., as to the limited application of s. 14. In *Preist v. Last* (5), which was the hot-water bottle case, COLLINS, M.R., says ([1903] 2 K.B. at p. 154):

"Speaking for myself I regard [s. 14 (1)] as merely expressing the law as it existed at the time of the passing of the Act."

F In *Bristol Tramways, etc. Carriage Co. v. Fiat Motors, Ltd.* (6), the appellants, by contract in writing, bought from the respondents a Fiat omnibus and six motor chassis. The contract of purchase did not contain any mention of the purpose for which these machines were required by the buyers. When delivered, they were found to be unfit for the purpose for which they were bought. An action was accordingly brought to recover damages for breach of warranty. The trial judge
G found that the plaintiffs had fully made known to the defendants the purpose for which the machines were required. He also found that the buyer relied on the defendants' skill and judgment and that the goods were of a description which it was in the course of the sellers' business to supply. COZENS-HARDY, M.R., in delivering judgment said:

"The case really turns upon s. 14 of the Sale of Goods Act, 1893. I rather
H deprecate the citation of the earlier decisions such as *Chanter v. Hopkins* (7) or *Shepherd v. Pybus* (8). The object and intent of the statute of 1893 was, no doubt, simply to codify the unwritten law applicable to the sale of goods, but in so far as there is an express statutory enactment, that alone must be looked at and must govern the rights of the parties, even though the section may to some extent have altered the prior common law. Turning to s. 14, it is plain
I that the defendants were told that the omnibuses were required for heavy passenger traffic at Bristol. I am disposed to think that such a statement of purpose suffices to show that the buyer relied upon the seller's skill and judgment without any further evidence on the point, but, however that may be, I think there was in the present case ample evidence that the plaintiffs did rely upon the defendants' skill or judgment. This being so, there was an implied condition that the omnibuses should be reasonably fit for the declared purpose, unless the defendants can rely upon the proviso at the end of sub-s. (1) of s. 14."

Jacobs v. James Scott & Co. (9) in this House supports those already cited as to the proper answer to be given to questions one and two; but as to the limited reach of s. 14, LORD DAVEY, in giving judgment expressly said that s. 14 only consolidated the law.

In the present case the statement of the purpose for which the coals were required, is, on these authorities, *prima facie*, sufficient to show that the buyers, the appellants, relied upon the skill and judgment of the respondents so as to satisfy sub-s. (1) of s. 14. It is established that on Oct. 8 when the appellants gave the order for the 500 tons of coal, Welsh coal of the kind described could only be acquired and brought to the port of Manchester under the requisition of the Coal Controller, and even then should be water borne; that local merchants in Manchester could only get such supplies of bunker coals as should be allotted to them by the Coal Controller; that they were, however, free to buy South Wales steam coal wherever they could find it and bring it to Manchester if they could so manage. The respondents had a practical monopoly in Manchester of the Welsh coal supply, but there were only about 300 tons of such coal then in stock in Manchester. About that time the Coal Controller succeeded in bringing by requisition up to Partington a steamer named *Penrhys* laden with a considerable cargo of what purported to be bunker coal. The respondents took no part in bringing this steamer to Partington, but they were aware that the coals she carried were intended to be used for bunkering purposes. The railway strike ended on Oct. 7. I cannot find in the case any evidence whatever that the respondents ever communicated directly or indirectly to the appellants that they had no coal to supply, in fulfilment of their contract, other than what they might obtain from the *Penrhys*. Nor did they ever inform the appellants or cause or procure them to be informed as to what was the kind or nature of the coal composing the *Penrhys*' cargo, nor did they ever inquire from the appellants whether they would be willing to accept coal carried in this ship in lieu of the coal they had purchased. Neither is there a shred of evidence that the appellants ever consented directly or indirectly to do anything of this kind. The cross-examination of the witnesses examined on behalf of the appellants was not ever directed to this point. The appellants did not, in my view, in any way relieve the respondents from the obligations their contract imposed upon them. A warranty, then, that the coals they would supply would be fit for the purpose for which the appellants required them remained, in my view, in full force and effect. They do not plead that it was impossible for them to have performed their contract; on the contrary, they plead they have performed it by supplying a substitute for the coals contracted for. When, therefore, the respondents, purporting to act in the discharge of the obligations imposed upon them by their contract, caused the bunkers of the *Manchester Importer* to be filled with 500 tons of coal from the cargo carried by the *Penrhys*, they must be held to have taken the risk of these coals not being of the kind and character they had warranted that the coals sold should be. I cannot concur with the Court of Appeal, if they have come to the conclusion that the circumstances existing at Manchester rendered it impossible for the respondents to exercise their skill and judgment as to the coal which should be supplied to the appellants' ship, and, therefore, relieved them from exercising that skill or judgment. The appellants have not, in their pleading, relied upon such impossibility. I think the appellants were entitled to assume that the respondents would exercise the skill and judgment they had contracted to exercise so as to secure that the coals which they caused to be filled into this ship's bunkers would be fit for the purpose for which they must be taken to have known the appellants required them. I am, therefore, of opinion that the order appealed from was erroneous and should be reversed, that the decision of *SALTER, J.*, should be restored, and this appeal allowed with costs here and in the Court of Appeal.

LORD SUMNER.—In this appeal there are two questions: (i) whether the statutory implied condition is satisfied, and (ii) whether the express terms of the

A contract or the circumstances exclude it. I take it that the buyer must prove the first and the seller the second.

The crucial time is the time when the contract is made. The buyer has to make known, expressly or by implication, the particular purpose for which the goods are required. He has to do this so as to show that he trusts the seller's skill and judgment to supply something reasonably fit for the purpose. That this was done is hardly in dispute. With great respect to the opinions of the lords justices I cannot see that this involves an express statement of the buyer's reliance in any form, though sometimes, as in *Gillespie's Case* (2) this actually occurs. *Frost's Case* (10), however, and *Preist's Case* (5) are instances in which communication of the reliance is inferential. The words of s. 14 (1) are "so as to show," not "and also shows." They are satisfied, if the reliance is a matter of reasonable inference to the seller and to the court, and in this case I think the evidence supports the finding of *SALTER, J.*, that the inference ought to be drawn. When the circumstances contra come to be looked at, I suppose that they must be facts common to both parties. Both must know or have notice of then. I do not see how difficulties in satisfying the condition, which would tend to deter the seller from contracting on the terms of it, can be relied on in rebuttal, if they are known to the seller only. *BANKES, L.J.*, seems to have thought that the implication only arises where the circumstances are such as to afford to the seller some reasonable opportunity of exercising his skill and judgment towards selecting and supplying goods which will satisfy the condition. This may well be when both parties know, or should know, that the seller has no such opportunity, but in this case I much doubt if, even the seller thought that he had not that opportunity, and am not at all satisfied that, if it was so, the buyer thought or should have thought so too. I doubt if the defendants ever developed the facts sufficiently in evidence: they seem to have relied too exclusively on the railway strike and the system of Coal Control, which no doubt were common knowledge.

It was argued, generally, that at such a time all implied conditions and guarantees are suspended, and that a buyer must take what a seller can get for him, provided that it answers the description. In this very wide form I know of nothing to support the contention. One must examine the facts to see, whether they were such as, to the minds of both parties, would exclude the statutory implication. Alternatively, it is said that the contract was really for the supply of specific ascertained goods, viz., coal ex the *Penrhy's* tale quale. I am afraid I can only say that it was not. In fact it was not proved that the buyer knew that he must take her coal or nothing, and it was clear that, down to the trial, the seller believed her coal to have been suitable for their purpose. As for the licence system, it really does not advance matters much. The owners of the *Manchester Importer* were allowed to get Welsh coal, if or when they could. The licence itself does not tie them to the cargo of any particular ship. It is not as though the seller had shown that no coals were available but the cargo of the *Penrhy's*, and that their quality was so dubious, that they could be sold only on caveat emptor terms. To say that the seller did not know what cargo the *Penrhy's* had, and, therefore, could not intend to warrant something unknown is an argument which fails, not merely because it rests on a unilateral state of mind, but also because, as he knew nothing against it and did know it to be South Wales coal, there is no reason why the seller should reject the natural implication. What then are the circumstances? Both parties to the contract were in the coal trade; both knew of the effects of the strike on the working of the control. The seller, however, was, and the buyer was not, specially conversant with South Wales coal, and, though both were fully alive to the difficulties of the time, the difficulties that they both felt related, in my opinion, solely to the scarcity and not at all to the quality of the coal available. In fact these coals were part of a considerable quantity, which the officials of the Coal Control had diverted to the Mersey as a general bunkering supply. I do not

think it is shown that even the seller had any reason to doubt that the coal would be fit for ordinary bunkers, or that the officials had not taken reasonable steps to ensure that the coal which they had secured would be suitable for the purpose. In fact, if they had not done so, they would be stultifying their own action and aggravating the famine, which they were trying to relieve. As to the buyer, I see no grounds at all on which to find that he had come to know that the quality of the coal must be so much a matter of uncertainty or of chance that no reliance on the seller's skill and judgment ought to arise on his side. I, therefore, think that the judgment of *SALTER, J.*, should be restored. I will only add that, if s. 14 (1) applies the case is disposed of, but I do not wish to be supposed to think that any other conditions or warranty is left outstanding in such circumstances beyond what the code describes.

LORD CARSON.—I concur.

Appeal allowed.

Solicitors: *Holman, Fenwick & Willan*, for *Vaudrey, Osborne & Mellor*, Manchester; *Rawle, Johnstone & Co.*, for *Hill, Dickinson & Co.*, Liverpool.

[Reported by *E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

COCHRANE v. COCHRANE AND OTHERS

[CHANCERY DIVISION] (*Sargant, J.*), April 27, 1922]

[Reported [1922] 2 Ch. 230; 91 L.J.Ch. 605; 127 L.T. 737; 38 T.L.R. 607; 66 Sol. Jo. 522]

Power of Appointment—Fraudulent appointment—Personal advantage sought by appointor—No pecuniary benefit—Acceleration of decree absolute of divorce.

An appointment under a power of appointment is void as being a fraud on the power if the appointor, in making the appointment, acts to secure for himself a personal advantage, and it matters not that the advantage sought is not a pecuniary advantage.

Where, therefore, a power was given to the appointor to appoint a fund for the benefit of all or any of his children, if more than one in equal shares, and after his divorce from his first wife he appointed to the only child of his first marriage a moiety of the fund and also a share *pari passu* with any future child or children of his in the other moiety of the fund, this being done to secure that his first wife should not delay in applying for the decree nisi which she had obtained to be made absolute so that he could re-marry at an early date,

Held: it was obviously contrary to the intention of the creator of the power that the appointor should bind himself to give an enormous preference to the child of his first marriage over any children of a subsequent marriage, and should do so, not in the bona fide exercise of a discretion as between the two families, but for the purely personal reason of obtaining an immediate release from his existing marriage, and, therefore, the appointment was a fraud on the power and void.

Power of Appointment—Fraudulent appointment—Proof of fraud—Burden on person seeking to impeach appointment—Need of prima facie validity.

When an appointment is admitted as having been made and as being on the face of it an appointment within the powers expressly given to the appointor it

- A** is for those who seek to impeach the appointment to make out a case for doing so. It is of the highest importance that a solemn act such as the exercise of a power of appointment should have an undoubted *prima facie* validity and should not be liable to be set aside merely on the ground of the apparent capriciousness or improvidence of its contents, or by reason of the execution of a subsequent appointment containing declarations by the appointor to the effect, e.g., that it was void as having been made against his real wishes to obtain a certain advantage for himself.

Notes. Referred to: *Re Nicholson's Settlement, Maloney v. Nicholson*, [1938] 3 All E.R. 532.

As to fraudulent appointments see 30 HALSBURY'S LAWS (3rd Edn.) 275 281; and for cases see 37 DIGEST 502 et seq.

Cases referred to:

- (1) *Re Bradshaw, Bradshaw v. Bradshaw*, [1902] 1 Ch. 436; 71 L.J.Ch. 230; 86 L.T. 253; 37 Digest 509, 1012.
- (2) *Vatcher v. Paull*, [1915] A.C. 372; 84 L.J.P.C. 86; 112 L.T. 737, P.C.; 37 Digest 492, 865.

Also referred to in argument:

Topham v. Duke of Portland (1862), 31 Beav. 525; 32 L.J.Ch. 81; 7 L.T. 11; 8 Jur. N.S. 1083; reversed (1863), 1 De G.J. & S. 517; 32 L.J.Ch. 257; 8 L.T. 180; 1 New Rep. 496; 11 W.R. 507; affirmed (1864), 11 H.L. Cas. 32; 34 L.J.Ch. 113; 10 L.T. 355; 10 Jur. N.S. 501; 12 W.R. 697; 11 E.R. 1242; 37 Digest 503, 963.

Vane v. Lord Dungannon (1804), 2 Sch. & Lef. 118; 40 Digest (Repl.) 661, *294. *Topham v. Duke of Portland* (1869), 5 Ch. App. 40; 39 L.J.Ch. 259; 22 L.T. 847; 18 W.R. 235, C.A.; 37 Digest 503, 965.

Rowley v. Rowley (1854), Kay, 242; 2 Eq. Rep. 241; 23 L.J.Ch. 275; 23 L.T.O.S. 55; 18 Jur. 306; 69 E.R. 103; 37 Digest 516, 1078.

Re Wright, Hegan v. Bloor, [1920] 1 Ch. 108; 88 L.J.Ch. 452; 121 L.T. 549; 64 Sol. Jo. 21; 37 Digest 453, 555.

Palmer v. Locke (1880), 15 Ch.D. 294; 50 L.J.Ch. 113; 43 L.T. 454; 28 W.R. 926, C.A.; 37 Digest 508, 1008.

Re A., [1904] 2 Ch. 328; 73 L.J.Ch. 648; 91 L.T. 238; 53 W.R. 2, L.J.J.; 33 Digest 227, 1373.

G Witness Action for a declaration that a deed of appointment was valid and effectual.

By his will, dated August, 1904, Sir Henry Cochrane, baronet, appointed the defendants, David Francis Moore and James Robertson Coade executors and trustees thereof, and after making certain specific and pecuniary bequests and specifically devising certain real estate, devised and bequeathed the remainder of his real and personal estate unto and to the use of his said trustees, their heirs, executors and administrators respectively according to the nature and tenure thereof upon trust to sell, call in and convert into money such parts thereof as should not consist of ready money, and out of the moneys to arise from such sale, calling-in and conversion and the ready money of which he should be possessed at the time of his death to pay his funeral and testamentary expenses and debts; and he desired his said trustees out of such moneys to hold a sum of £50,000 in trust for his son the defendant Sir Ernest Cecil Cochrane during his life and after his death (subject to such jointure as he might have created in favour of his wife in exercise of the power thereafter reserved to him) in trust for all or such one or more exclusively of the others or other of the children or remoter issue of Sir Ernest, at such age or time or respective ages or times, if more than one in such shares, and with such future or other trusts for their respective benefit and such provision for their respective advancement either in the lifetime of Sir Ernest or after his death and

maintenance and education at the discretion of his said trustees or any other person or persons, and in such manner in all respects as Sir Ernest should from time to time by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment as aforesaid in trust for all or any the children or child of Sir Ernest who being sons or a son attained the age of twenty-one years, or being a daughter or daughters attained that age or married, and if more than one in equal shares; and the testator thereby empowered Sir Ernest to appoint by deed or will to his then wife (namely, Dame Ethel Amy Cochrane, the next friend of the infant plaintiff in this action) in the event of her surviving him or to any future wife for her life, or any lesser period, a rentcharge or rentcharges by way of jointure not exceeding in all the annual sum of £800 to be charged on or payable out of the income of the said sum of £50,000, or the investments representing the same. The will contained a similar settlement of a sum of £100,000 in favour of a younger son of the testator, Stanley Herbert Cochrane, and his children and issue with a similar power of jointuring, and provided that in case no child of Stanley Herbert Cochrane should attain the age of twenty-one years, or, being a daughter, should marry earlier, the said sum of £100,000 and the investments representing the same should be held (subject to any jointure appointed by him) upon the like trusts in favour of the defendant Sir Ernest Cecil Cochrane and his issue as were thereinbefore contained concerning the £100,000 trust fund for Stanley Herbert Cochrane and his issue. The will also contained a settlement of a separate sum of £50,000 as a fund for the endowment of the persons for the time being entitled to the testator's baronetcy in succession to him.

The testator, Sir Henry Cochrane, died on Sept. 11, 1904, and his will was proved in the Principal Probate Registry in Ireland on Nov. 1, 1904. On the death of the testator the defendant, Sir Ernest Cecil Cochrane, succeeded to the baronetcy. Sir Ernest had married, on June 8, 1898, the said Dame Ethel Amy Cochrane. There was issue of the said marriage one child only—namely, the plaintiff Beatrice Dorothea Cochrane who was born on Dec. 2, 1900. On Nov. 24, 1910, Lady Cochrane obtained a decree nisi in the Probate, Divorce and Admiralty Division of the High Court of Justice dissolving her marriage with Sir Ernest. The custody of the infant plaintiff was committed to Lady Cochrane. After the making of the decree nisi a negotiation took place between Lady Cochrane through Mr. Walter Lumley of the firm of Lumley and Lumley, solicitors, and Sir Ernest through Mr. George Jefford Fowler of the firm of Fowler & Co., for settling the permanent alimony or maintenance to be allowed to Lady Cochrane, and also for making provision for the plaintiff. The first definite proposals on the subject are contained in a statement on behalf of Sir Ernest which was forwarded to Messrs. Lumley and Lumley on April 4, 1910. In that statement the net income of Sir Ernest is estimated at some £7,600 per annum, subject, however, to certain possible heavy liabilities, and a proposal is made that Lady Cochrane should receive by way of permanent alimony a sum of £2,500 per annum, being approximately one-third of his income. The statement then proceeds as follows.

“Under the trust of the will of the late Sir Henry Cochrane Sir Ernest Cochrane has, subject to his life interest, a power of appointment among his children over the sum of £50,000 and in certain events—namely, the decease of his brother Stanley without issue, an appointment over a further £100,000, making £150,000 in all. Sir Ernest Cochrane proposes to release these powers of appointment so that the £50,000 or £100,000 as the case may be shall go among all his children including the child of his marriage with Lady Cochrane in equal shares.”

On May 2, 1911, an interview took place between Mr. Fowler (on behalf of Sir Ernest) and Lady Cochrane and Mr. Walter Lumley, and as a result of that interview and of a subsequent conference between Mr. George Fowler and Sir Ernest, a

A letter of May 4, 1911, was written by Messrs. Fowler and Co. to Messrs. Lumley and Lumley in the following terms :

“Without prejudice. We have had an opportunity of conferring with Sir Ernest Cochrane on the interview we had with Lady Cochrane and yourselves the day before yesterday, and we are instructed to submit to you final proposals, which are as follows :—(i) Lady Cochrane to have £3,000 a year for life. (ii) If Lady Cochrane dies in the lifetime of Sir Ernest Cochrane, leaving her daughter her surviving, the daughter is to have an income of £1,000 a year, to be increased on marriage to £1,500 a year. (iii) £25,000 is to be immediately appointed to the daughter, and the remaining £25,000 as also Sir Ernest's contingent interest in the £100,000 and one half of the baronetcy fund of £50,000 is to go among all Sir Ernest's children (including the daughter) in shares. (iv) Lady Cochrane is to maintain and educate her child until marriage, but on her marrying, the daughter is to have £500 for trousseau, and an income of £500 a year, and Sir Ernest suggests that Lady Cochrane should, in that event, give up £500 a year to the daughter, so that she may have an income of £1,000 a year after marriage, but this will be for Lady Cochrane to determine. (v) Your costs against Lady Cochrane, as between solicitor and client, to be taxed or agreed and paid by Sir Ernest Cochrane. . . . Sir Ernest Cochrane considers these proposals are liberal, and that unless, within a week, they are in substance accepted, the matter must take the regular course.”

On May 8 there was a further discussion between Mr. Fowler and Mr. Walter Lumley, and a further conference between Mr. Fowler and Sir Ernest and as a result a letter was sent by Messrs. Fowler & Co. to Messrs. Lumley and Lumley in the following terms :

“We have seen Sir Ernest this afternoon with reference to our conversation with you to-day, and, taking into account his liabilities, it seems to us that the offer of £3,000 a year amounts, or practically amounts, to a moiety of our client's income. We are instructed, however, to say that provided, and provided only, that the decree is made absolute on the 29th inst. our client will, in addition to the £3,000 a year, contribute £250 towards the maintenance and education of his daughter.”

After this there was some further correspondence as to an increase (which was eventually agreed to) in the income to be provided for the plaintiff in the event of Lady Cochrane predeceasing Sir Ernest. There was also a controversy as to the amount of security to be provided by Sir Ernest for the payment of annuities to Lady Cochrane and the plaintiff. At an interview on May 30, 1911, the security provisionally agreed on, subject to confirmation by Lady Cochrane, was the income of Sir Ernest from the £50,000 trust fund and also the income from three-fourths of the preference shares and ordinary shares belonging to Sir Ernest in a company called Cantrell and Cochrane, Ltd., and subject to this confirmation the whole of the terms (which had by this time been reduced to writing) were agreed. But, on the morning of May 31, at an interview at Messrs. Fowlers' office, at which Mr. George Fowler, Sir Ernest, and a clerk of Messrs. Lumley and Lumley were present it was insisted on behalf of Lady Cochrane that the security should be increased to seven-eighths instead of three-quarters of these shares. That was eventually agreed to by Sir Ernest.

By the terms of settlement then signed by Sir Ernest it was provided (cl. 1) that Sir Ernest should transfer to certain trustees seven-eighths (and not three-fourths only) of the whole of his shares in Cantrell and Cochrane, Ltd., and should execute a deed declaring that they should hold his life interest in the £50,000 trust fund and the said shares upon trust out of the income of the £50,000 trust fund and the dividends of the shares to pay Lady Cochrane an annual sum of £3,250. By cl. 2 that after the death of the survivor of Sir Ernest and Lady Cochrane the trustees

should pay out of the dividends of the shares to such person as Lady Cochrane should by deed expressly referring to that power appoint an annuity not exceeding £500 a year during the life of such person, and (cl. 3) that Sir Ernest should by deed irrevocably appoint subject to his life interest the sum of £25,000 (part of the £50,000 trust fund) to the plaintiff for her life and after her death to her children who should attain the age of twenty-one years in equal shares, and if there should be only one such child the whole to such child, and if there should be no child to such person as she should appoint, but so as not to transgress the rule against perpetuities, and also a share (to be settled in like manner as the above-mentioned sum of £25,000) *pari passu* with any other child or children of any future marriage of Sir Ernest Cochrane in the remaining part of the said sum of £50,000. The terms of settlement further provided that the deed to be executed by Sir Ernest as aforesaid should also contain a declaration that, in the event of the death of Lady Cochrane leaving the plaintiff her surviving, the trustees should as from the date of the death of Lady Cochrane pay out of the income of the £50,000 trust fund and the dividends of the said shares an annuity of £2,000 to the plaintiff during her life by equal quarterly payments, the first quarterly payment to be made at the end of three calendar months from the date of the death of Lady Cochrane, provided that on the death of Sir Ernest Cochrane such annuity should abate by the amount of the interest on the said sum of £25,000.

Two days after the signing of these terms of settlement—namely, on June 2, 1911, the decree *nisi* was made absolute on the application of Lady Cochrane, and in September of that year Sir Ernest married his present wife.

After the signature of the terms of settlement some delay and difficulty occurred in carrying them into execution. In the first place a question arose whether the power to Lady Cochrane to appoint the annuity of £500 per annum was to operate as from Lady Cochrane's death or only as from the death of the survivor of herself and Sir Ernest. As to this Sir Ernest agreed that the terms as drawn up did not accurately represent the bargain, and was willing that the power should operate as from Lady Cochrane's death whether he survived her or not. But a more serious difficulty was as to the proportion of Sir Ernest's shares in Cantrell and Cochrane, Ltd., which was to be transferred as security. Sir Ernest objected to transfer more than three-fourths of his shares, and insisted that the change to seven-eighths had been made in such circumstances as not to be enforceable. On the other hand, Lady Cochrane relied on the signed terms and ultimately made application to the Divorce Court for an order that the terms should be confirmed and carried out. On this application a number of affidavits were filed, but ultimately, on Dec. 4, 1911, terms were arrived at between the parties which were indicated by the following endorsements in counsel's brief:

"Vary terms of settlement dated May 31, 1911. (i) By making shares to be assigned to trustees 14,236 preference shares and 25,000 ordinary shares in Cantrell and Cochrane, Ltd. (ii) By making the power of appointment of £500 annuity run from death of petitioner whether respondent be then living or not; (iii) By making the costs payable by the respondent the full solicitor and client costs properly incurred by the petitioner as petitioner. Confirm the said terms of settlement so varied. Adjourn motion generally."

On the same day an order in accordance with these terms was made by BARGRAVE DEANE, J.

The preparation of the necessary documents was then proceeded with, and they were ready to be executed about the beginning of April, 1912, but Sir Ernest apparently still hesitated about executing them, and in this state of things a consultation was arranged by Mr. Fowler for Sir Ernest with counsel—namely, Mr. Grazebrook and Mr. Crossman; and the advice then given by counsel, which was verbal, was communicated to Sir Ernest. There is in existence a memorandum

A made by one of Mr. Fowler's clerks of the advice so given, and this has been accepted by the parties as accurate, and is to the following effect:

B "Mr. Grazebrook advised that, if Sir Ernest refused to execute the deeds, it would be open to the other side to apply for an order directing him to execute them within a specified time; and, upon his failing to do so, they would be at liberty to apply to the Divorce Court to attach him, or the court could order the registrar to execute the deeds on behalf of Sir Ernest. It was explained by Mr. Crossman that he had great difficulty in advising Sir Ernest to execute the deeds having regard to the fact that, if Sir Ernest had further children, the execution of the appointment in favour of the child of his first marriage would be a fraud on the power."

C Shortly after this consultation Messrs. Lumley and Lumley wrote to Messrs. Fowler & Co. asking for an appointment to complete, and to this Messrs. Fowler replied in a letter of Mar. 8 which, omitting an unimportant passage, is in the following terms:

D "We have considered the form of the deeds as settled by Mr. Hume, and we have submitted them to our conveyancing counsel, Mr. Stafford Crossman, who feels the greatest difficulty in advising Sir Ernest to execute the deeds by reason of the fact that, if Sir Ernest has further children, the execution of the deed of appointment in favour of the child of his first marriage would (contrary to the desire and intention of both our clients) be a fraud on the power of appointment, so that the children by our client's present or any subsequent marriage would have a right to set aside the appointment as being a fraud on the power. Having regard, however, to the order of the Divorce Court our client will, though most reluctantly, execute the deeds in their present form, if your client insists upon it, but we should like to have your written assurance that the contents of the letter have been brought under the notice of your client so that it may not be open to her hereafter to say that she was not aware of the opinion expressed by our conveyancing counsel. We suggest that you should consider the decision in *Re Bradshaw*, *Bradshaw v. Bradshaw* (1)."

To this letter Messrs. Lumley and Lumley sent an answer on the following day in which they stated that they had sent a copy of Messrs. Fowler & Co.'s letter to Lady Cochrane, and referred them to an opinion of Mr. Edward Hume, a copy of which Messrs. Fowler & Co. already had, and which was in favour of the validity of the proposed appointment. The matter then proceeded in the usual course, and on April 11, 1912, was completed by the execution of deeds to give effect to the terms of settlement of May 31, 1911, as modified by the compromise arrived at on Dec. 4, 1911.

I The deed which was executed to effect the proposed appointment to the plaintiff was an indenture dated April 11, 1912, and made between Sir Ernest, of the one part, and the defendants, David Francis Moore and James Robertson Coade, as trustees, of the other part, whereby Sir Ernest irrevocably appointed and declared that the defendants, David Francis Moore and James Robertson Coade, and the survivor of them or other the trustees or trustee for the time being of the said will, should from and after the death of Sir Ernest, subject to any exercise of the power to appoint a jointure which was given him by the said will and which power was thereby expressly reserved, and subject to the power of varying investments contained in the said will stand possessed of one equal moiety of the £50,000 trust fund, and also of a share *pari passu* with any child or children of Sir Ernest Cochrane thereafter to be born in the other moiety of the £50,000 trust fund upon trust for the plaintiff during her life for her separate use without power of anticipation, and from and after her death upon trust as to the capital and income of the premises thereby appointed for all or any the children or child of the plaintiff who being male should attain the age of twenty-one years, or

being female should attain that age or marry and if more than one in equal shares. If there should be no such child of the plaintiff then, subject to the trusts therein before declared, upon trust for such person or persons as the plaintiff should by will or codicil appoint but not so as to transgress the rule against perpetuities.

There was issue of the second marriage of Sir Ernest, three children—namely, an eldest son, the defendant, Ernest Henry Cochrane, and two younger children, the defendants, Elizabeth Margaret Cochrane, and Desmond Oriel Alistair George Weston Cochrane of whom the elder son was born in February 1913. In November, of 1913, Mr. W. H. Schumacher, the paternal grandfather of the defendant, Ernest Henry Cochrane, purporting to act as his next friend, raised a question as to the validity of the appointment of April 11, 1912, but Mr. W. H. Schumacher died not long afterwards and the matter was allowed to drop. However, by a deed poll, dated Oct. 4, 1920, and under his hand and seal, Sir Ernest purported to declare that the appointment affected to be made by the indenture of April 11, 1912, was wholly void as having been made by him against his real wishes and pursuant to an agreement which he had made unwillingly with Lady Cochrane with the sole object of inducing her to make absolute the decree nisi obtained by her against him in the Divorce Court, and Sir Ernest also thereby purported to direct and appoint that, subject and without prejudice to his life interest under the aforesaid will and to every appointment theretofore or thereafter made by him in favour of any past, present, or future wife of his under the power in that behalf conferred on him by the said will, the trustees or trustee from time to time of the will should hold the £50,000 trust fund and the income thereof in trust for all his children whether then living or thereafter born as tenants in common in equal shares, with certain provisions for accruer as regards the shares of any child dying under the age of twenty-one years without leaving issue living at the death of the survivor himself and such child. And the said deed poll also provided that the appointment thereby made should be revocable as therein mentioned. It was regarded as impossible in the interests of the plaintiff to allow this deed poll to remain unchallenged, and within a few months of its execution the present action was brought for a declaration that the deed of appointment of April 11, 1912, operated as a valid and effectual irrevocable appointment, and that the deed poll of Oct. 4, 1920, was invalid and inoperative so far as it purported to declare void or defeat, supersede, vary or prejudice the earlier deed.

Maugham, K.C. and *C. W. Turner* for the plaintiff.

Stafford Crossman for Sir Ernest Cochrane.

Romer, K.C. and *Farwell* for the children of the second marriage.

Brydges for the trustees.

Cur. adv. vult.

April 27. **SARGANT, J.**, read the following judgment.—The plaintiff here seeks to have it declared that an irrevocable appointment in her favour, which was made in the year 1912 by her father, the defendant, Sir Ernest Cochrane, is a valid and effectual appointment, and that a subsequent appointment made by Sir Ernest in the year 1920 is invalid and inoperative, so far as it purports to declare void or defeat, supersede, vary or prejudice the earlier appointment. The substantial question is whether the earlier appointment was or was not what is termed a fraud on the power under which it purported to have been made, or, in other words, whether in all the circumstances of the case the power was or was not exercised by Sir Ernest "for a purpose or with an intention beyond the scope of or not justified by the instrument creating the power": see the definition by LORD PARKER in *Vatcher v. Paull* (2). It may be that on the strictest view of the matter the action should have been limited to one for the perpetuation of testimony since the rights in question are reversionary only. But those acting for the infant defendants as well as the plaintiff are desirous

A that the matters in dispute should be settled forthwith, and this course is, in my judgment, a beneficial one for all parties concerned, and, accordingly, I have thought the case a proper one in which to exercise the power vested in the court of proceeding by way of declaratory judgment with regard to future rights.

The actual appointment to the plaintiff being admitted, the first question that arises is whether it is for her to show affirmatively that it was made in good faith and in proper exercise of the power in the will, or for the infant defendants to show that it was made improperly and in fraud of the power. The infant defendants have in their favour on this point both the great inequality of the appointment actually made to the plaintiff and also the terms of the subsequent deed poll of Oct. 4, 1920, which might perhaps be argued to afford an expression of Sir Ernest's views having a weight equal to that of the original appointment. But, nevertheless, I think that when once the original appointment to the plaintiff is admitted as having been made and as being on the face of it an appointment within the powers expressly given to the appointor, it is for those who seek to impeach the appointment to make out a case for doing so. It is of the highest importance that a solemn act, such as that comprised in the indenture of April 11, 1912, should have an undoubted *prima facie* validity and should not be liable to be set aside merely on the ground of the apparent capriciousness or improvidence of its contents or by reason of the execution of subsequent appointments containing declarations by the appointor, such as those in the deed poll of Oct. 4, 1920. Indeed it is clear that any such subsequent written declarations are not in themselves evidence that the court can receive of the state of mind of the appointor at the date of the previous appointment or of the purpose with which that appointment was made.

The onus, then, being on the infant defendants, they seek to discharge it in ways which are clearly indicated in their defence, which was communicated to the plaintiff's advisers some little time before the hearing of the action, was not objected to by them at the hearing, and has, of course, been allowed by me. In the first place they say that the appointment to the plaintiff was made as part of the terms of an agreement for the compromise of the claims of Lady Cochrane for permanent alimony and to avoid proceedings by her to have that alimony fixed by the court. Alternatively they say that the appointment was agreed to be made for the purpose of inducing Lady Cochrane to apply to the court to have the decree *nisi* made absolute, and in the belief that otherwise she would not make the application. As a further alternative, they say that the appointment was made through the belief of the defendant that, if he did not make it, he would be guilty of contempt of court, and for the purpose of avoiding the penalties that such contempt would entail. They say that in any of these three alternatives the appointment is bad, as being made not *bonâ fide* for the benefit of the appointee, but to secure a benefit for the appointor or avoid a risk to him.

The first of these three alternative defences cannot, in my judgment, be sustained. It is no doubt true that by conducting a negotiation and entering into a bargain, which related not only to the permanent alimony or maintenance to be secured to Lady Cochrane but also to the appointment to be made to the plaintiff, Lady Cochrane and her advisers ran a certain risk of invalidating the latter part of the transaction, and that it would have been far safer and better that any stipulations or arrangements with regard to the first part of the negotiation should have been kept quite separate from those with regard to the latter part. But, on the other hand, I do not think that the simultaneity of the negotiations as to the two parts of the transaction are necessarily fatal, if it is reasonably clear that the arrangements as to the appointment were not, in fact, affected by those as to the maintenance. It was, after all, very natural that, when Lady Cochrane was making terms for a separate establishment for herself

and the child of whom she had the custody, she should desire that the permanent future of her child should also be reasonably provided for, and I cannot see that any inference necessarily arises that Sir Ernest's intentions to provide for the future of his daughter were influenced by the claims of his wife for maintenance. Had there been any indication that Lady Cochrane proposed to accept a smaller provision for herself out of Sir Ernest's own property, on the understanding that Sir Ernest would make a specially large provision for the plaintiff out of the £50,000 trust fund, the case would have borne an entirely different complexion. But the whole course of the negotiations indicates that Lady Cochrane was asking simultaneously for an increase in the provision for her own maintenance which Sir Ernest had originally proposed out of his own property, and for a still larger increase in the provision for her daughter, both out of Sir Ernest's own property and out of the capital of the £50,000 trust fund. I cannot come to the conclusion that in acceding, as he did at an early stage, to the very large appointment desired for his daughter, Sir Ernest was in any way seeking to gain a pecuniary benefit for himself by way of reducing the provision which he had to make out of his own property either for Lady Cochrane or for the plaintiff. In coming to this conclusion I have not overlooked the provision in the terms of settlement, under which after Sir Ernest's death the income on the part of the £50,000 trust fund appointed in favour of the plaintiff operates in relief of the income which he has to provide for her out of his shares in Cantrell and Cochrane, Ltd.—a provision which illustrates the danger involved in bringing into a negotiation of this sort the two elements of a dealing with the appointor's own property and a dealing with a trust fund by means of the exercise of a limited power of appointment. But no stress was laid on this feature of the arrangement by counsel for the infant defendants, and I do not think that in fact this provision operated on Sir Ernest's mind or formed an element in inducing him to make an extremely large appointment in favour of the plaintiff. All through the transaction, as I judge him, he was much more occupied with what was to affect him immediately and in his lifetime, than with what would affect the £50,000 trust fund or his estate after his death.

The second alternative defence to which I have referred is a much more formidable one. It is abundantly clear that Sir Ernest was desperately anxious that Lady Cochrane should proceed to have the decree nisi made absolute at the earliest possible moment, so that, as he put it in his evidence, he should regain his freedom and be able to marry again. I am also convinced that Mr. Walter Lumley was well aware of this extreme anxiety, and probably of the reason for it, and that this formed an important element in the negotiations. The terms of the letter of May 8, 1911, the circumstances of the final signature of the terms of May 31, the letters of that date which Mr. Walter Lumley caused Sir Ernest to sign at his office, and the extraordinary promptitude with which the application to have the decree made absolute followed on the signature of the terms of settlement, all point in the same direction. This view is strikingly confirmed by a passage in one of the affidavits filed on behalf of Lady Cochrane on the application to the court to confirm the terms. For, in para. 17 of his affidavit sworn on Nov. 29, 1911, Mr. Walter Lumley stated in the most definite terms that his client, Lady Cochrane, had instructed him not to apply to make the decree absolute until the future of herself and her child had been properly assured. It is true, indeed, that when this passage was put to Lady Cochrane in cross-examination, she did not remember having given these instructions, but she admitted that she must have had Messrs. Fowler & Co.'s letter of May 8, 1911, shown to her, and have realised at that time that they were making it a term on behalf of Sir Ernest that the decree should be made absolute. Further, she had been in bad health at the time, her recollection of the whole

A transaction was admittedly very defective, and she had left herself entirely in the hands of Mr. Walter Lumley and was bound by his action. But beyond this there is the direct evidence of Sir Ernest himself as to his own mental attitude at the time, and the purpose for which he agreed to the bargain. Some objection indeed was taken by counsel for the plaintiff to the reception of this evidence, and at the time I allowed it to be given merely *de bene esse* and subject to that objection. On reflection, however, I am convinced that the evidence was admissible, whatever comments might be made as to its value. In the words of the late LORD BOWEN, the state of a man's mind, if ascertainable, is as much a fact as the state of his digestion, and here the evidence is being tendered not on behalf of Sir Ernest but on behalf of his children, so that there is no personal objection to the evidence such as may sometimes occur when the question is whether a purchase or transfer in the name of another was intended by way of advancement or not. Dealing then with this evidence, I ought to state in the first place that I am convinced that Sir Ernest was trying to tell the truth to the best of his recollection, but, on the other hand, he was obviously vague and confused as to a good deal that had occurred, and I think that his recollection has been somewhat coloured by the great desire which he has obviously been feeling for some time past that the striking inequality between the provision for his two families should be put right. I am unable for instance to accept as proved his statement that between April 4 and May 4, 1911, he met Mr. Walter Lumley casually, and that Mr. Lumley positively insisted on the £25,000 appointment as a *sine qua non*, and that it was for this reason that this term of the arrangement was taken as settled in the proposals of May 4 and was never afterwards discussed or objected to in terms. I think Sir Ernest's dates on this point cannot be relied on, and, further, that at this distance of time he may very likely be confusing something communicated to him by Mr. Fowler, or even some general impression, with something said to him direct by Mr. Lumley, and that, therefore, no reliance can be placed on this part of Sir Ernest's evidence. I do not think that at the time of the negotiations Sir Ernest attached anything like the same comparative importance to the question of the appointment as he has since done and now does. It seems to me that he was a weak man, self-indulgent, and liable to be carried away by the passions of the moment, and that he was more impressed by that which was about to affect him personally and immediately, such as the proportion of the shares which he was to transfer as security, than by what would merely affect a possible future family on his death. But, on the other hand, there can be no doubt that Mr. Walter Lumley, for Lady Cochrane, was attaching great importance to obtaining a good permanent provision for the plaintiff, and as part of that provision an appointment for her of a very large proportion of the £50,000 trust fund, and I believe Sir Ernest's general evidence that he was aware of the uncompromising nature of Mr. Lumley's demands on behalf of Lady Cochrane; that he realised on May 31 that, in the language he attributes to Mr. Lumley's clerk "it was that or nothing"; that he feared—and I think not without reason—that unless he gave way the decree nisi would not be made absolute; and that he ultimately signed the terms of settlement most reluctantly and for the purpose of obtaining his freedom. It is in relation to this view of the matter that the extraordinary preferential treatment of the plaintiff, as compared with any future children, acquires importance. The difference in her favour is so great as markedly to support the view that it was due not to any special affection entertained for her by Sir Ernest (particularly at a time when he was contemplating re-marriage) but to the insistence of Mr. Lumley on behalf of Lady Cochrane. That a petitioner who has obtained a decree nisi for the dissolution of marriage should, whether directly or through a legal adviser, threaten to decline to have the decree made absolute, and should use this threat as a lever for the purpose

of securing larger pecuniary provision from the respondent would, in my judgment, be a most unpleasant and regrettable incident, and would, I think, if brought to the notice of the Divorce Court, be visited with severe reprobation. But, as Mr. Lumley is dead and has no opportunity of explanation, it is obviously undesirable that I should express any definite opinion whether he did in fact go as far as this, unless it were absolutely necessary to do so for the purposes of my present decision. This, I think, is not the case. The really vital question is not the precise limit to which Mr. Lumley went, but the state of Sir Ernest's mind at the time of the signing of the terms of settlement, and the purpose with which he signed them. As to this I am convinced that Sir Ernest thought, whether rightly or wrongly, that it was a necessary condition of obtaining his freedom that he should accept wholly and entirely and without any modification the terms of settlement as presented to him on May 31, including, of course, the very important term as to the appointment to be made to the plaintiff, a term which, as I have already shown, was contrary to his original wish and had obviously been pressed on him by Lady Cochrane and her adviser.

In these circumstances, can the bargain in the terms of settlement be upheld, so far as relates to the proposed appointment of the £50,000 trust fund? In my judgment, the answer must be in the negative. Had Sir Ernest agreed to make the appointment for the purpose of obtaining some pecuniary advantage for himself, there is no doubt that the agreement would have been bad, and no difference can, in my judgment, be made by the fact that the advantage at which Sir Ernest was aiming was one of another kind—namely, freedom to re-marry. Such an advantage, though less sordid than the other, is just as much a personal advantage, and just as alien from the purposes for which the power of appointment was entrusted to him. It was obviously contrary to the intention of the creator of the trust that Sir Ernest should bind himself antecedently to give an enormous preference to the child of his first marriage over any children of a subsequent marriage, and should do so, not in the *bonâ fide* exercise of a discretion as between the two families, but for the purely personal reason of obtaining an immediate release from his existing marriage.

In the view which I have taken of the second alternative defence it is unnecessary to deal with the third alternative defence as a substantive defence. But I have still to consider whether, although the plaintiff cannot justify the agreement to make the appointment, she can, nevertheless, succeed in upholding the validity of the appointment itself as actually carried out by the indenture of April 11, 1912. This must, I think, depend upon whether the actual appointment was the result of a fresh and independent exercise of discretion by Sir Ernest for the legitimate purposes of the power confided to him, or was merely the execution and completion of a bargain which had already been arrived at for an illegitimate purpose. As to this the facts, in my judgment, admit of but one interpretation. It is, of course, quite true that Sir Ernest's main objection to the completion of the transaction was founded on the increase of security which had been wrung from him on May 31, and that this was the ground on which he relied in opposing the confirmation of the terms of settlement by the Divorce Court. But even after this objection had been dealt with and adjusted in Sir Ernest's favour, he was still most reluctant to execute the necessary deeds. He only proceeded to do so after receiving the advice from Mr. Grazebrook which I have already stated, and the letter from Messrs. Fowler & Co. of Mar. 8, 1912, which I have also read, put this reluctance on record in the most definite and formal manner. Some reliance indeed was placed by counsel for the plaintiff on a passage in that letter which disclaimed any desire to commit a fraud on the power of appointment. But I have to regard here facts and not expressions of pious intention, however sincere. No doubt, no one desired that what they did should amount to a fraud on the power and be impeachable accordingly.

A But they did intend, though as to Sir Ernest most reluctantly and under stress of circumstance, to carry out the arrangements which had been made and confirmed by the court, and they carried out that intention, in spite of the doubt that had been definitely expressed as to the validity of a very important part of the transaction. My conclusion then is, as to this part of the case, that the actual appointment amounted at the best to no more than the formal carrying
B out and completion of an illegitimate agreement to appoint, and is at the best in no better case than the original agreement itself. Indeed, there are grounds for deciding, where it necessary, that, even if the original agreement were unimpeachable, the appointment itself was vitiated by the circumstances in which it was executed. For this part of the terms of settlement could never have been specifically enforced, and Sir Ernest had always a locus pœnitentiæ down to the very moment of the execution of the appointment. This being so, regard must
C be had to his state of mind and the purpose for which he was appointing down to the last moment preceding the actual execution, and though by that time Sir Ernest had attained his original purpose of freedom to marry again, he realised and made it clear that he realised, that he was exercising his power, not for the purposes for which it was confided to him—i.e., for what he then considered to
D be in the bonâ fide interests of his issue present and future—but under the stress and compulsion of a bargain, the breach of which might involve him in unpleasant consequences.

In the result, then, I propose to declare that the appointment of April 11, 1912, was invalid and void. I note Sir Ernest's offer in the course of the hearing to ensure that the plaintiff should take a share equal to that of each of his other
E children, and I hope that he will take steps to give effect to that offer, but the matter is not one as to which I ought to put him to any terms. The question of costs has given me a good deal of difficulty. I propose to allow the costs both of the plaintiff and of the infant defendants and of the defendant trustees out of the £50,000 trust fund, the costs of the trustees being, of course, taxed as
F between solicitor and client. Sir Ernest will suffer quite enough in being left to bear his own costs and losing the income during the rest of his life on that portion of the trust fund which is applied in paying the other costs.

Solicitors: *E. F. Turner & Sons; Fowler, Legg & Young; Lanfear, Tanner & Mackenzie.*

[*Reported by L. MORGAN MAY, Esq., Barrister-at-Law.*]

FOWLER AND OTHERS v. KIBBLE AND ANOTHER

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.),
January 23, 1922]

[Reported [1922] 1 Ch. 487; 91 L.J.Ch. 353; 126 L.T. 566; 38 T.L.R. 271;
66 Sol. Jo. 267]

*Coal Mine—Checkweigher—Interference with workmen—Right of workmen to restrain—Coal Mines Regulation Act, 1887 (50 & 51 Vict., c. 58), s. 13 (1).
Trade Union—Trade dispute—Workers deprived of tools by union officials—
Right of workers to sue for statutory offence—Conspiracy and Protection of
Property Act, 1875 (38 & 39 Vict., c. 86), s. 7—Trade Disputes Act, 1906 (6
Edw. 7, c. 47), s. 3.*

The plaintiffs, miners employed in a certain pit, having seceded from a trade union in the district which was affiliated to the Miners' Federation, and having founded an independent trade union, pressure was brought to bear upon them by the defendants, who were officials of trade unions affiliated to the federation, to return to one or other of those unions. On their refusal one of the defendants, who was a checkweigher appointed under s. 13 of the Coal Mines Regulation Act, 1887, to supervise the weighing of coal on behalf of the miners, requested the lampman in charge of the safety lamps in the mine, without which no miner was allowed to work in the pit, not to issue any safety lamps to the plaintiffs. The lampman, accordingly, refused to issue lamps to the plaintiffs. In an action by the plaintiffs to restrain the defendants from procuring a breach of the plaintiffs' contract to work for their employers, and from interfering with their right to work and dispose of their labour as they willed, and for damages,

Held, by SARGANT, J.: (i) in the circumstances there was a trade dispute within s. 5 (3) of the Trades Disputes Act, 1906; the acts of the defendants were done in furtherance of that dispute; and, therefore, s. 3 of the Act afforded a complete defence to the main ground of action; (ii) s. 13 (3) of the Coal Mines Regulation Act, 1887 (which provides that a checkweigher shall not impede or interrupt the working of the mine or interfere with any of the workmen) was designed to protect the mineowners, and the miners could not avail themselves of the subsection if they were interfered with.

Held, by the Court of Appeal: s. 7 of the Conspiracy and Protection of Property Act, 1875 (which makes it an offence, with a view to compel any person to abstain from doing or to do any act which he has a legal right to do or abstain from doing, wrongfully and without legal authority deprives him of any tools or other property owned or used by him) created no new right of action, but made penal certain acts which previously had been merely civil torts; therefore, the acts of the defendants could only have been actionable at common law on the ground that the defendants had induced the plaintiffs to break their contracts of employment or had interfered with their employment, and the case fell within s. 3 of the Trades Disputes Act, 1906.

Notes. As to offences and torts arising out of the operations of trade unions see 32 HALSBURY'S LAWS (2nd Edn.) 505 et seq.; and for cases see 43 DIGEST 110 et seq. For Conspiracy and Protection of Property Act, 1875, see 5 HALSBURY'S STATUTES (2nd Edn.) 885, and for the Trade Disputes Act, 1906, see *ibid.*, vol. 25, p. 1267.

Cases referred to :

- (1) *Groves v. Lord Wimborne*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 47 W.R. 87; 14 T.L.R. 493; 42 Sol. Jo. 633, C.A.; 34 Digest 218, 1815.
- (2) *Ward, Lock & Co., Ltd. v. Operative Printers' Assistants' Society* (1906), 22 T.L.R. 327, C.A.; 15 Digest (Repl.) 919, 8827.

A Also referred to in argument :

Ashby v. White (1703), Bro. Parl. Cas. 62; Holt, K.B. 524; 2 Ld. Raym. 938; 6 Mod. Rep. 45; 1 Salk. 19; 3 Salk. 17; 14 State Tr. 695; 1 Smith, L.C., 12th Edn., 266; 1 E.R. 417; 1 Digest 23, 187.

B

J. Lyons & Sons v. Wilkins, [1896] 1 Ch. 811; 65 L.J.Ch. 601; 74 L.T. 358; 60 J.P. 325; 45 W.R. 19; 12 T.L.R. 278; 40 Sol. Jo. 372, C.A.; subsequent proceedings [1899] 1 Ch. 255; 68 L.J.Ch. 146; 79 L.T. 709; 63 J.P. 339; 47 W.R. 291; 15 T.L.R. 128, C.A.; 43 Digest 111, 1167.

Simmonds v. Newport Abercarn Black Vein Steam Coal Co., [1921] 1 K.B. 616; 90 L.J.K.B. 609; 124 L.T. 557; 85 J.P. 109; 37 T.L.R. 165, C.A.; 34 Digest 730, 1104.

C

Walters v. Green, [1899] 2 Ch. 696; 68 L.J.Ch. 730; 81 L.T. 151; 63 J.P. 742; 48 W.R. 23; 15 T.L.R. 532; 43 Digest 125, 1278.

Appeal from an order of SARGANT, J.**D**

The plaintiffs were ten miners in the employment of the Cannock and Leacroft Colliery Co., and the defendants were officials of the Cannock Chase Miners' Association, which was affiliated to the Miners' Federation, the defendant Kibble

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being the treasurer of the association and also a checkweigher in the mine appointed by the miners under the Coal Mines Regulation Act, 1887, and the other defendant Sambrook being a delegate of the association. The plaintiffs were members of a trade union in the district called the Wednesfield Union, which was not affiliated to or recognised by the Miners' Federation, or by the Cannock Chase Miners' Association or the Pelsall Miners' Association, the only two affiliated unions in the district. The Wednesfield Union had been formed by one Cartwright, who had formerly been a member of the Pelsall union, and had quarrelled with and left the Federation, taking other men with him. At all material times there was keen rivalry between the Wednesfield Union and the Cannock Chase and Pelsall unions. On June 4, 1920, a resolution was

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passed at a meeting of the Cannock Chase union to hold a card examination at the mine in question. This was to insure, if possible, that no person should work in the mine who was not a member of the federation, and not in arrear with his subscriptions to the local affiliated union. The card examination was fixed to take place on June 22 and 23. On June 5 the defendant Kibble warned one of the plaintiffs that he must join the Cannock union or he would not be able to continue at work in the pit. On June 11, the defendant Sambrook,

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having seen the card of the plaintiff Fowler, told him that unless he joined the Cannock Chase union he would not get a safety lamp issued to him to enable him to go down the pit. On June 16 the miners were waiting as usual in a queue to be given their lamps, each lamp being numbered so as to correspond with the number on the man's card, when upon the advice or instructions of Kibble the lampman refused to issue his lamp to the plaintiff Fowler, and Sambrook told him that unless he joined the Cannock Chase union he would not get a lamp. Fowler was thereby prevented from going down the pit and working. Two other plaintiffs, Davies and Birch, were also refused lamps by the lampman acting on the instructions of Kibble on the same day. On June 17 Davies and Birch were refused their numbered lamps, but were afterwards given unnumbered lamps, but when they went to the cage which was to take them down, Kibble

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asked them to give up their lamps, which they did. On June 22 two other plaintiffs, Turner and Humphries, were standing in the lamp queue when Sambrook informed them that they were not entitled to receive lamps, upon which they left the queue, and did not ask for lamps. On June 23, which was the second day of the card examination, six of the plaintiffs who were waiting to get their lamps were told by Sambrook that they could not be given lamps, as they were not members of the Cannock Chase union, and they thereupon left the lamp queue. One of the plaintiffs, Turner, went to Mr. Biddle, the assistant

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One of the plaintiffs, Turner, went to Mr. Biddle, the assistant

manager of the mine, and asked him to intervene and prevent the lamps being withheld. Mr. Biddle replied that the dispute was no concern of his, and he was not going to have the work of the pit held up for the sake of half a dozen men. The plaintiffs then commenced this action, claiming an injunction and damages against the defendants for procuring a breach of contract between the plaintiffs and their employers, and from interfering with their right to work. They also claimed damages against Kibble for breach of his statutory duties as a checkweigher appointed under the Coal Mines Regulation Acts, and as against both defendants for having deprived the plaintiffs of the use of safety lamps, as being tools of their trade, without which they were unable to descend the mine and work, and for having hindered them in such use, in breach of the Conspiracy and Protection of Property Act, 1875.

By the Coal Mines Regulation Act, 1887, s. 13 (3):

"A checkweigher shall not be authorised in any way to impede or interrupt the working of the mine, or to interfere with the weighing, or with any of the workmen or with the management of the mine . . ."

By the Conspiracy and Protection of Property Act, 1875, s. 7:

"Every person, who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or to abstain from doing, wrongfully and without legal authority. . . (3) Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof . . . shall, on conviction thereof . . . be liable . . . to . . . a penalty . . ."

By the Trade Disputes Act, 1906, s. 3:

"An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

SARGANT, J., in giving judgment, said that what had occurred amounted to a trade dispute within s. 5 (3) of the Trade Disputes Act, 1906, s. 3 of which negatived any right to an injunction restraining the defendants from procuring a breach of contract or interfering or attempting to interfere with the right of the plaintiffs to dispose of their labour as they would. The injunction asked for practically followed the wording of s. 3 of the Act which said that in the case of a trade dispute, the very things it was sought here to prevent should not be actionable. **HIS LORDSHIP** continued: In my judgment, there plainly was a trade dispute in existence at the material time, and the acts in question were done in furtherance of it. Accordingly, the defendants have, in my judgment, a complete answer to the cause of action of the plaintiffs apart from the two subsidiary causes of action, to which I am now going to refer.

The first subsidiary cause of action only touches the defendant Kibble who was a checkweighman. Section 13 of the Coal Mines Regulation Act, 1887, constitutes the position of a checkweigher and creates a special code for the protection of the employers. The checkweigher is appointed by the men entirely independently of the employers, and he is there to check the weighing of the coal, and see that the miners receive full value for the coal they have worked. The owners have nothing to do with him, he is appointed by the miners, and he acts as a check upon the employers. The section provides a rather elaborate code, under which the employers may apply to a particular authority, if they disapprove of the conduct of the checkweigher and get him removed. Sub-section (3) of s. 13 is relied on. It prevents the checkweigher from interfering with the management of the mine. It is put there in order that the employers may be protected from having their management of the mine interfered with by a person

A who is appointed by the miners, for their protection in one particular matter. He is given a position in the mine, which he might, it is thought, use to the detriment of the employers with the result that the management of the mine would be interfered with. It is that which this sub-section prohibits. It is for the protection of the employers, and not in the least for the protection of the miners whose representative the checkweigher is. Here it is the miners themselves

B who complain of something done by the checkweigher. In my judgment, the miners have no *locus standi* under this section to complain of the conduct of the checkweigher. Here the employers are not in any way objecting to anything done by Kibble. Indeed, so far was Kibble from interfering with the management that he was really carrying out an arrangement between the employers and the federation under which the continuous working of the mine and the prevention of quarrels were obtained by ensuring that only federation labour should be employed in the mine. Accordingly, in my judgment, even if the civil right or remedy given by s. 13 was not overridden by the subsequent legislation in the Trades Disputes Act, 1906, a question which might need very careful consideration if it were necessary to consider it, there is not here any breach of duty on the part of Kibble, which the miners are entitled to complain of, or,

D indeed, so far as I can see, any breach of duty as towards the employers themselves, having regard to the arrangement that had been made between the employers' association and the federation.

His LORDSHIP also held that the plaintiffs were not entitled to succeed under s. 7 of the Conspiracy and Protection of Property Act, 1875, and gave judgment for the defendants. The plaintiffs appealed against the learned judge's decision

E on s. 7.

Disturnal, K.C. and R. A. Willes for the plaintiffs.

Grant, K.C. and W. M. Hunt for the defendants.

LORD STERNDALE, M.R.—This is an appeal from an order of SARGANT, J., who decided three questions against the plaintiffs and in favour of the defendants.

F The first was that on the facts of this case no action would lie at the suit of the plaintiffs against the defendants because of the operation of s. 3 of the Trade Disputes Act, 1906. The second was that the plaintiffs were not entitled to maintain an action against the defendants by reason of a breach of s. 13 of the Coal Mines Regulation Act, 1887. Against those two decisions there is no appeal.

G The third was that the plaintiffs were entitled to maintain an action against the defendants for breach of the obligation imposed upon the defendants and all other persons by s. 7 of the Conspiracy and Protection of Property Act, 1875. On that point we have had a long, interesting, and able argument.

The plaintiffs are members of a union called the Wednesfield Union, a body which is not recognised by or affiliated to the Miners' Federation. The defendants are members of one or other of two unions, both of which are so affiliated. The

H great bulk of men working at the colliery which is concerned in this matter are also members of these two unions. The defendant Kibble was the checkweigher appointed by the miners working at the colliery, and, I think, was also an official of the union. The defendant Sambrook was a delegate of one of those unions. They were therefore, persons of considerable influence among the workers.

I Before the circumstances with which this case is concerned happened an agreement had been made between the mine owner and the federation that only union labour was to be employed at the colliery, and for this purpose members of the Wednesfield Union were considered non-unionists. That union had been established or promoted in a great measure by a man of the name of Cartwright, who had quarrelled with the Miners' Federation, and there was a considerable feeling among the other men antagonistic to Cartwright and his union. I think the learned judge was warranted in finding there was a well-grounded anticipation that if the members of the Wednesfield Union were allowed to work the other

miners would refuse to work, and there would be a stoppage in the pit. I think he was also warranted in finding that the defendants were anxious to avoid such a stoppage if possible, and what they did was done with the object of preventing the stoppage, although they certainly also wished, as they frankly admitted, by the steps they took to induce the plaintiffs to join one or other of the affiliated unions. The steps they took were these. Before the miners can go down to work in the pit each of them must have a safety lamp; without such a lamp they cannot work, and are not allowed to go down the pit. These lamps are kept in a lamp room under the charge of the lamp man, who is a servant of the mineowner, and not in any way under the control of either of the defendants. Each miner, as I understand it, is provided with a ticket or check corresponding in number with a numbered lamp, and when the lamps are to be given out a queue is formed and each man is given a lamp in exchange for a check. The defendants, in order to prevent the plaintiffs from working, took two steps, one step being taken in some cases, and the other step being taken in other cases, according to the circumstances. First, they told the lampman not to give out lamps to the plaintiffs, I use the word "told" as a neutral word. The learned judge has found that what they did was to advise the lampman not to give out lamps to the plaintiffs. I do not think the word to describe what they did is very material. It was found, and indeed admitted that no violence, no threats, and no intimidation were used, and in that case, as the defendants had no control over the lamp man, what they did could not amount to more than advice or request. Secondly, when lamps were given out they, without violence or threats or intimidation, asked the plaintiffs to give them back, and the plaintiffs did so.

The plaintiffs brought an action against the defendants for an injunction and damages, alleging a combination or conspiracy to compel or induce a breach of contract, which was stated to be a breach by the plaintiffs of a contract to work for the mineowner, without giving the fourteen days' notice required by the terms under which they were working. I think in a later stage of the argument some breach of the mine owner in not giving a lamp was contemplated and spoken of. SARGANT, J., held that, apart from any inducing of a breach of contract, no cause of action was disclosed in the case, but that, assuming such a cause of action to be shown the court could not entertain it by reason of s. 3 of the Trade Disputes Act, 1906. As I have said this decision was not questioned before us, nor was the decision of the learned judge on the second point. The plaintiffs have contended that they are entitled to succeed upon a cause of action founded on s. 7 of the Conspiracy and Protection of Property Act, 1875. The learned judge held that this contention failed because he was of opinion the section contemplated something in the nature of violence as being necessary to support a cause of action under it. I do not quite agree with the reasons as stated, but I think the decision is correct, and I rather think the learned judge did not mean to give any reason other than those which I intend to give.

The contention for the plaintiffs was mainly that they were entitled to maintain the action for a breach of the statutory obligation imposed by s. 7, causing injury to them upon the authority of *Groves v. Lord Wimborne* (1), and cases of that nature. I do not intend to cast any doubt on the principle on those cases which I take to be that where obligations are created by a statute in favour of a certain class of person any member of a class may maintain an action in respect of special injury occasioned to him by a breach of the obligation. This section, however, is not of that character. It was decided in the Court of Appeal in *Ward, Lock & Co., Ltd. v. Operative Printers' Assistants' Society* (2) that this section makes nothing actionable that was not so before and that its only effect

A is to make what was before only the subject of a civil action punishable by a court of summary jurisdiction. FLETCHER MOULTON, L.J., said:

B "Giving to that section the most careful consideration in my power, I come to the same conclusion as is expressed in the judgment of my Lord. I cannot see that this section affects or is intended to affect civil rights or civil remedies. It legalises nothing, and it renders nothing wrongful that was not so before. Its object is solely to visit certain selected classes of acts which were previously wrongful, that is to say, were at least civil torts, with penal consequences capable of being summarily inflicted."

C The decision is an important one. It proceeds upon a different sub-section from that with which we are concerned—sub-s. (4) which prohibited wrongful watching and besetting—and the court held that there was watching and besetting without violence and intimidation to compel or induce the employers to employ none but union labour, that is, to compel or induce them from abstaining from doing that which they had a legal right to do, but it was not actionable because the means adopted were not wrong within the meaning of the section. Therefore, authority, by which we are bound, establishes that no new right of action is given by the section and no conduct not actionable without the section becomes so by virtue of it.

D That, I think, concludes the case. The alleged cause of action here arises, if at all, under sub-s. (3) by reason of the defendants wrongfully depriving the plaintiffs of their tools or hindering them in the use thereof. This case was argued entirely upon the action of the defendants in telling, advising, requesting, E or whatever it may be called, the lampman not to give the plaintiffs lamps. So far as I understand the contention it was to this effect. The mineowners were under a contract to give their workmen lamps, I think it was said a particular lamp, and, therefore, the plaintiffs had a possession, or right of possession, or special property in the lamps, and an invasion of that right by the defendants' requesting the mineowners' servant not to give them the lamp was F actionable. I will assume for the purposes of the case that the mineowners are under a contract to supply lamps. There is certainly nothing upon the facts of this case to show that such a contract, if it existed, gives the plaintiffs a right to any particular lamp. I think they have no possession, or right of possession, or special property in any lamp, and that the action of the defendants did not constitute an actionable wrong except possibly on one ground to which G I have already referred. If, therefore, what they did was, within the section, depriving the plaintiffs of their tools or hindering them in the use of them which I assume for the purposes of this case, but do not decide, it was not wrongfully depriving or hindering within the section. The fact that it was done to compel the plaintiffs to do or abstain from doing an action which they were legally entitled to do is shown by the case I have referred to not to be of itself H sufficient to make the act within the section wrongful.

I I proceed to deal with the circumstances under which the act might be said to be actionable. If it were shown that it was done in combination for the purpose of inducing a breach of contract by either the defendants or the mineowners or for the purpose of interfering with the employment of the plaintiffs, or with the right of the plaintiffs to dispose of their labour as they willed, it might be actionable at common law. That, in my opinion, is the sole ground on which it could become so, and s. 3 of the Trade Disputes Act, 1906, provides that nothing shall become actionable on the ground only that it induces some other person to break a contract of employment, or is an interference with the trade, business, or employment of some other person or the right of some other person to dispose of his capital or labour as he wills. I say nothing as to what might be the case on other facts and in other circumstances in respect of their contracts. This case is concerned with a contract of employment and nothing else, and

it is upon that contract, and upon that contract alone, that the plaintiffs could possibly sue because they have no other contract at all. In my opinion, the facts which they have to prove in order to support their alleged cause of action are exactly the facts which are mentioned in s. 3 of the Trade Disputes Act. It cannot, in my opinion, be contended that an action which was prohibited by that section can be maintained by merely changing its name, and calling it an action for breach of s. 7 of the Conspiracy and Protection of Property Act, 1875, because, as I have shown, the question whether it is actionable or not must be considered apart from the section altogether, and if what is done is not actionable apart from the section it is not made so by reason of it. I think SARGANT, J., when he spoke of the necessity of violence to bring a case within the section, had probably in his mind the necessity of it being wrongful and actionable, and violence is the most obvious way in which it could so become wrongful. In fact, without saying no other circumstances would have that effect, it is difficult to specify what circumstances apart from violence would have. I think the appeal fails, and must be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. It is not now in dispute that there was at the time in question a trade dispute, and that the acts done by the defendants were in furtherance of that dispute. Consequently, by reason of s. 3 of the Trade Disputes Act, 1906, if the acts done by the defendants were actionable on the ground only that they interfered with the employment of the plaintiffs or their right to dispose of their labour as they would, then no action could be brought in respect of those acts. The learned judge has decided that the acts done by the defendants were actionable only on the grounds I have stated, and that by reason of the provisions of the Trades Disputes Act, 1906, no action could be brought in respect of them, and it is not disputed now that that decision of the learned judge was right except in one respect.

The plaintiffs maintain that the acts done were not only actionable on the grounds mentioned in the Trade Disputes Act, 1906, but that they were also actionable because they constituted breaches of the prohibition imposed by the Conspiracy and Protection of Property Act, 1875. Does that Act put an end to an actionable wrong? In my opinion, it does not. The learned judge decided on the construction of the Conspiracy and Protection of Property Act that the element of violence was essential to the offences specified in the Act, and that, inasmuch as violence was absent in the present case, the Act had no application to the acts done by the defendants. I am not sure that the learned judge's view of the construction of the Act is in the terms in which he expressed it accurate, but I am also not sure that it is not merely a verbal difference between the view I take and the view the learned judge expressed. In *Ward, Lock & Co. v. Operative Printers' Assistants' Society* (2), it was decided by the Court of Appeal that the Act of 1875 did not render wrongful anything that was not previously wrongful, but that all it did was to add the sanction of a penalty to that which previously was nothing but a civil wrong. The point is put with extreme clearness by FLETCHER MOULTON, L.J., where he says (22 T.L.R. at p. 329):

"I cannot see that [s. 7 of the Act] affects or is intended to affect civil rights or civil remedies. It legalises nothing, and renders nothing wrongful that was not so before. Its object is solely to visit certain selected classes of acts which were previously wrongful, that is to say, were at least civil torts, with penal consequences capable of being summarily inflicted."

If this is so, then on the ground that there is no statutory right of action the plaintiffs would fail, but I think they also fail for the reason that what the defendants did was not within the statute at all. I cannot see that what the defendants did deprived the plaintiffs of the use of their lamps. The Act does not say deprives or causes to be deprived of the use of the tools, and at the outside all the defendants did was to persuade the lampman, whose duty it was

A to hand out the lamps, that it would be better in the circumstances of the case not to hand the lamps to the plaintiffs; in that I cannot see that there was any wrongful (which is essential) depriving of the plaintiffs of the use of the lamps to the use of which they allege they were entitled. If I am right with regard to the construction and effect of the section—I must be right in this court, because I am only following the decision of the Court of Appeal in the *Ward*,
B *Lock & Co., Ltd. v. Operative Printers' Assistants' Society* (2)—and there is no new right of action created by the statute itself, then the only right of action is that which I referred to at the beginning of my judgment, namely, the right of action the ground of which is only that the act of the defendants, among other things, interferes with the employment of the plaintiffs and with the right to dispose of their labour as they will, and an action founded on such a ground,
C since the Trade Disputes Act, can no longer be maintained. On the whole, therefore, I think the appeal fails, and must be dismissed.

YOUNGER, L.J.—I am of the same opinion. Whether the acts alleged and proved against the defendants are or are not, even if wrongful, within the language of s. 7 of the Act of 1875 is, I think, more than doubtful. I will assume, however,
D without so deciding, that they are. Even so *Ward, Lock & Co., Ltd. v. Operative Printers' Assistants' Society* (2), to which reference has already been made by my Lord and the lord justice, clearly shows that no act, if it be aptly described by that section is thereby made an offence unless, apart from the section altogether, it constitutes an actionable wrong. I will again assume, but without deciding, that the acts proved against the defendants constitute in normal circumstances
E actionable wrongs at the instance of the plaintiffs. I then ask myself the question why so much can be said of them, and in answer I can think of no more appropriate reason than that they amounted to an interference with the employment of the plaintiffs, or with the right of the plaintiffs to dispose of their labour as they willed. I can myself, as I have said, think of no more strictly appropriate answer than one stated in that form of words, and no other more
F closely relevant reply to the question was suggested to me by counsel for the plaintiffs. If, therefore, the acts in question be in normal circumstances actionable at all they are so actionable because they amounted to an interference with the employment of the plaintiffs, or with the right of the plaintiffs to dispose of their labour as they willed. But it is agreed that these acts were committed in furtherance of a trade dispute, and if they were so committed and were actionable
G only for the reason I have stated, it becomes clear that under s. 3 of the Trade Disputes Act, 1906, they cease to be actionable in the circumstances in which they were committed. Accordingly, it appears to me that the learned judge was right in his conclusion, and the appeal should be dismissed.

Solicitors: *Ward, Bowie & Co.*, for *H. J. Nicklin*, Walsall; *Sharpe, Pritchard & Co.*, for *R. A. Willcock*, *Taylor & Co.*, Wolverhampton.

[Reported by H. LANGFORD LEWIS, ESQ., Barrister-at-Law.]

Re KINATAN (BORNEO) RUBBER, LTD.

[CHANCERY DIVISION (P. O. Lawrence, J.), October 24, 1922]

[Reported [1923] 1 Ch. 124; 92 L.J.Ch. 613; 128 L.T. 216; 39 T.L.R. 53;
67 Sol. Jo. 113; [1923] B. & C.R. 139]

Company—Winding-up—Distribution of assets—Assets insufficient to repay whole paid-up capital.

The articles of association of the company provided by art. 151 that if, on the company being wound-up, the assets available for distribution among the members should be insufficient to repay the whole of the paid-up capital such assets should be distributed so that, as nearly as might be, the losses should be borne by the members in proportion to the capital paid up, or which ought to have been paid up, at the commencement of the winding-up on the shares held by them respectively. The issued capital of the company consisted of fully paid-up shares and partly paid-up shares. In the voluntary winding-up of the company the assets available for distribution were insufficient to repay the whole of the paid-up capital and the liquidator applied for the determination of the principle on which the assets ought to be distributed.

Held: on its true construction, art. 151, excluded the general principle laid down in *Re Hodges Distillery Co., Ex parte Maude* (1) (1870), 6 Ch. App. 51, and, without calling up or treating as called up any uncalled capital, the assets available ought to be distributed among the members in proportion to the amounts actually paid up, or which ought to have been paid up, at the commencement of the winding-up.

Notes. Article 151, followed form 152 of PALMER'S COMPANY PRECEDENTS (11th Edn.), vol. 1, p. 783, see now form 184 (17th Edn.), Part 1, p. 641.

As to distribution among contributories of assets according to nominal capital in the case of the winding-up of a company see 6 HALSBURY'S LAWS (3rd Edn.) 679; and for cases see 10 DIGEST (Repl.) 1065 et seq.

Cases referred to:

- (1) *Re Hodge's Distillery Co., Ex parte Maude* (1870), 6 Ch. App. 51; 40 L.J.Ch. 21; 23 L.T. 749; 19 W.R. 113, L.J.J.; 10 Digest (Repl.) 1010, 6945.
- (2) *Re Anglo-Continental Corp'n. of Western Australia*, [1898] 1 Ch. 327; 67 L.J.Ch. 179; 78 L.T. 157; 46 W.R. 413; 14 T.L.R. 218; 42 Sol. Jo. 270; 5 Mans. 184; 10 Digest (Repl.) 1009, 6944.

Also referred to in argument:

Re Sheppard's Corn Malting Co., Ltd., Ex parte Lowenfield (1893), 70 L.T. 3; 1 Mans. 325; 7 R. 337, C.A.; 10 Digest (Repl.) 1068, 7404.

Adjourned Summons in companies winding-up.

The Kinatan (Borneo) Rubber, Ltd., was incorporated in 1910 with the object of acquiring certain rubber estates in North Borneo. The capital consisted of 20,000 £1 fully paid-up shares and 60,000 £1 shares of which 13s. 6d. per share only had been called up and had been paid, with the exception that at the commencement of the winding-up, of those calls there remained about £487 unpaid. Article 151, of the company's articles of association followed form 152 of PALMER'S COMPANY PRECEDENTS (11th Edn.) vol. 1, p. 783 [see now form 184 (17th Edn.) Part 1, p. 641] and provided as follows:

"If the company shall be wound-up and the assets available for distribution among the members as such shall be insufficient to repay the whole of the paid up capital such assets shall be distributed so that, as nearly as may be, the losses shall be borne by the members in proportion to the capital

- A paid up, or which ought to have been paid up, at the commencement of the winding-up, on the shares held by them respectively. And if in a winding-up the assets available for distribution among the members shall be more than sufficient to repay the whole of the capital paid up at the commencement of the winding-up, the excess shall be distributed amongst the members in proportion to the capital at the commencement of the winding-up, paid up
- B or which ought to have been paid up on the shares held by them respectively. But this clause is to be without prejudice to the rights of the holders of shares issued upon special terms and conditions."

- C Resolutions were passed and confirmed in April, 1922, for the voluntary winding-up of the company and a liquidator was appointed. There were liquid assets in the hands of the liquidator amounting to about £8,000 available for distribution among the shareholders, which were not sufficient to repay the capital paid up. The liquidator took out this summons for the determination of the question whether, according to the true construction of art. 151 of the company's articles of association, and in the event which had happened, of the assets of the company available for distribution among its members as such being insufficient to repay
- D the whole of the paid-up capital of the company: (a) the assets, exclusive of any uncalled capital, ought, without calling up uncalled capital, to be distributed amongst the members of the company in proportion to the amounts actually paid up or which ought, at the date of the commencement of the winding-up of the company, to have been paid up on the shares held by such members respectively, or (b) the uncalled capital ought to be called up, and the assets, inclusive
- E of the amount so called up, ought to be distributed amongst the members of the company rateably in proportion to the number of shares held by them respectively with set-off of calls against such distribution.

Heckscher for the liquidator.

F. Whinney for fully paid-up shareholders.

- F *Cecil Turner* for partly paid-up shareholders.

P. O. LAWRENCE, J.—This case raises a short and interesting point upon the construction of art. 151 of the company's articles of association. [His LORDSHIP read the article and continued:] The assets now available for distribution, are insufficient to return the whole of the paid-up capital, and the question arises how the liquidator ought to distribute those assets amongst the shareholders.

- G *Re Hodges Distillery Co., Ex parte Maude* (1) laid down the principle that, where the shares in a company have been unequally called up, and, after payment of the debts, there remains a surplus which is insufficient for the return of the whole of the paid-up capital then (in the absence of an express provision regulating the distribution of the surplus assets in some other manner), the uncalled capital is as much liable to be called up for the purpose of meeting the deficiency or
- H loss—for it is a question of providing for a loss and not a question of distributing profits—as it is for the payment of debts. The result of that decision was that, after the capital account had been equalised by calling up or treating as called up, so much of the unpaid capital as was necessary for that purpose, the whole of the resulting balance was returned to the shareholders in proportion to the nominal amount of the shares held by them respectively. The principle of that
- I case was followed by *WRIGHT, J.*, in *Re Anglo-Continental Corpn. of Western Australia* (2). I agree with the contention of counsel, for the fully paid up shareholders, that *prima facie* the most equitable method of dealing with losses is the one which was adopted in the two cases to which I have referred.

But the question here is whether art. 151 excludes that general rule and provides for the distribution of the available assets in some other manner. Upon its proper construction I think that the effect of art. 151 is to throw the loss upon the shareholders not in proportion to the nominal amounts of the shares held by

them, but in proportion to the amounts which at the date of the commencement of the winding-up were paid up or ought to have been paid up on their shares. A

Counsel asks me to construe the words "which ought to have been paid up at the commencement of the winding-up," as throwing on the liquidator the duty to call up the unpaid capital, and apportion the loss upon the principle of *Re Hodges Distillery Co., Ex parte Maude* (1). In my opinion, however, those words do not operate to cast any such duty on the liquidator, but were merely intended B to provide for the case of a shareholder not having paid a call made prior to the commencement of the winding-up. In my judgment the words in art. 151 "at the commencement of the winding-up" have reference to the immediately preceding words "capital which ought to have been paid up," and not to the words "shares held by them respectively." It is in this respect that the art. 151 differs from the corresponding article in *Re Anglo-Continental Corpn. of Western C Australia* (2), which provided that the surplus assets should be distributed so that, as nearly as might be, the losses should be borne by the members, in proportion to the capital paid up or which ought to have been paid up "on the shares held by them respectively at the commencement of the winding-up." Upon the construction of that article the words "at the commencement of the winding-up" clearly have reference to the words "on the shares held by them," D and WRIGHT, J., held that "capital paid up or which ought to have been paid up" meant not merely capital paid up or which ought to have been paid up before the commencement of the winding-up, but included capital called up in the course of the liquidation not only for the purpose of paying the debts, but also for the purpose of putting the fully paid-up shares on a level with the partly paid-up shares. In my view the language of art. 151 makes such a construction E impossible.

In the result, therefore, I propose to make a declaration that the assets available for distribution among the members of the company, without calling up or treating as called up any uncalled capital, ought to be distributed among the members in proportion to the amounts actually paid up, or which, in obedience to any calls made before the commencement of the winding-up, ought to have been paid up F at the commencement of the winding-up, on the shares held by them respectively.

Solicitors : *Mayo, Elder & Co.*

[Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.]

A R. v. INCOME TAX SPECIAL COMMISSIONERS.
 Ex parte SHAFTESBURY HOMES AND ARETHUSA
 TRAINING SHIP

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.),
 November 21, 1922]

B [Reported [1923] 1 K.B. 393; 92 L.J.K.B. 152; 128 L.T. 463;
 39 T.L.R. 99; 8 Tax Cas. 367]

Income Tax—Charity—Exemption—"Annual payment"—Balance of annual profits of business—Income Tax Act, 1842 (5 & 6 Vict., c. 35), s. 105.

C A testator, who died in 1900, by his will dated in 1890 bequeathed to trustees the goodwill and property in certain proprietary medicines on trust to pay out of the annual profits some annuities and the balance of such profits to certain persons for life, and, subject thereto, to pay the annual profits to a charity. In pursuance of orders made in an administration action, the trustees paid to the charity the annual balance of the profits, and the charity applied the money in the manner prescribed by the will, i.e., for charitable purposes only. In making payments to the charity the trustees deducted income tax under Sched. D. The charity claimed exemption from income tax and sought an order for repayment of the tax deducted.

D **Held:** the payments made to the charity were annual payments in respect of which tax had been paid by deduction or otherwise within the Income Tax Act, 1842, s. 105, and were not merely the profits of a business being carried on on behalf of the charity, and, therefore, the charity was entitled to exemption from income tax under that section.

E **Notes.** The Income Tax Act, 1842, s. 105, was replaced by the Income Tax Act, 1918, s. 37 (1) (b), which was replaced by the Income Tax Act, 1952, s. 447 (1) (b). Distinguished: *Brighton College v. Marriott*, [1925] 1 K.B. 312. Considered: *I.R. Comrs. v. Lebus*, [1946] 1 All E.R. 476. Referred to: *A.-G. v. Metropolitan Water Board*, [1927] All E.R. Rep. 526; *Timpson's Executors v. Yerbury*, [1936] All E.R. 186; *Latilla v. I.R. Comrs.*, [1943] 1 All E.R. 265.

F As to what are annual payments, see 20 HALSBURY'S LAWS (3rd Edn.) 362 et seq.; and for cases, see 28 DIGEST (Repl.) 169 et seq.

G Cases referred to:

- (1) *Psalms and Hymns (Baptist) Trustees v. Whitwell* (1890), 7 T.L.R. 164; 3 Tax Cas. 7, D.C.; 28 Digest (Repl.) 321, 1414.
- (2) *Williams v. Singer, Pool v. Royal Exchange Assurance*, [1921] 1 A.C. 65; 89 L.J.K.B. 1151; 123 L.T. 632; 36 T.L.R. 661; 64 Sol. Jo. 569; 7 Tax Cas. 387, H.L.; 28 Digest (Repl.) 202, 844.

H **Appeal** by the Crown from the decision of a Divisional Court of the King's Bench Division, consisting of LORD HEWART, C.J., and LUSH and BAILHACHE, JJ., arising on a rule nisi for a mandamus to the Income Tax Special Commissioners to allow under s. 105 of the Income Tax Act, 1842, the claim of the applicants, a society known as the "Shaftesbury Homes and Arethusa Training Ship," whose objects were exclusively charitable, for exemption from income tax on the income derived by the society under the will of one Alfred Fennings and to issue an order under s. 40 of the Act for repayment of £21,369 13s. 2d., the income tax paid on such income during the three years ending Jan. 7, 1920. It appeared on affidavit that the testator, who died on Jan. 7, 1900, by his will dated July 3, 1890, bequeathed to trustees, (i) the goodwill and property in certain proprietary medicines on trust to pay out of the annual profits certain annuities (some of which still subsisted) and the balance to certain persons (all of whom had since died) for life and after their death to

the applicant society; (ii) the goodwill and property in certain other proprietary medicines on trust to pay the annual profits to one Beavan (since deceased) for life and after his death to the applicants; and (iii) the goodwill and property in another proprietary medicine on trust to pay the annual profits to certain persons (some of whom were still alive) for life and after the death of the survivor to the applicants. In pursuance of orders made in an administrative action the trustees from time to time paid to the applicants the annual balance of the profit of the business, which the trustees were carrying on, and the applicants applied the money in the way prescribed by the testator's will. The trustees, before paying the money to the applicants, deducted and paid income tax thereon under Sched. D from Jan. 7, 1917 to Jan. 7, 1920, the amount so deducted and paid amounting to £21,369 13s. 2d. The Special Commissioners refused to order repayment.

The Income Tax Act, 1842, s. 88, Sched. C, r. 3, provided the following exception :

"The stock or dividends of any corporation, fraternity, or society of persons, or of any trust established for charitable purposes only, or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, shall be applicable by the said corporation, fraternity, or society, or by any trustees, to charitable purposes only, and in so far as the same shall be applied to charitable purposes only."

Section 105, Sched. D, provided :

"Provided always that any corporation, fraternity, or society of persons, and any trustee for charitable purposes only, shall be entitled to the same exemption in respect of any yearly interest or other annual payment chargeable under sched. D of this Act, in so far as the same shall be applied to charitable purposes only, as is hereinbefore granted to such corporation, fraternity, society, and trustee respectively in respect of any stock or dividends chargeable under sched. C of this Act, and applied to the like purposes; and such exemption shall be allowed by the Commissioners for Special Purposes on due proof before them, and the amount of the duties which shall have been paid by such corporation, fraternity, society, or trustee in respect of such interest or yearly payment, either by deduction from the same or otherwise, shall be repaid under the order of the said Commissioners for Special Purposes in the manner hereinbefore provided for the repayment of sums allowed by them, in pursuance of any exemption contained in the said sched. C."

The Income Tax Act, 1918 :

"Section 37 (1). Exemption shall be granted . . . (b) from tax under sched. C in respect of any interest, annuities, dividends or shares of annuities, and from tax under sched. D, in respect of any yearly interest or other annual payment forming part of the income of any body of persons or trust established for charitable purposes only, or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, are applicable to charitable purposes only, and so far as the same are applied to charitable purposes only . . . Section 40 (1). Any claim under the last three preceding sections shall be made to the Special Commissioners in writing, in such form as may be prescribed by the Commissioners of Inland Revenue and the Special Commissioners on proof of the facts to their satisfaction shall allow such claim accordingly. . . . (3) Where the Special Commissioners allow a claim they shall issue an order for repayment. . . ."

The Attorney-General (Douglas Hogg, K.C.), Sheldon, and R. P. Hills for the Crown.

Maugham, K.C. and Gavin T. Simonds for the taxpayers.

A LORD STERNDALÉ, M.R.—This is an appeal from a Divisional Court of the King's Bench Division arising on a rule nisi for a mandamus to the Commissioners of Income Tax to make an allowance in accordance with the provisions of s. 105 of the Income Tax Act, 1842, to a society known as the Shaftesbury Homes and the Arethusa Training Ship. It arises in these circumstances: A gentleman of the name of Fennings, who had made a considerable amount of money in the patent medicine business, made a will by which he left his business to his trustees on trusts applying differently to three different funds. The first one was on trust out of the annual income and profits thereof to pay certain yearly sums or annuities

C "and subject to the payment of all the last-mentioned annuities or yearly sums to stand possessed of them upon trust to pay the balance of the annual income and profits thereof"

D to the charity which I have mentioned. It is not disputed that it is a charity. The second fund is given on trusts for a certain person for life and afterwards for the charity; and the third fund is on trusts similar to the second. Under an order made in the administration of the estate the trustees are ordered to pay out of the profits of the said first-mentioned business—that is the first fund—the several annuities given and afterwards they are to pay the residue of such profits to the treasurer of the fund. As to the second fund it is ordered that the plaintiff do pay the residue of the profits of the said secondly mentioned business or property to the treasurer of the charity; and the third order is the same. Under those orders the trustees have paid to the treasurer of the charity certain lump **E** sums from time to time, and at the end of the year they have paid the balance of the profits; they have also paid the annuities.

The first question that arises is whether those payments made by the trustees in this way are included in the words "any yearly interest or other annual payment." They are not yearly interest; that is obvious; and the question is whether they are annual payments. A good deal of discussion has taken place here and **F** in the court below as to the application of the doctrine of ejusdem generis to those words, but I confess, after having heard it, I cannot see how the question arises. Eventually, I think counsel for the Crown came to this decision on it, that the two things "yearly interest" and "or other annual payment" themselves constitute a genus. If that is so there is no room for the application of ejusdem generis because they are within the genus; they are part of it. What the genus **G** is that is composed of "yearly interest or other annual payment" I do not quite know, but if those two are not put into a genus and one wants to apply the doctrine of ejusdem generis to "other annual payment" then it seems to me it will have to be ejusdem generis with "yearly interest," and that seems clearly not the meaning of the words. I do not think that there is any room in this section for the application of the doctrine, and in that I agree with the Lord **H** Chief Justice. Therefore, the only question which we have to consider is, Is this an annual payment to the charity? That seems to me to depend almost entirely on one question, and that is this: Were the charity (which means, I suppose, the committee of the charity) carrying on this business? If they were then they were not getting an annual payment; they were merely getting the profits of the business that they were carrying on, and they would then come **I** within the four corners of the decision, which seems to me to be quite right, in the *Psalms and Hymns (Baptist) Trustees v. Whitwell* (1). Some of the cases cited seem to me to have a very distant relevance, if any, to the point which we are considering; other cases have been cited which no doubt are relevant as to the relation of trustee and cestui que trust in regard to income tax, chiefly *Williams v. Singer* (2). The principle of that case and the principle of the other cases as to trustee and cestui que trust is said to establish that these trustees who are carrying on the business were carrying it on for the committee of the charity,

and that, therefore, the committee of the charity were carrying it on themselves. I can only say that those cases do not seem to me to establish anything of the kind, and, in my opinion, looking at the will under which the trustees are carrying on the business and looking at what is happening with regard to the carrying on of the business, the committee of the charity are not carrying on this business themselves. That is at the root of the whole thing. If they are not carrying on the business themselves then they are not receiving the profits of the business carried on by them, and if they are not doing that, then they are receiving an annual sum that is paid to them by somebody else. In those circumstances it does not seem to me to matter whether the amount which they are receiving is fixed at so much per year or whether it is fixed by reference to the profits of the business which the person who has to pay it to them is carrying on. It does not become a receipt by them of profits of business if it is not their own business, and if it be a payment, then it does not matter in the least that that payment arises out of the profits of a business that is carried on by somebody else.

In that I agree with the Divisional Court, and it did not seem to me that there was very much to be said against the judgment of the Divisional Court on the points with which they have dealt, but the Attorney-General at the last moment took a point which counsel for the taxpayers tells us was not taken below, which did trouble me at first and that was this: He said that not only must the taxpayers show that they are entitled to exemption, but that they also must show that duties have been paid by them in respect of the yearly payment either by deduction from the same or otherwise; and that they do not do that for the reason that the amount of the tax—i.e., 5s. in the £—is not deducted from that sum as it is in the case of annuities, but the amount that is left of the profits is diminished by the payment that has been made by the trustees who carry on the business in respect of the profits of the business, and that that is not deducting or charging the duty in any way on this sum, but is charging it on something different—viz., an average of the three years' profits of the business, and that, therefore, although the taxpayers may satisfy the first part and show themselves entitled to exemption, they do not satisfy the second part of the exemption, because they have not shown that the amount of the duty has been paid in respect of such interest or yearly payment. It is a case which I do not suppose the framers of the section contemplated, and therefore the words are perhaps not quite clear at first sight; but I think, although I confess I was considerably taken with the point at first, that there is really nothing in the last point taken by the Attorney-General, for this reason: the taxation which is imposed on the profits of a business is the taxation for the year, but, by reason of the difficulty and sometimes the unfairness of taking one year, a conventional method of computation of the income for the purpose of taxation has been provided by the Act. It has been provided that the profit for the year shall be arrived at by a computation of the average of the three preceding years, but when it has been arrived at on that computation, then that is the taxation which is to be applied to the taxable year. In this case the amount which has to be handed over has been decreased by the amount of duty chargeable in respect of that taxable year, having been deducted from the balance before it was handed over, and therefore, as was said by BAILHACHE, J., the payment that was made was a payment which would have been automatically increased but for the deduction of the tax from the sum paid at its source. I think, therefore, that the benefit that the taxpayers get under this will is an annual payment which is exempt, and I think also they satisfy the second part of the section and have shown that the duties in respect of such yearly payment have been charged either by deduction or otherwise; and I think, therefore, the appeal fails and must be dismissed with costs.

A **WARRINGTON, L.J.**—I am of the same opinion. Under the will of the testator, Alfred Fennings, and an order made by COZENS-HARDY, J., on July 3, 1901, the treasurer of the charity in question is and has for many years been in receipt of the annual profits of two businesses formerly belonging to the testator. In the case of one of the businesses they do not receive the whole income because the testator directed certain annuities to be paid thereout, but they receive what is left after those annuities have been paid; in the case of the other they receive the whole of the profits. Those businesses are under the trusts of the will and the orders of the court being carried on by the trustees of the testator's will and not by the charity itself. The profits in the one case and the balance of the profits in the other case are paid by the trustees to the treasurer of the charity. The question is whether the charity itself is entitled to an exemption from income tax in respect of the payments so made to it, and, secondly, whether under the circumstances of the case it is entitled to be repaid the tax which the trustees of the testator's will have paid to the Crown in respect of these profits. The three years as to which the question arises are years ending April 5, 1918, 1919, and 1920, and therefore they are governed, certainly as to the first two, by the Income Tax Act, 1842, and, I think, as to the last year by the Income Tax Act, 1918; but I do not think that it much matters; we have considered the case as if they were all governed by the Act of 1842. I will deal with it on that footing for the moment, though I shall have a remark to make about the Act of 1918. The section on which the question turns is s. 105 of the Act of 1842, corresponding with s. 37 (1) (b) of the Act of 1918. On that the question is: Is the amount of the profits which are paid to the treasurer of this charity an annual payment? In my opinion it is. It is a payment by the trustees to the treasurer of the charity. It is annual because it is paid in respect of the profits each year. It is, therefore, one would have thought, quite plainly an annual payment made by one person to another. The Act of 1842 provides by s. 105 that the charity

F "shall be entitled to the same exemption in respect of any yearly interest or other annual payment chargeable under sched. D of this Act in so far as the same shall be applied to charitable purposes only as is hereinbefore granted [to such charity] in respect of any stock or dividends chargeable under sched. C."

G Here it is, as I have said, an annual payment; it is an annual payment chargeable under Sched. D. It seems to me, therefore, that so far as the exemption is concerned the charity has brought itself exactly within the terms of the section, and the only difficulty that is raised with reference to those expressions in that part of the section, is founded on what is called the principle of ejusdem generis, though, with all respect to the argument which has been addressed to us with reference to that, and with all respect also to the judgment of CHARLES, J., in the case which has been cited (*Psalms and Hymns (Baptist) Trustees v. Whitwell*) (1), I cannot see how the principle of ejusdem generis has anything to do with it. Beyond the fact that it is a payment and that it is annual there is nothing in common between "yearly interest" and "any other annual payment." It is not a case of an enumeration of certain particulars followed by general words

I which, according to the doctrine I am referring to are held only to include other particulars which may be said to fall within the same genus as those which are indicated; it is simply two things specified: "yearly interest" and "other annual payment." There is nothing there to limit the kind of annual payment which one is to deal with. It seems to me, therefore, without saying more about it, that the charity have made out their right to the exemption. But it is said that they have not made out their right to have the amount of the duties that has been repaid. Section 105 goes on, after creating the exemption, to provide that

"such exemption shall be allowed by the Commissioners for Special Purposes, on due proof before them, and the amount of the duties which shall have been paid by [the charity] in respect of such interest or yearly payment, either by deduction from the same or otherwise, shall be repaid under the order of the said commissioners. . . ."

What is suggested is, that there has been no duty paid by deduction or otherwise. All that has happened is, that the trustees have paid the income tax in respect of, not each year's annual profits, but in respect of the average for three years according to the plan fixed by the Income Tax Act in the case of the profits of a business. With all respect I do not think that is so. I think that they have deducted by paying to the government the income tax in respect of the profits for each year. Sched. D of the Act of 1842, which imposes the tax, imposes it in these terms: it is a tax upon "the annual profits or gains arising or accruing"—leaving out immaterial words—"from any trade." Then by the rule for ascertaining those duties in the particular cases mentioned it is provided that

"the duty to be charged shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure or concern upon a full and just average of three years."

It seems to me it is the duty on the annual profits and gains, but it is computed in a special way owing to the fact that those profits and gains vary from year to year. It is none the less the duty in respect of that annual payment that has to be reckoned in the way laid down by the Act. It seems to me, therefore, that the judgments of the Divisional Court were correct, and the appeal must be dismissed.

With regard to the last point, I should like to point out that as far as I can make out from a somewhat cursory examination of the Act of 1918 no question can ever arise on that in the future. The provisions of the Act of 1918 are different. Section 37 provides that exemption shall be granted from, among other things,

"tax under sched. C in respect of any . . . yearly interest or other annual payment forming part of the income,"

of the charity. Then provisions are made in s. 40 as to claiming repayments, and s. 40 provides for the commissioners before whom and the mode in which the claim shall be made, and sub-s. (3) is:

"Where the Special Commissioners allow a claim they shall issue an order for repayment."

Nothing is said in the section at all about the foundation of the claim, i.e., there is no reference to payment by deduction or otherwise; it simply assumes that there being an exemption there may be a claim either to exemption from the tax or to repayment of the tax actually paid, and it provides simply in general terms, that where that claim is made out, then the commissioners when they allow a claim shall issue an order for repayment. It seems to me, therefore, that this second question cannot arise in respect of any years to which the Act of 1842 does not apply. On the whole I think that the judgment of the court below was correct and this appeal must be dismissed.

YOUNGER, L.J.—I am of the same opinion. It was not, as I understood it, contested that there can be annual payments to a charity out of the yearly profits of a business which are exempted from tax under s. 105 of the Act of 1842. If that be agreed, and it was agreed in this case, then it can, in my judgment, make no difference that such payments represent either the whole or the residue of such yearly profits, provided only that the business itself is not being carried on by the charity. The charity is not carrying on the business here in question or any of the businesses here in question. Nor again can it, in my judgment,

A be said that the duties, in respect of the annual payments which have been made in this case to the charity, have not, for the reasons which have been cited by my Lord and the lord justice, been paid by a deduction from those payments or otherwise within the meaning of these words in s. 105 of the Act. Accordingly, in my judgment, the decision of the court below was right, and this appeal should be dismissed.

B *Appeal dismissed.*

Solicitor : *Solicitor of Inland Revenue; Hawes, Wood & Ware.*

[*Reported by J. L. DENISON, ESQ., Barrister-at-Law.*]

C

D

CONRON v. LONDON COUNTY COUNCIL

[CHANCERY DIVISION (Peterson, J.), January 19, 20, 23, 24, February 15, 1922]

[Reported [1922] 2 Ch. 283; 91 L.J.Ch. 386; 126 L.T. 791; 87 J.P. 109;
38 T.L.R. 380; 66 Sol. Jo. 350; 20 L.G.R. 131]

E

Housing—Compulsory acquisition of land—Acquisition of licensed premises—Control of sale of liquor on estate—Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39) s. 11—Housing, Town Planning, &c., Act, 1919 (9 & 10 Geo. 5, c. 35), s. 12 (1) (a) (b), (2) (b), s. 15 (1).

F Under the provisions of the Housing Acts, 1903–1919 [now ss. 93, 96, and 105 of the Housing Act, 1957] a local authority which has acquired an area of land for housing purposes has power to acquire licensed premises within the area with the object of controlling the sale of intoxicating liquor on the estate.

G **Notes.** As to the powers of local authorities in relation to housing schemes see 19 HALSBURY'S LAWS (3rd Edn.) 682 et seq.; and for cases see 38 DIGEST 215, 216. For Housing Act, 1957, see 37 HALSBURY'S STATUTES (2nd Edn.) 314.

Cases referred to :

- (1) *J. L. Denman & Co., Ltd. v. Westminster Corpn., J. C. Cording & Co., Ltd. v. Westminster Corpn.*, [1906] 1 Ch. 464; 75 L.J.Ch. 272; 94 L.T. 370; 70 J.P. 185; 54 W.R. 345; 22 T.L.R. 270; 4 L.G.R. 442; 11 Digest (Repl.) 120, 131.
- H** (2) *Westminster Corpn. v. London and North Western Rail. Co.*, [1905] A.C. 426; 74 L.J.Ch. 629; 93 L.T. 143; 69 J.P. 425; 54 W.R. 129; 21 T.L.R. 686; 3 L.G.R. 1120, H.L.; 38 Digest 21, 119.
- (3) *Rolls v. London School Board* (1884), 27 Ch.D. 639; 51 L.T. 567; 33 W.R. 129; 11 Digest (Repl.) 119, 117.
- I** (4) *Galloway v. London Corpn.* (1866), L.R. 1 H.L. 34; 35 L.J.Ch. 477; 14 L.T. 865; 30 J.P. 580; 12 Jur. N.S. 747, H.L.; 11 Digest (Repl.) 118, 112.
- (5) *Eversfield v. Mid-Sussex Rail. Co.* (1858), 3 De G. & J. 286; 28 L.J.Ch. 107; 32 L.T.O.S. 202; 5 Jur. N.S. 776; 7 W.R. 102; 44 E.R. 1278, L.J.J.; 11 Digest (Repl.) 116, 100.
- (6) *Lord Carington v. Wycombe Rail. Co.* (1868), 3 Ch. App. 377; 37 L.J.Ch. 213; 18 L.T. 96; 16 W.R. 494, L.J.J.; 11 Digest (Repl.) 301, 2064.

- (7) *Stockton and Darlington Rail. Co. v. Brown* (1860), 9 H.L. Cas. 246; 3 L.T. 131; 24 J.P. 803; 6 Jur. N.S. 1168; 8 W.R. 708; 11 E.R. 724, H.L.; 38 Digest 280, 181.
- (8) *Gard v. Sewers Comrs. of London* (1885), 28 Ch.D. 486; 54 L.J.Ch. 698; 52 L.T. 827; 1 T.L.R. 208, C.A.; 11 Digest (Repl.) 118, 114.
- (9) *Lynch v. Sewers Comrs. of London* (1886), 32 Ch.D. 72; 55 L.J.Ch. 409; 54 L.T. 699; 50 J.P. 548, C.A.; 11 Digest (Repl.) 311, 2180.
- (10) *Quinton v. Bristol Corpn.* (1874), L.R. 17 Eq. 524; 43 L.J.Ch. 783; 30 L.T. 112; 38 J.P. 516; 22 W.R. 434; 11 Digest (Repl.) 118, 113.
- (11) *Savoy Hotel Co. v. L.C.C.*, [1900] 1 Q.B. 665; 69 L.J.Q.B. 274; 82 L.T. 56; 64 J.P. 262; 48 W.R. 351; 16 T.L.R. 148; 44 Sol. Jo. 212; 19 Cox, C.C. 437, D.C.; 24 Digest (Repl.) 1107, 518.

Also referred to in argument :

Dunhill v. North Eastern Rail. Co., [1896] 1 Ch. 121; 65 L.J.Ch. 178; 73 L.T. 644; 60 J.P. 228; 44 W.R. 231; 12 T.L.R. 91; 40 Sol. Jo. 143, C.A.; 11 Digest (Repl.) 299, 2050.

London, Brighton and South Coast Rail. Co. v. Truman (1885), 11 App. Cas. 45; 55 L.J.Ch. 354; 54 L.T. 250; 50 J.P. 388; 34 W.R. 657, H.L.; 11 Digest (Repl.) 121, 134.

Local Government Board v. Arlidge, [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 30 T.L.R. 672; 12 L.G.R. 1109, H.L.; 38 Digest 97, 708.

Witness Action in which the plaintiffs, the owners and the licensee and occupier of the Royal Oak beerhouse in Green Lane, Chadwell Heath, sought to restrain the London County Council from exercising its powers of compulsory purchase in respect of the beerhouse.

In accordance with the provisions of s. 1 of the Housing, Town Planning, &c., Act, 1919 [see now Housing Act, 1957, Part V], the London County Council prepared a scheme for the provision of houses for the working classes. Under this scheme it was proposed to acquire about 3,000 acres lying between Barking and Dagenham in Essex, and consisting mainly of market gardens, for the purpose of erecting houses for the accommodation of about 120,000 persons. Within this area there were four beerhouses or public houses, of which one was the Royal Oak. On the fringe of the area there were other licensed premises. On Oct. 21, 1919, the London County Council made an order for the compulsory acquisition of the lands specified in the schedule to the order. The schedule contained particulars of the lands contemplated by the scheme, but owing to a mistake in the valuer's office, the Royal Oak and some cottages adjoining the garden of the Royal Oak on the west, were omitted from the schedule. The other three licensed houses which were included within the area of the scheme, were included in the order. This order was confirmed by the Ministry of Health [now Minister of Housing and Local Government] on Feb. 26, 1920. The omission of the Royal Oak and the cottages was subsequently discovered, and on Aug. 30, 1920, another order was made for the compulsory acquisition of the Royal Oak, as well as the cottages and certain other lands which lay between the River Thames and the area included in the original scheme. Owing to opposition by the plaintiff this order was confirmed by the Ministry of Health on Oct. 16, 1920, in respect of the lands in question other than the Royal Oak, without prejudice to the right of the Minister to confirm the order so far as it related to the Royal Oak. Subsequently, for the sake of convenience, the London County Council withdrew its application to have this order, so far as it concerned the Royal Oak, confirmed, and made a third order on Nov. 9, 1920, for the compulsory acquisition of the Royal Oak and its garden.

The Royal Oak had a frontage to Green Lane. It stood on the extreme east corner of a piece of land about 1 rood 22 poles in area. The greater part of

A this land was the garden of the house. The value of the freehold with the licence at the end of September, 1920, was stated to have been about £7,500, and it was obvious that only a small fraction of this sum was attributable to the garden. The London County Council proposed to make a road through the garden, and on Dec. 7, 1920, after the commencement of this action, the plaintiffs offered to the council the land upon which it was proposed to construct the road and the land lying to the west of the site of the road and suggested that the price should, in default of agreement, be ascertained upon the same basis and in the same manner as if the third order had been confirmed, and intimated that, if the council accepted the offer, nothing would be left to litigate except the council's right to acquire compulsorily the beerhouse itself. In November, 1921, the council, being anxious to proceed with the road, accepted this offer and proceeded to construct the works. The plaintiffs by their statement of claim only seek to prevent the council from acquiring compulsorily so much of their premises as consists of the beerhouse and the land within its curtilage.

F. H. Maugham, K.C., Gavin T. Simonds, and F. J. Wrottesley for the plaintiffs.
T. R. Hughes, K.C. and F. H. Attwater for the London County Council.

D

Cur. adv. vult.

Feb. 16. **PETERSON, J.**, read the following judgment.—In this action the owners and the licensee and the occupier of the Royal Oak beerhouse, seek to restrain the London County Council from exercising its powers of compulsory purchase in respect of the beerhouse. The dispute between the parties ultimately depends upon the powers of the council under the Housing Acts. The plaintiff's case is that the council can only acquire the premises for the purposes authorised by the Housing Acts, and that it proposes to acquire the Royal Oak for a purpose which is not authorised by those Acts. It is, I think, well established that a local authority or any other body entrusted with statutory powers to acquire compulsorily the land of others for purposes authorised by their special Act can only acquire land for the authorised purposes: see *J. L. Denman & Co., Ltd. v. Westminster Corpn.* (1); *Westminster Corpn. v. London and North Western Rail. Co.* (2); *Rolls v. London School Board* (3); *Galloway v. London Corpn.* (4) (L.R. 1 H.L. at p. 43); *Eversfield v. Mid-Sussex Rail. Co.* (5); *Lord Carington v. Wycombe Rail. Co.* (6); *Stockton and Darlington Rail. Co. v. Brown* (7) (9 H.L. Cas. at p. 256). Thus in *Gard v. Sewers Comrs. of London* (8), the commissioners, who had statutory powers to improve streets gave notice to treat for the acquisition of the whole of a site of which only a small portion was required by them for the purpose of widening the street, and proposed to make a profit by selling the rest of the land. It was held that they had power to take that part which was required for the purpose of widening the street, but that the purpose for which they proposed to acquire the rest was not authorised by the Act which conferred the compulsory powers which they purported to be exercising. On similar grounds it was held in *Lynch v. Sewers Comrs. of London* (9) that a power of compulsory purchase for the purpose of widening streets did not authorise the acquisition of land for the purpose of altering levels. Cases such as *Galloway v. London Corpn.* (4) and *Quinton v. Bristol Corpn.* (10) are not departures from the general rule. Indeed the decision in *Galloway v. London Corpn.* (4) expressly recognises the rule. Both these cases are decided upon the ground that on the true construction of the particular Acts the purposes for which the local authority proposed to acquire the lands in question were authorised.

I

It is necessary, therefore, to ascertain what are the purposes for which the London County Council proposed to acquire compulsorily the Royal Oak and its garden, and whether those purposes are authorised by the Housing Acts. The only member of the council (as distinguished from officials of the council) who was called as a witness was Lieut.-Colonel Fremantle, the chairman of the

housing committee. In cross-examination he said: "I do not know in the least bit why the order (that is Order No. 3) was made. I do not know in the least what was the main reason for making the order." If this statement were taken literally, it would seem to indicate that the council had not considered whether the land in question was required for the purposes of the Act. But, in fact, long before the third order was made the proposed new roads had been planned by the officials of the London County Council, and one of them ran through the garden of the Royal Oak; and it was in consequence of the urgent necessity of proceeding without delay with the making of the road and the sewer in it that the council accepted the plaintiffs' offer of Dec. 7, 1920. Moreover, it appears from one of the plans that shops are to be built on that part of the plaintiffs' garden which lies to the west of the new road. The minutes of the housing committee and of the council show that it was determined to acquire the beer-house as well as the other three licensed premises within the area which the council had decided to acquire, for the purpose of obtaining control over all the licensed premises within the area. As appears from the minutes of the council's meeting of July 6, 1920, the housing committee recommended that the council should acquire the Royal Oak and thereby secure control of it. On July 13, 1920, the council resolve (i) That the licences for the sale of intoxicating liquor on premises to be acquired by the council in connection with the development of the Dagenham site should not be abandoned for the present. (ii) That the supply of refreshments in such licensed premises should be controlled by the council and that the housing committee do report . . . as to the lines on which they recommend the council to control such supply, and as to any negotiations with the Liquor Control Board and the neighbouring licensing justices. The council, at the meeting of Oct. 19, 1920, considered a report of the housing committee which pointed out the difficulties in connection with the Liquor Control Board, and at a meeting of Oct. 26, 1920, resolved that the system of control to be exercised by the council over the existing beerhouses on the Dagenham housing site be based on management by a company or association whose servants would not have a pecuniary interest in encouraging the sale of alcoholic liquors, that such system should provide for the general entertainment and refreshment of the population, and that the housing committee should report in due course as to the terms and conditions upon which such management could be established. On Nov. 9, 1920, the third order which dealt exclusively with the Royal Oak was made. It is, I think, plain from the record of the meetings of the housing committee of the council that the council decided to acquire the Royal Oak and the other three beerhouses on the Dagenham site with the object of controlling or regulating the traffic in intoxicating liquor on the Dagenham site. Lieut.-Colonel Fremantle in re-examination confirmed this conclusion by stating that the council wanted to acquire these four beerhouses with a view of getting control, and "control" having regard to the rest of his evidence and to the minutes of the council and of the committee meant "control or regulation of the supply of alcoholic liquor."

Admittedly the council cannot carry on the business of licensed victuallers, and notwithstanding Mr. Orr's report to the housing committee, there is nothing which shows that the council at any time contemplated doing so, but what precisely is to be done with the beerhouses when they have been acquired has not yet been determined. The council, however, has decided that the supply of alcoholic liquor shall be controlled by it, and that that control shall be based on management by some company or association, whose servants are not to have a pecuniary interest in the sale of alcohol and that provision shall be made for the general entertainment and refreshment of the population. As the council admittedly cannot carry on the business of a publican I cannot suppose that it contemplated that the company or association referred to is to manage the business for the

A council, for this would merely mean that the council carry on business by its agent. The council must, I think, in passing the resolutions of Oct. 26, 1920, have contemplated the lease or sale of the beerhouses when they had been acquired to some company or association on terms which would secure that the houses should be managed on lines which would give effect to the desires of the council.

B The council, then, had a two-fold object in acquiring the plaintiffs' premises. It determined to purchase the plaintiffs' beerhouse and garden, intending to use the west part of the garden for a roadway and as a site for shops and to arrange with some company or association to take over the beerhouse and carry on the business there on lines corresponding with the views of the council which were summarised in the council's resolution of Oct. 26, 1920. The erection of shops and the construction of roads are authorised by s. 11 of the Housing of the Working Classes Act, 1903, and s. 15 (1) of the Housing Town Planning, &c., Act, 1919, [see Town and Country Planning Act, 1947, s. 47, and ss. 93, 107 of Housing Act, 1957]. Section 45 of the Housing, Town Planning, &c., Act, 1909, however, prohibits the compulsory acquisition for the purposes of Part 3 of the Act of 1890 of any land which forms part of any front garden or pleasure ground or is otherwise required for the amenity or convenience of any dwelling-house. This section would prohibit the council from acquiring under its compulsory powers the garden of the Royal Oak without acquiring the Royal Oak itself. Whether a local authority can insist upon taking the whole of a man's land because it cannot otherwise take a part of it which it requires is a question which may have to be answered in another case. It may be contended that if a local authority desires to acquire a small portion of a large park for the purposes of the Housing Acts, it cannot in order to surmount the difficulties occasioned by s. 45 take compulsorily the mansion and the rest of the park which are not required for the purposes of the Acts. But whatever the correct answer to that question may be, it is not necessary to consider it in the present case, having regard to the arrangement which was reached in November, 1921, and to the powers conferred upon the London County Council by the sections of the Housing Acts.

E The question raised in this action appears to be whether there is anything in the Housing Acts which enables the council to acquire compulsorily the Royal Oak beerhouse and what is left of its garden with the object of controlling the traffic in intoxicating liquor on the Dagenham estate in the manner which has already been indicated. The material legislation begins with Part 3 of the Housing of the Working Classes Act, 1890. By s. 53 of that Act the purposes of Part 3 of that Act include the provision of lodging houses and cottages for the working classes. Section 57 (1) enables a local authority to acquire land for the purposes of Part 3 compulsorily by reference to ss. 175 and 176 of the Public Health Act, 1875, which enable a local authority to acquire land for the purposes of the Acts, and provide for the sale of any lands acquired in pursuance of the powers conferred by the Act and not required for the purpose for which they were acquired. This, no doubt, contemplates that a local authority may find that it has superfluous land; but the power to sell relates to land acquired under the powers of the Act and not required for the purposes for which it was acquired, and under s. 175 the local authority is only enabled to acquire lands for the purposes of the Act. The fact that the sections contemplate the possibility that the local authority may in the result have more land than it needs for the authorised purposes, and directs that such land shall be sold does not enable a local authority to acquire land deliberately for a purpose which is not authorised. Section 59 of the Act of 1890 authorises local authorities to erect buildings for the housing of the working classes on land acquired by them. The same section appears to me to imply that the power to acquire land carried with it a power to acquire buildings on the land, for it provides for the conversion of buildings

on land acquired into lodging houses for the working classes. But whether that be so or not I do not find any contrary intention in the Act which prevents the word "land" from including buildings by virtue of s. 3 of the Interpretation Act, 1889. A

I will next deal with s. 12 of the Housing Town Planning, &c., Act, 1919, on which much reliance was placed. Subsection (1) declares that the powers of a local authority to acquire land for the purposes of Part 3 of the Act of 1890 shall be deemed to include powers (a) to acquire any houses or other buildings on the land proposed to be acquired as a site for the erection of houses for the working classes [see s. 96 (a) of Housing Act, 1957]; and (b) to acquire any estate or interest in any houses which might be made suitable as houses for the working classes [see s. 96 (b)], together with any lands occupied with such houses, and enacts that the local authority shall have power to alter, enlarge, repair, and improve any such houses or buildings so as to render them in all respects fit for habitation as houses of the working classes. Subsection (1) (b) probably was intended to enable the local authority to acquire any kind of estate or interest in houses which are capable of being made suitable as houses for the working classes to meet the suggestion that before this enactment it could only acquire the whole of the house whatever its tenure: Act of 1890, s. 57, and s. 3 of the Interpretation Act, 1889. The material part of the sub-s. (1) for present purposes is the power conferred upon the local authority by sub-cl. (a). The effect of that clause, in my opinion, is that where a local authority has power to acquire land for the purposes of providing dwelling accommodation for the working classes, it has power to acquire any houses or other buildings on the land which it proposes to acquire as a site for the erection of houses for the working classes. This power is not, in my view, restricted to the acquisition of buildings on the site of which it is proposed to erect houses for the working classes. The Act contemplates extensive schemes for the provision of working class houses by local authorities which in many cases will involve the acquisition of considerable areas of land. Thus under s. 1 (2), a scheme must state the number of houses to be provided, the quantity of land required, and the average number of houses per acre; while the proviso at the end of sub-s. (3) provides for the preservation of buildings of historical or architectural interest in the area affected by the scheme and for the preservation, as far as possible, of the natural amenities of the locality. In order to carry out the requirements of the Act it became necessary for the London County Council to prepare a scheme for the acquisition of about 3,000 acres and the erection of houses for the accommodation of about 120,000 persons. Such a scheme as this is one for the creation of a new town. It is reasonable enough that a local authority which is bound to acquire an extensive track of land for the erection of houses for a large community should have power to acquire any houses or other buildings which are within the boundaries of the area selected, and that it should have complete control over this area in order to prevent or remove any impediment in the way of complete development of the scheme. Subsection (1), in my view, contemplates a scheme under which an area has been marked out for the erection of the houses which the local authority is bound to provide under the provisions of the Act. That area is "the land proposed to be acquired as a site for the erection of houses for the working classes." The words "the land" do not refer to the land of each individual owner of land within the area, but refer to the land which the local authority proposes to acquire for the purpose of giving effect to its obligations under the Act. The subsection deals with houses on "the land proposed to be acquired as a site," not with houses on "land proposed to be acquired as a site," and, in my view, treats the land within the selected area as a whole as something in the nature of a building estate. The section then, in my opinion, gives power to acquire any house which is on any part of the area which it is proposed to take. B
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A It is, I think, of no importance for the purpose of this subsection that the house and its site which it is proposed to take are not required for use as a workman's dwelling or as a site for such a dwelling, or for a roadway, or for other purposes mentioned by the earlier Housing Acts. The power is given as incidental to the complete control of the development of the building scheme. It was somewhat faintly argued that on its true construction sub-cl. (a) gives power to acquire as a site for the erection of houses for the working classes any houses or buildings on the land proposed to be acquired or to acquire any houses on the land which—i.e., the houses—are proposed to be acquired as a site for the erection of houses for the working classes. But I am unable to accept this suggestion. A house is not a site for the erection of a house, although the land on which it is built may be, nor should I expect to find a power to acquire houses as "a site" instead of "sites."

C In my view, then, under the section the London County Council had power to acquire any house on the land which it proposed to acquire as a site for the erection of houses for the working classes, or, in other words, it had power to acquire any house or building on the Dagenham site. The powers in sub-s. (12) (1) to alter or improve "any such houses or buildings as to render them fit for habitation as houses for the working classes" [see s. 92 (1) (d) of Act of 1957] does not limit the powers conferred by sub-cl. (a) and (b). This power, in my opinion, applies to houses acquired under either of the preceding sub-clauses; the use of the words "any such houses or buildings" must apply to any which have already been referred to, and it is to be observed that while sub-cl. (b) mentions only "houses" sub-cl. (a) mentions "houses or other buildings." But the power to acquire and the power to alter are different and independent powers, and it is, in my view, impossible to hold that the power to acquire confirmed by sub-cl. (a) is limited to houses which it is proposed to adopt for working class accommodation under the power to alter in the latter part of the section. That appears to be the governing idea of the power conferred by sub-cl. (b). The idea of sub-cl. (a), as it appears to me, is that the local authority shall be enabled to obtain complete control over the area which it proposes to acquire as a building estate. In my opinion, then, the London County Council had power, subject to the approval by the Minister of Health, to purchase the Royal Oak compulsorily.

F There is also a question whether the London County Council had not power to acquire the Royal Oak under s. 12 (2) (b) of the Act of 1919 [see s. 105 of Act of 1957], which enables a local authority to acquire compulsorily land for the purpose of leasing or selling any part of it with a view to its use for purposes which, in the opinion of the local authority, are desirable for the development of the land as a building estate, including the provision of places of recreation and other works or buildings for or for the convenience of persons belonging to the working classes and other persons. For reasons which I have already given the council's resolution of Oct. 26, 1920, in my opinion, contemplates the lease or sale of the Royal Oak to some company or association, and in terms contemplates "provision for the general entertainment and refreshment of the population" which inhabits the Dagenham site. If it were necessary to express an opinion on this point I should be prepared to hold that the London County Council had power to acquire the Royal Oak under the provisions of s. 12 (2).

I Reference may also be made to the provisions of s. 11 of the Housing of the Working Classes Act, 1903. That section enacts that any power of a local authority under the Housing Acts to provide dwelling accommodation or lodging houses shall include a power to provide and maintain, with the consent of the Local Government Board, now the Minister of Health, in connection with any such accommodation or houses any building adapted for use as a shop, any recreation grounds or other buildings or land which in the opinion of the Board

will serve a beneficial purpose in connection with the requirements of the persons for whom the dwelling accommodation or lodging houses are provided. The question whether a beerhouse is for the purpose of this section a shop (see per CHANNELL, J., in *Savoy Hotel Co. v. L.C.C.* (11) ([1900] 1 Q.B. at p. 669) appears to be one which it is not necessary to determine in this action, for it is a building, and if in the opinion of the Minister of Health it will, if acquired, serve a beneficial purpose in connection with the requirements of the persons for whom the dwelling accommodation is provided, the local authority, with the consent of the Minister of Health, has power to provide it. If the Minister considers it desirable that a beerhouse, to be conducted on the most improved lines, should be provided to meet the wants of the persons who live on the local authority's building estate, the local authority has, in my opinion, under this section power to provide it. The method in which it may be provided is not restricted. The provision covers the building of a new house or the purchase of one which is already in existence. It is said that the sanction required by s. 11 has not been given, and, therefore, that the London County Council has no power to make the provision contemplated by s. 11, but order No. 3 is not effective until it has been confirmed by the Ministry of Health, and assuming that I am correct in thinking that the London County Council can acquire the beerhouse if the Ministry of Health is of opinion that the provision of it would serve a beneficial purpose in connection with the requirements of the persons for whom the dwelling accommodation on the Dagenham site is being provided, and consents to the acquisition, I cannot declare that the London County Council has no power to purchase the house compulsorily or restrain the council from taking steps to purchase it. If the Minister of Health is of opinion that the Royal Oak will serve the kind of beneficial purpose which is mentioned in s. 11 if it is purchased by the London County Council and confirms order No. 3, the London County Council will, in my view, have power to acquire it compulsorily. The section in fact extends the purposes for which land or buildings can be acquired under the Housing Acts, and authorises the compulsory acquisition of a building for use as a shop, or of land for recreation grounds, or of land and buildings for use in connection with the requirements of the inhabitants of the local authorities' estate if that use in the opinion of the Minister of Health is beneficial. I am, therefore, of opinion that this action fails, and should be dismissed with costs.

Solicitors: *Witham, Roskell, Munster & Weld; D. P. Andrews.*

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

A

CARDIFF CORPORATION v. COOK AND OTHERS

[CHANCERY DIVISION (Romer, J.), December 1, 4, 1922]

[Reported [1923] 2 Ch. 115; 92 L.J.Ch. 177; 128 L.T. 530; 87 J.P. 90;
67 Sol. Jo. 315; 21 L.G.R. 279]

B

Compulsory Purchase—Right of landowner—Right to assign property after notice to treat—Effect of assignment—Rights obtained by assignee—Claim for compensation—Landowner's right to amend.

The effect of the service of a notice to treat in connection with the proposed compulsory acquisition of land constitutes as between the landowner and the acquiring authority, to a certain extent and for some purposes, the relation of vendor and purchaser. The landowner, therefore, has a right to deal with the property after the notice to treat, as, e.g., by assigning his interest in it, but that right cannot be exercised in such a way as to increase the obligations of the authority. An acquiring authority cannot continue to treat and ultimately enter into a contract with a landowner after he has assigned his interest in the property. A landowner after putting in a claim for compensation can amend the claim.

D

Where, therefore, a local authority served a notice to treat on the tenants of premises who put in a claim for £550 for disturbance,

Held: the tenants had a right thereafter to assign their leasehold interests to a third party, but they could only do so subject to the rights which had been acquired by the authority by virtue of the notice to treat and the claim which the tenants had submitted to the authority; the assignment conferred on the third party the property in the lease subject to the offer of the tenants to accept £550 as compensation, but with the right as between himself and the authority to withdraw that offer before it was accepted by the authority and submit a larger claim for compensation.

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Notes. As to the effect of a notice to treat and claims for compensation see 10 HALSBURY'S LAWS (3rd Edn.) 63-68; and for cases see 11 DIGEST (Repl.) 189-192.

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Cases referred to :

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(1) *Mercer v. Liverpool, St. Helens and South Lancashire Rail. Co.*, [1903] 1 K.B. 652; 72 L.J.K.B. 128; 88 L.T. 374; 67 J.P. 77; 51 W.R. 308; 19 T.L.R. 210, C.A.; affirmed [1904] A.C. 461; 73 L.J.K.B. 960; 91 L.T. 605; 68 J.P. 533; 53 W.R. 241; 20 T.L.R. 673, H.L.; 11 Digest (Repl.) 289, 1951.

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(2) *Haynes v. Haynes* (1861), 1 Drew. & Sm. 426; 30 L.J.Ch. 578; 4 L.T. 199; 7 Jur. N.S. 595; 9 W.R. 497; 62 E.R. 442; 11 Digest (Repl.) 189, 557.

(3) *Adams v. London and Blackwall Rail. Co.* (1850), 2 Mac. & G. 118; 6 Ry. & Can. Cas. 271; 2 H. & Tw. 285; 19 L.J.Ch. 557; 16 L.T.O.S. 277; 14 Jur. 679; 42 E.R. 46, L.C.; 11 Digest (Repl.) 236, 1016.

(4) *Re Marylebone (Stingo Lane) Improvement Act, Ex parte Edwards* (1871), L.R. 12 Eq. 389; 40 L.J.Ch. 697; 25 L.T. 149; 19 W.R. 1047; 11 Digest (Repl.) 289, 1950.

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(5) *Wilkins v. Birmingham Corpn.* (1883), 25 Ch.D. 78; 53 L.J.Ch. 93; 49 L.T. 468; 48 J.P. 231; 32 W.R. 118; 11 Digest (Repl.) 293, 1989.

(6) *Carnochan v. Norwich and Spalding Rail. Co.* (1858), 26 Beav. 169; 53 E.R. 861; 11 Digest (Repl.) 189, 562.

Also referred to in argument :

Dawson v. Great Northern and City Rail. Co., [1905] 1 K.B. 260; 74 L.J.K.B. 190; 92 L.T. 137; 69 J.P. 29; 21 T.L.R. 114, C.A.; 1 Digest 79, 636.

Syers v. Metropolitan Board of Works (1877), 36 L.T. 277, C.A.; 11 Digest (Repl.) 187, 533.

Tiverton and North Devon Rail. Co. v. Loosemoore (1884), 9 App. Cas. 480; 53 L.J.Ch. 812; 50 L.T. 637; 48 J.P. 372; 32 W.R. 929, H.L.; 11 Digest (Repl.) 231, 954. A

Sewell v. Harrow and Uxbridge Rail. Co. (1903), 20 T.L.R. 21, C.A.; 11 Digest (Repl.) 189, 564.

Action for a declaration and specific performance.

By the Local Government Board's Provisional Orders Confirmation Act, 1915, the plaintiffs, Cardiff Corporation, were given power, for the purpose of street widening, to acquire by compulsory purchase No. 2, Duke Street, Cardiff. The defendants, Frank Henry Cook and Ernest Edward Cook, trading as Thomas Cook & Son, held those premises on a lease the term of which would expire in 1922, with, however, an option to renew for five years. The defendant, Robert Lane, was under-tenant of Messrs. Cook of part of the premises, which he was holding over as a tenant from year to year. On Aug. 2, 1919, the plaintiff corporation served on the defendants the usual notice to treat for the premises. On Aug. 22, 1919, Messrs. Cook sent in a claim of £550 for disturbance, but made no claim in respect of their leasehold interest which they thought was of no value. Before the offer to accept £550 in settlement of their claim was accepted by the plaintiff corporation Messrs. Cook assigned all their leasehold interest in the premises to R. Lane for the nominal sum of £1, and in a deed of covenant Lane covenanted to indemnify Messrs. Cook in respect of any costs and damages which he (Lane) might incur by reason of the acquisition of the premises by the plaintiff corporation. Lane then leased the part of the premises formerly occupied by Messrs. Cook for the residue of the term which had $7\frac{1}{2}$ years to run at a yearly rent of £700, and continued in occupation of the part of which he had been the yearly tenant of Messrs. Cook at a rent of £100. The yearly rent reserved by the lease, which was assigned to Lane by Messrs. Cook, was £350, consequently Lane, on June 20, 1921, sent in a claim to the plaintiff corporation for compensation for his interest in the premises of £3,375, that sum representing $7\frac{1}{2}$ years' purchase of £450 a year, his annual profit on the premises. The plaintiff corporation refused to pay this sum. In August, 1921, Messrs. Cook, their offer to accept £550 as compensation not having been accepted, wrote informing the plaintiff corporation that they would accept £550 as compensation for disturbance, but were no longer able to negotiate with the corporation as to the compensation to be paid for the leasehold interest in the premises. The plaintiff corporation in this action asked for a declaration that the compensation for the compulsory acquisition of the premises was limited to £550 and claimed specific performance and an order for the assignment of the premises to them. B C D E F G

T. R. Hughes, K.C. and *W. F. Swords* for the plaintiff corporation.

Cleveland-Stevens for the defendants, *F. H. Cook* and *E. E. Cook*.

J. H. Cunliffe, K.C. and *C. A. Bennett* for the defendant, Lane. H

ROMER, J.—Cardiff Corporation, by virtue of a provisional order, made by the Local Government Board in 1915, and confirmed by the Local Government Board's Provisional Orders Confirmation Act, 1915, obtained for the purposes of street widening compulsory powers in regard to certain premises at Cardiff, including the premises which are numbered 26 in the schedule to the provisional order. Those premises are in the schedule described as "shop, offices and workrooms, telephone wires and brackets." The "lessees or reputed lessees" are put down as "Frank Henry Cook, Ernest Edward Cook, and Robert Lane." The "occupiers" are described as "Frank Henry Cook, Ernest Edward Cook (trading as Thomas Cook & Son), Robert Lane, and the Postmaster-General." The Postmaster-General's interests we are not concerned with. Messrs. Thomas Cook & Son held the premises in question on a lease for five years ending at Christmas, 1922, with an option to renew for another five years. Mr. Robert Lane at the time I

A of the order was an under-tenant of Messrs. Cook holding over as a yearly tenant on the expiration of a term of ten years from some time in 1907. On Aug. 2, 1919, the corporation served upon Mr. Frank Henry Cook and Mr. Ernest Edward Cook separate notices to treat in respect of the premises in question and on the same day they served a notice to treat on Mr. Lane. The notices to treat called upon the persons upon whom they were served to send in particulars of their estate and interest in the lands and hereditaments in question, and of the claims made by them in respect thereof. Accordingly, on Aug. 22, 1919, Messrs. Cook sent in to the corporation particulars of their claims. The material part of the claims they sent in is in this form. Under the heading of "Particulars of claim specifying separately the amount claimed for value of property and for compensation for loss or injury," it is stated :

C "Compensation for disturbance, £550. In connection with the renewal of our business activity after the war and the fact that it would be utterly impossible for us to carry on in existing premises after a portion had been taken away, we have considered it urgently necessary to make arrangements at once for a removal securing other premises at a heavy premium and removing thereto as soon as possible. Claim for disturbance, £550."

D It appears to me that the meaning of those claims is quite obvious. They estimated the damage done to them by "disturbance," that is to say, by their compulsory removal, at £550. They treated their leasehold interest as not being worth anything. They were required to give particulars of their estate and interest in the lands and hereditaments referred to in the notices to treat and of the total claims made by them in respect thereof, "specifying separately the amount claimed for value of property and for compensation for loss or injury." It is obvious, to my mind, that what they meant by their claims was : "We are willing to take £550 in respect of the whole of our claim—made up as follows—for disturbance, £550; for value of property, 'nil,' " and they put down nothing whatever so far as the leasehold interest is concerned. That that is so is, I think, quite clear having regard to a letter which, very shortly after sending in their claims, they wrote to the town clerk in response to a request by him to be supplied with details of their claims. In that letter, which is dated Jan. 8, 1920, they pointed out that the leasehold interest was regarded by them as in the nature of a liability. After stating how it was that they arrived at their claim for compensation for disturbance, they say :

G "We are endeavouring to dispose of our liability at 2, Duke Street, but no premium can be obtained and this has not yet been arranged. We consider that with due regard to all the circumstances we are entitled to a sum of £550 as compensation, and, therefore, enter a claim for that amount."

H Had the corporation then and there agreed to pay them that sum of £550, I do not doubt that Messrs. Cook and any assignees of theirs would be under a liability to assign the whole of the premises in question to the corporation in consideration of that sum of £550, and that they could not have claimed a penny more afterwards, either in respect of disturbance or in respect of their leasehold interest. But, before their offer to take £550 was accepted, Messrs. Cook assigned their leasehold interest in the premises to Mr. Lane in consideration of a payment to them by Mr. Lane of a nominal sum—£1, and on the same day Mr. Lane entered into a deed of covenant with Messrs. Cook. That deed contained certain covenants by Lane, to two of which it is necessary to refer. Lane covenanted in that deed, among other things, that he

"will at all times hereafter save harmless and keep indemnified the said Frank Henry Cook and Ernest Edward Cook and their respective executors and administrators from any costs, losses, damages, injuries or expenses which the said Robert Lane may suffer in consequence of the acquisition of the said

premises wholly or partly under the proposed scheme of the Cardiff City Corporation for acquiring by Parliamentary sanction or otherwise howsoever (inter alia) either the whole or part of such premises demised by the herein-before recited indenture of lease for the purpose of the widening of and effecting other improvements in Duke-street aforesaid."

That is a covenant by Lane to keep Messrs. Cook indemnified in regard to any costs, losses, damages, injuries, or expenses which Lane may suffer in consequence of the acquisition of the premises in question by the corporation. It means that he agrees not to make any claim against them in respect of any damage he may sustain by virtue of the acquisition by the corporation of the premises. The deed goes on:

"And will in particular refrain from doing or performing any act or thing which might in any way compromise or adversely affect the claim or claims of the said Frank Henry Cook and Ernest Edward Cook against the said corporation for and in respect of the costs incurred by them in removing the business formerly conducted and carried on by them at 2, Duke Street, aforesaid, to the premises at present in their occupation at 28, High Street, Cardiff, aforesaid."

That means, that the parties, being under some doubt as to what was the precise effect of the assignment and having regard to the notice to treat and the claim made by Messrs. Cook under that notice, wanted to provide that nothing that Lane might or might not do was in any way to prejudice the claim which Messrs. Cook had put forward for £550, as compensation for their disturbance.

It is now necessary to consider what was the effect of these transactions as between the three parties to this action. For this purpose it is necessary to ascertain, first of all, what was the effect of this notice to treat upon the power of Messrs. Cook to deal with their leasehold property. Of the authorities cited to me on this point it is only necessary to refer to *Mercer v. Liverpool, St. Helens and South Lancashire Rail. Co.* (1). I want to refer to two passages in the judgment of STIRLING, L.J., in that case, and to one passage in the judgment of MATHEW, L.J. In giving judgment, STIRLING, L.J., after stating the facts, first of all quotes with approval ([1903] 1 K.B. at p. 661) what KINDERSLEY, V.C., said in *Haynes v. Haynes* (2) (1 Dr. & Sm. at p. 450):

"I consider that the notice to treat constitutes, as between the landowner and the company, the relation of vendor and purchaser to a certain extent and for certain purposes [that is the language of LORD COTTENHAM in *Adams v. London and Blackwall Rail. Co.* (3)] and that some of the consequences which flow from an actual contract also follow upon the notice to treat; such as that the particular lands which the company are to take, and which the landowner must give up to the company after certain steps prescribed by the Act shall have been taken, are fixed, and that neither party can get rid of the obligation, the one to take and the other to give up the lands specified in the notice; and that such is the meaning to be attributed to those expressions, which may have dropped from learned judges, which seem to intimate that it is a contract, but that in no other sense and to no further extent does the notice constitute a contract, at least on the part of the landowner."

STIRLING, L.J., after pointing out that the rights and obligations created by a notice to treat, being derived from a statute, are legal and not merely equitable, says ([1903] 1 K.B. at p. 662):

"Now at law a contract for the sale of land creates merely a personal obligation between the vendor and the purchaser and does not bind the land; in equity such a contract binds the land, and that not only as against the vendor, but also as against all persons claiming under him with notice of the existence of the contract. On the other hand, legal rights and interests in and to land

A bind all persons, whether with notice or not; and I apprehend that rights and interests arising under a notice to treat fall within this rule. It is for this reason, as it seems to me, that it has been held that an interest in land which has been created by the owner after service of notice to treat is not a subject for compensation under the Lands Clauses Consolidation Act, 1845: see, for example, *Ex parte Edwards* (4); *Wilkins v. Birmingham Corpn.* (5). In accordance with the same principle it was laid down by LORD ROMILLY in *Carnochan v. Norwich and Spalding Rail. Co.* (6) that

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'the purchase of land in respect of which a railway company has served a proper notice to treat, and in respect of which the company has entered into possession, is, in truth, but the purchase of an interest in the purchase money.'

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MATHEW, L.J., in giving judgment, said (*ibid.* at p. 667):

"It seems to me that, either when the land is taken or is injuriously affected, the owner cannot derogate from the obligation created by the notice to treat. . . . In my judgment, in such cases as the present, it must be regarded as a settled rule of law as between landowner and railway company that there can be but one proceeding for compensation, and that after notice to treat no onerous interest, either in the land taken or in that injuriously affected, can be created by the owner to the prejudice of the railway company."

D

The decision in that case was affirmed by the House of Lords. LORD LINDLEY, in the course of his speech said ([1904] A.C. at p. 465):

"The broad principle appears to me to be that it is not competent for an owner of land who has received notice to treat to deal with any of his land either taken or injuriously affected by the company, so as to increase the burdens of the company as regards the compensation to be made in respect of such land or any part of it."

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In these passages the right of a landowner to deal with his property after a notice to treat is recognised, but the right cannot be exercised in such a way as to increase the obligations of the company. It seems to me that it follows that in the present case Messrs. Cook had a right to assign the leasehold interest to Mr. Lane, but they could only assign that interest subject to the rights which had been acquired by the corporation by virtue of the notice to treat and by virtue of the claim that had been sent in by Messrs. Cook themselves; in other words,

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I do not think the fact that they had assigned the leasehold interest to Mr. Lane operated as a withdrawal of the offer by them, Messrs. Cook, to accept £550 in full settlement. On the other hand, I cannot see that Mr. Lane acquired by virtue of that assignment any less right than Messrs. Cook themselves would have had. It seems to me, therefore, that the assignment to Mr. Lane was effectual to confer upon him the property, subject, however, to an offer which must now be deemed to be his offer, to accept £550 in full settlement, but together with the right as between himself and the corporation to withdraw that offer before acceptance, if Messrs. Cook had a right themselves to withdraw it at the time that they assigned the property to Lane. No authority has been cited to me in support of the proposition that a landowner, after being served with a notice to treat and putting in a claim for compensation, is not at liberty before his claim for compensation is accepted to amend it. It would be a great hardship if he were not allowed to do that, because he might have put in his claim under some misapprehension. In the absence of authority to the contrary, I hold that the landowner is entitled before acceptance to withdraw and amend his claim. If, therefore, Mr. Lane, as I apprehend he was, was entitled to the same rights as those that Messrs. Cook had at the date of the assignment, he had the right to withdraw and amend the claim by which it appears to me, unless withdrawn, he was bound. Whatever may be the precise meaning of the claim

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put in by Mr. Lane on June 20, 1921, it, at any rate, amounts to an intimation to the corporation that he, Mr. Lane, does not consider himself any longer bound by the offer which was made by Messrs. Cook, because he, Lane, is now submitting a claim for £3,000 odd, the amount at which he valued his interest in the property.

Mr. Lane arrived at his figure of £3,375 in this way. It appears that after the assignment to him he let the ground floor of the premises which had been in the occupation previously of Messrs. Cook to a tenant at an annual rental of £700, while he himself remained in occupation as tenant from year to year of the upper part of the premises at a rental of £100 a year. The rent which is payable under the lease to Messrs. Cook was only £350 a year, so therefore there was a profit to Mr. Lane of £450 a year. Mr. Lane capitalised that at $7\frac{1}{2}$ years' purchase, because that was the length of the term of the lease he had still to run assuming he exercised his option to renew it. That works out at £3,375. Mr. Lane, therefore, put in a claim for £3,375, and that claim gave notice to the corporation that, whereas Messrs. Cook had valued the leasehold interest of the premises at nil, Mr. Lane valued it at £3,375, and claimed to be paid that sum for his interest. That was necessarily a withdrawal of the offer made by Messrs. Cook to accept a sum of £550 for "disturbance" and nothing for "leasehold interest." That being so, and Messrs. Cook's original offer not having been accepted at that time, it appears to me that there is not any contract between the corporation and Mr. Lane, who, after the assignment to him, became the owner of the leasehold interest in the property.

But then it is said by the plaintiffs: "We, the corporation, have nothing to do with Mr. Lane. The true meaning of the authorities is that, having served notice to treat on Messrs. Cook, and they having put in a claim for compensation, we have nothing to do with anybody to whom they may have assigned their interest. We can continue to deal with Messrs. Cook in just the same way as if they were still the owners of the property, and we can disregard Mr. Lane altogether." I do not think that that is the result of the authorities to which I have been referred. I do not think that after a notice to treat, even when followed by a claim, the undertakers can still continue to treat and ultimately enter into a contract with the owner after he has assigned away the whole of his property. It is admitted that until the offer is accepted and the compensation in this way agreed, there is no contract, in the usual sense of the term, between the undertakers and the owner of the property. There being, therefore, no contract in this case at the time of the assignment to Mr. Lane, how is it possible for the corporation subsequently to make a contract for the purchase of this property with somebody who, at the time of making of the contract, has ceased to have any legal or equitable interest in the property at all? It does not appear to me to be possible for the corporation to do that. Mr. Lane, like any other assignee who takes an assignment after the notice to treat, stands in precisely the same position as the person upon whom the notice to treat has in fact been served. By virtue of the assignment he takes the place of the person on whom the notice to treat has been served, and, therefore, becomes the person with whom the undertakers have to agree compensation, or against whom they must take the necessary proceedings to get the compensation, if it cannot be agreed, ascertained.

But assuming that the contention of the corporation is right, and that, notwithstanding the assignment, they could continue to deal with Messrs. Cook entirely regardless of the existence of Mr. Lane, I should then have to consider whether Messrs. Cook themselves ever withdrew the offer which they had made. Messrs. Cook had made an offer which, according to the construction that I have put upon it, was an offer to accept £550 in full settlement of their interest in the premises. But before ever that offer was accepted by the corporation Messrs.

- A** Cook had, in my opinion, made it perfectly clear to the corporation that they were no longer willing to accept £550 in full satisfaction of their claim for compensation and for the value of the leasehold interest. On Aug. 4, 1921, Messrs. Cook's solicitor wrote to the town clerk a letter which, so far as material, is in these terms: "Our clients, you will remember, made no claim for the value of the leasehold premises and only claimed £550 for disturbance and the assignment to Mr. Lane preserved our clients' rights to claim compensation for disturbance. If Mr. Lane can establish his claim that there was some value in the leaseholds at the date of the notice to treat we fear that we cannot compel him to assign the lease until his claim has been satisfied. We do not wish to support Mr. Lane's claim in any way, and we venture to suggest that it would simplify the position if the corporation were to agree the claim for compensation with us for £550, to be paid when the premises are assigned, and leave Mr. Lane to make such claim, if any, as he can to the value of the lease which our clients assigned to him for the nominal consideration of £1. Matters seem to be at a deadlock. You certainly and probably Mr. Lane are taking up legal positions which do not seem to be tenable." That letter seems to me to mean this: "True, we sent in a claim for £550, and we are still willing to accept £550 as compensation, but we are no longer in a position to agree with you in reference to the value of the leasehold premises. It is true that we think that they are worth nothing, but Mr. Lane takes a different view, and so far as regards the value of the leasehold premises you must settle with Mr. Lane." It seems to me in law that that amounts to a withdrawal of their previous offer. It was quite a different offer from their original offer to accept £550 in full discharge of their claim. It is now an offer by them to accept £550 as compensation for their own disturbance only, and they say that the value of the leasehold interest "must now be settled between you and Mr. Lane." Assuming they were wrong in asking the corporation to settle the value of the leasehold interest with Mr. Lane, it seems to me that after that letter it was no longer open to the corporation to accept the offer Messrs. Cook had previously made, as that offer was no longer open to acceptance.
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Solicitors: *Smith, Rundell, Dods & Bockett*, for *Cecil G. Brown*, Town Clerk, Cardiff; *Ingledeu, Davies, Sanders & Brown*, for *Ingledeu & Sons*, Cardiff; *Simmons and Simmons*, for *Morgan Scott & Scott*, Cardiff.

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

FOLKES v. KING

[COURT OF APPEAL (Bankes and Scrutton, L.JJ., and Eve, J.), October 25, 26, November 9, 1922]

[Reported [1923] 1 K.B. 282; 92 L.J.K.B. 125; 128 L.T. 405; 39 T.L.R. 77; 67 Sol. Jo. 227; 28 Com. Cas. 110; 86 J.P. Jo. 552]

Agent—Mercantile agent—Goods entrusted to mercantile agent for sale—Goods sold to bonâ fide purchaser—Purchase price lower than authorised by agent—Purchase price retained by agent—Title to goods obtained by purchaser—Factors Act, 1889, (52 & 53 Vict., c. 45), s. 2 (1).

In March, 1921, the plaintiff entrusted to one H. a motor car for sale at a price of £575. On the same day H. sold the car to one A. for £340 and applied the money to his own use. There was evidence that at that time in a large number of other cases H. was selling cars below the authorised prices and retaining the money he received. A. sold the car which then passed through two other purchasers' hands from the second of which the defendant bought it in good faith, as had A. and his sub-buyers. In an action by the plaintiff for the return of the car, or its value, or damages for its detention,

Held: the Factors Act, 1889, was intended to protect a purchaser in good faith who was carrying out an ordinary mercantile transaction with a person in the position of a mercantile agent, and Parliament did not intend to apply the artificial distinction of the criminal law to a commercial transaction, defeating it if there were larceny by a trick, but not if there were only larceny by a bailee or possession obtained by false pretences; where the true owner of goods intended to give a mercantile agent possession of the goods the fact that that agent, while apparently agreeing to the terms of the agency, really intended to disregard them and act for his own benefit did not destroy the consent of the owner and so deprive a bonâ fide purchaser of the protection afforded by s. 2 (1) of the Act; and, therefore, the sale of the car by H. to A. was valid and the defendant obtained a good title to the car when he purchased it from A.'s sub-buyer.

Criminal Law—Larceny—Larceny by a trick—Goods entrusted to agent for sale—Goods sold and purchase price retained by agent.

SEMBLE: A person is not guilty of larceny by a trick by inducing the owner of goods to part with them if the owner intends that such person shall have power to pass the property to a third person.

Notes. Applied: *London Jewellers, Ltd. v. Attenborough*, [1934] All E.R. Rep. 270. Distinguished: *Heap v. Motorists' Advisory Agency*, ante p. 251. Considered: *Lake v. Simmons*, [1926] 2 K.B. 51; *Lowther v. Harris*, [1926] All E.R. Rep. 352; *Buller & Co., Ltd. v. T. J. Brooks, Ltd.*, [1930] All E.R. Rep. 534. Applied: *Pearson v. Rose and Young, Ltd.*, [1950] 2 All E.R. 1027; *Du Jardin v. Beadman Bros., Ltd.*, [1952] 2 All E.R. 160. Referred to: *Dennant v. Skinner*, [1948] 2 All E.R. 29.

As to sales by mercantile agents see 1 HALSBURY'S LAWS (3rd Edn.) 151, 214, 215, and as to larceny by a trick see *ibid.*, vol. 10, pp. 770, 771. For cases see 1 DIGEST 330-340, 15 DIGEST (Repl.) 1037-1043. For Factors Act, 1889, see 1 HALSBURY'S STATUTES (2nd Edn.) 29.

Cases referred to:

- (1) *Oppenheimer v. Frazer and Wyatt*, [1907] 1 K.B. 519; 76 L.J.K.B. 276; 23 T.L.R. 183; 12 Com. Cas. 147; varied, [1907] 2 K.B. 50; 76 L.J.K.B. 806; 97 L.T. 3; 23 T.L.R. 410; 51 Sol. Jo. 373; 12 Com. Cas. 280, C.A.; 15 Digest (Repl.) 1037, 10,196.
- (2) *R. v. Semple* (1786), 2 East, P.C. 691; 1 Leach, 420; 15 Digest (Repl.) 1040, 10,226.
- (3) *R. v. Pear* (1779), 1 Leach, 212, C.C.R.; 15 Digest (Repl.) 1040, 10,227.

- A** (4) *R. v. Ashwell* (1885), 16 Q.B.D. 190; 55 L.J.M.C. 65; 53 L.T. 773; 50 J.P. 181, 198; 34 W.R. 297; 2 T.L.R. 151; 16 Cox, C.C. 1, C.C.R.; 15 Digest (Repl.) 1048, 10,325.
- (5) *R. v. Russett*, [1892] 2 Q.B. 312; 67 L.T. 124; 56 J.P. 743; 40 W.R. 592; 8 T.L.R. 607; 36 Sol. Jo. 541; 17 Cox, C.C. 534, C.C.R.; 15 Digest (Repl.) 1042, 10,250.
- B** (6) *Whitehorn Bros. v. Davidson*, [1911] 1 K.B. 463; 80 L.J.K.B. 425; 104 L.T. 234, C.A.; 15 Digest (Repl.) 1038, 10,197.
- (7) *Cundy v. Lindsay* (1878), 3 App. Cas. 459; 38 L.T. 573; 42 J.P. 483; 26 W.R. 406; 14 Cox, C.C. 93; sub nom. *Lindsay & Co. v. Cundy*, 47 L.J.Q.B. 481, H.L.; 39 Digest 534, 1454.
- C** (8) *Hardman v. Booth* (1863), 1 H. & C. 803; 1 New Rep. 240; 32 L.J.Ex. 105; 7 L.T. 638; 9 Jur. N.S. 81; 11 W.R. 239; 158 E.R. 1107.
- (9) *Kingsford v. Merry* (1856), 1 H. & N. 503; 26 L.J.Ex. 83; 28 L.T.O.S. 236; 3 Jur. N.S. 68; 5 W.R. 151; 156 E.R. 1299, Ex.Ch.; 37 Digest 18, 146.
- (10) *Baines v. Swainson* (1863), 4 B. & S. 270; 2 New Rep. 357; 32 L.J.Q.B. 281; 8 L.T. 536; 11 W.R. 945; 122 E.R. 460; 1 Digest 331, 469.
- D** (11) *Fuentis v. Montis* (1868), L.R. 4 C.P. 93; 38 L.J.C.P. 95; 19 L.T. 364; 17 W.R. 208, Ex.Ch.; 1 Digest 336, 500.
- (12) *Cole v. North Western Bank* (1875), L.R. 10 C.P. 354; 44 L.J.C.P. 233; 32 L.T. 733, Ex.Ch.; 1 Digest 333, 477.
- (13) *Jenkyns v. Usborne* (1844), 7 Man. & G. 678; 8 Scott, N.R. 505; 13 L.J.C.P. 196; 3 L.T.O.S. 300; 8 Jur. 1139; 135 E.R. 273; 39 Digest 626, 2236.
- E** (14) *M'Ewan v. Smith* (1849), 2 H.L. Cas. 309; 13 Jur. 265; 9 E.R. 1109, H.L.; 39 Digest 522, 1367.
- (15) *Sheppard v. Union Bank of London* (1862), 7 H. & N. 661; 31 L.J.Ex. 154; 5 L.T. 757; 8 Jur. N.S. 265; 10 W.R. 299; 158 E.R. 635; 1 Digest 339, 520.
- (16) *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q.B. 643; 68 L.J.Q.B. 515; 80 L.T. 269; 47 W.R. 422; 15 T.L.R. 247; 43 Sol. Jo. 331; 8 Asp. M.L.C. 517; 4 Com. Cas. 168, C.A.; 39 Digest 519, 1352.
- F** (17) *Shepherd v. Harrison* (1871), L.R. 5 H.L. 116; 40 L.J.Q.B. 148; 24 L.T. 857; 20 W.R. 1; 1 Asp. M.L.C. 66, H.L.; 39 Digest 520, 1355.

Appeal by the defendant from an order of GREER, J., in an action tried by him without a jury in which the plaintiff claimed the return of an Austin motor car which he alleged was his property, or its value, and for damages for its detention.

G The facts appear in the judgments.

By the Factors Act, 1889, s. 2 (1):

H "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

Schiller, K.C. and Malcolm Hilbery for the defendant.

Ernest B. Charles, K.C. and Tristram Beresford for the plaintiff.

I

Cur. adv. vult.

Nov. 9. The following judgments were read.

BANKES, L.J.—This appeal raises what GREER, J., justly described as a difficult question as to the effect to be given to s. 2 of the Factors Act. The action is brought in detinue for the return of a motor car, or for its value, and for damages for detention. The claim is resisted upon the ground that a title to the car had been obtained by the defendant through a person acting in good faith

and without notice who had purchased it from a mercantile agent when acting in the ordinary course of his business, the mercantile agent having obtained possession of the car with the consent of the plaintiff. To this it was replied that possession was not obtained with the plaintiff's consent. Upon this last contention the whole case turns.

The facts are not in dispute. The plaintiff was at one time the true owner of the car. He entrusted it for sale to a man named Hudson, who, with a partner, carried on business as a mercantile agent in the selling of cars. The terms upon which the car was entrusted to Hudson for sale appear in his letter to the plaintiff dated Mar. 14, 1921, which was in the following terms:

"I hereby acknowledge receipt of your 1920 Austin car, and this acknowledgment brings the car under my floating insurance policy. I hereby agree your Austin touring car will not be disposed of under £575 without your permission. Any offer received below this figure will be submitted to you by wire for your acceptance or refusal. Assuring you of my prompt and courteous attention."

The same day that Hudson received the car he sold it in fraud of the plaintiff at much less than the authorised price to a purchaser who purchased it in good faith and without any notice of want of authority on the part of Hudson. Hudson pocketed the purchase money. The defendant purchased from a sub-purchaser from Hudson and relied on the title of the purchaser from Hudson in defence of the claim. GREER, J., held that Hudson acted throughout and from the very initiation of his negotiation with the plaintiff with the intention of defrauding the plaintiff, that his conduct amounted in law to larceny by a trick, and that the fact that he had stolen the car took the case out of the protection of the Factors Act, upon the ground that, in the circumstances, there was no consent by the true owner to Hudson's being in possession of the car.

It was not disputed that if the true inference in law from Hudson's conduct was, either that he had obtained the car by false pretences, or had been guilty of the statutory crime of stealing it as a bailee, the plaintiff must fail, because in either of those cases it could not successfully be contended that Hudson had not obtained possession of the car with the consent of the true owner. The plaintiff's case, therefore, hinged upon the narrow and technical distinction between the three classes of offence—namely, larceny by a trick, larceny as a bailee, and obtaining goods by false pretences. Our attention has been called to a number of cases in which the question for decision was whether a conviction of larceny by a trick could be supported. All these are cases in which an attempt was being made to quash a conviction on a technical ground, though no doubt whatever existed as to the moral guilt of the accused. I agree with the observations of the President in *Oppenheimer v. Frazer and Wyatt* (1) ([1907] 2 K.B. at p. 66) that these decisions are conflicting and difficult to understand, and that in many of them the accused was possibly held guilty of larceny on facts as to which there might be some doubt whether they amounted to larceny or not. Be that as it may, each of this class of case depends upon its own particular facts and upon the inferences to be drawn from those facts, and, for reasons which I will indicate later, I do not think that it is material to discuss them.

The plaintiff in the present case, however, bases his claim upon the suggestion that Hudson's conduct amounted to simple larceny. It is necessary, therefore, to ascertain the principle upon which the distinction between the three offences of larceny, obtaining goods by false pretences, and larceny as a bailee rests. There is no doubt as to what the principle is. We were referred to *Semple's Case* (2), decided in 1786, where the court lay down the law in these terms (1 Leach, at p. 422):

"The court is bound by the determination of former cases. It is now settled that the question of intention is for the consideration of the jury;

A and in the present case, if they should be of opinion that the original hiring of the chaise was felonious, it will fall precisely within the principle of *Pear's Case* (3), and the other decisions which the judges have made upon the subject of constructive felony. If there was a bonâ fide hiring of the chaise, to pay so much for every day for the use of it, and a real intention of returning it, a subsequent conversion of it cannot be felony, whether the time for which it was hired be limited or indefinite; for by the bonâ fide contract, and subsequent delivery, the prisoner would have acquired the lawful possession of it; and, therefore, although he afterwards abused the trust and that possession, felony could not ensue, because the original taking was lawful. But, on the other hand, if the hiring was only a pretence made use of to get the chaise out of the possession of the owner, without any intention to restore it or to pay for it, in that case, the law supposes the possession still to reside with the owner, though the property itself is gone out of his hands, and then the subsequent conversion will be felony. The case of *R. v. Pear* (3) was very solemnly debated at Lord Chief Justice DE GREY's house; and the unanimous opinion of the judges was at last, that the direction given to the jury by the learned judge who tried the prisoner was right. The most important part of the argument turned upon the consideration, whether the delivery of the horse to Pear had in law divested the owner either of his property or the possession of it. The question left with the jury was, whether the contract was meant fairly? or, whether it was a mere colour and pretence? The jury found that it was a mere colour and pretence; and, upon that finding, the judges determined the taking to be felony; because it is an established principle of law that the possession of property cannot be obtained through the medium of a fraud."

A. L. SMITH, J., in two cases states the rule of law in very clear terms. In *R. v. Ashwell* (4) he says (16 Q.B.D. at p. 195):

"To constitute the crime of larceny at common law, in my judgment, there must be a taking and carrying away of a chattel against the will of the owner, and at the time of such taking there must exist a felonious intent in the mind of the taker. If one or both of the above elements be absent there cannot be larceny at common law. The takings must be under such circumstances as would sustain an action of trespass. If there be a bailment or delivery of the chattel by the owner, inasmuch as, among other reasons, trespass will not lie, it is not larceny at common law. In *HAWKINS' PLEAS OF THE CROWN*, book 1, chap. 33, s. 1 [Leach's Edn., p. 208; Curwood's Edn., p. 142], it is stated:

'It is to be observed that all felony includes trespass; and that every indictment of larceny must have the words felonice cepit, as well as asportavit; from whence it follows, that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away.' "

Again, in *R. v. Russett* (5), he says ([1892] 2 Q.B. at p. 316):

"The question is whether the prisoner has been guilty of the offence of larceny by a trick or that of obtaining money by false pretences; it has been contended on his behalf that he could only have been convicted on an indictment charging the latter offence; but I cannot agree with that contention. The difference between the two offences is this: if possession only of money or goods is given, and the property is not intended to pass, that may be larceny by a trick, the reason being that there is a taking of the chattel by the thief against the will of the owner; but if possession is given and it is intended by the owner that the property shall also pass, that is not larceny by a trick, but may be false pretences, because in that case there is no taking, but a handing over of the chattel by the owner."

There is also the passage in the same case in LORD COLERIDGE's judgment (*ibid.* at p. 314) which is cited and relied on by GREER, J. A

The first question in the present case, therefore, resolves itself into the question whether in the circumstances the plaintiff did intend to pass the property in the car to Hudson, or to give him the necessary authority to pass the property in it to a purchaser. If he did, then Hudson could not have been convicted of being guilty of larceny of the car, and the plaintiff must fail in his action. The same question which has to be decided here was discussed in *Whitehorn Bros. v. Davison* (6), where the jury found that Bruford, who obtained the necklace from the plaintiffs on the terms of the approbation note, obtained possession of it by fraud with the intention of stealing it. The court decided the appeal upon another ground, but all the members of the court expressed their opinion quite clearly that in the circumstances of that case Bruford could not have been found guilty of larceny by a trick. I cannot distinguish the facts of that case from the facts of the present case. For the purpose of raising this point they appear to me to be identical. We are not, I think, bound by the opinions expressed as they are, no doubt, obiter, and we must, in the present appeal, come to a conclusion as to whether they are well founded or not. In my opinion, they are well founded, and the result of adopting them appears to me to fit in better with the policy of the law on which s. 2 of the Factors Act is founded than the opposite view, which was the one accepted by GREER, J., in the court below. I desire to cite a passage from each of the judgments, in which I entirely concur. VAUGHAN WILLIAMS, L.J., says ([1911] 1 K.B. at p. 475): B C D

"This case, as I have already said, is not one of merely obtaining possession by a trick, but one in which the plaintiffs gave possession of the necklace under such circumstances that they must have intended that it should be exhibited to a customer of Bruford, and that he should have the power, if he chose, of accepting the article which was delivered to him on sale or return, and of transferring the property therein to a purchaser." E

BUCKLEY, L.J., said (*ibid.* at p. 479): F

"I think there is larceny by a trick where the owner of goods, being induced thereto by a trick, voluntarily parts with the possession of the goods but does not intend to pass the property in them, and the recipient has the animus furandi; and the same is true where the owner of the goods does not intend to pass the property in them to the particular person with whom he is dealing, and has been deceived by that person as regards the identity of the person with whom he is dealing. That was the case in *Cundy v. Lindsay* (7). On the other hand, goods are obtained by false pretences where the owner of the goods, being induced thereto by a trick, voluntarily parts with the possession of the goods, and does intend to pass the property. The question which is material under the circumstances of the present case is this: Suppose the facts are that the owner of the goods, being induced thereto by a trick, intends, not to pass the property in them, but to confer on the person to whom he gives possession a power to pass the property; under which head does that case fall? *Prima facie* it would look, inasmuch as he does not intend presently to pass the property, as if that would be larceny by a trick. I think, however, that is not so. It seems to me that, where the owner of the goods intends to confer a power to pass the property, it is a case of obtaining goods by false pretences. It is, I think, obtaining goods by false pretences where the owner, being induced thereto by a trick, voluntarily parts with the possession, and either intends to pass the property, or intends to confer a power to pass the property. If he gives, and intends to give, that power, and the power is exercised, the person who takes under the execution of the power obtains the property, not against, but by the authority of, the original owner, and none the less because the authority was obtained by fraud." G H I

A KENNEDY, L.J., said (*ibid.* at p. 485) :

B "I do not think that a case such as this, where, even on the plaintiff's view, there was a bailment and delivery, and not that alone, but a bailment and delivery for the purpose of the person to whom the article was delivered himself exercising a disposing power over the property, can be properly described for the purposes of such an action as the present as larceny by a trick, resulting in a void, and not a merely voidable contract. It was intended by the plaintiffs that Bruford should sell himself, as is shown by many passages in the evidence for the plaintiffs. It seems to me impossible to say that this is a case in which there is no contract at all beyond a mere bailment: it was not a case of a mere bailment; not only was the possession parted with, but a right was also given to the bailee to confer the property in the article on a third person. I think, as I gather, CHANNELL, J., thought, that where you have a case like *Hardman v. Booth* (8), or *Cundy v. Lindsay* (7), i.e., a case where, though there may be an apparent contract, there is no real contract as the result of the transaction, because there is no person with whom a contract is really made by the seller at all, in such a case the mere bailment of the goods with the consent of the owner does not prevent the transaction from being larceny by a trick; but, when the facts are such as I have described them in the present case, I think that there is no evidence to support a finding by the jury that there was larceny by a trick."

D I desire also to refer to what CHANNELL, J., said in *Oppenheimer v. Frazer and Wyatt* (1) ([1907] 1 K.B. at p. 527) :

E "It seems to me that the true rule is that where there is a consent of the owner of the goods to the possession of the goods by the mercantile agent as a mercantile agent—and that is the important part of the matter—that then the statute applies, provided the other conditions are fulfilled; but there may be such a trick as would prevent there being any consent of the owner to the particular man having them as a mercantile agent. The facts in *Kingsford v. Merry* (9) and *Hardman v. Booth* (8), if they applied, might do so; but here there is nothing but a fraud, and a fraud of exactly the same character as took place in *Baines v. Swainson* (10). There the man represented to one firm that he was acting for another firm who proposed to buy the goods, whereas that firm had given him no authority and had been in no communication with him, exactly as was the case here."

G These passages appear to me to contain correct statements of the law. It follows, therefore, that the plaintiff fails in establishing the larceny of the car by Hudson, with the result that his claim in the present action fails also. Attention was called both in the court below and in this court to the divergent views upon points which have been argued before us of the members of the court which decided *Oppenheimer v. Frazer and Wyatt* (1) and of those who decided *Whitehorn Bros. v. Davison* (6). To some extent only is it true to say that those views differed. KENNEDY, L.J., was a member of both courts. Upon the question which I have just dealt with, the President and KENNEDY, L.J., in their judgments in the first of those two cases, appear to me to express considerable sympathy with the view that upon the facts in that case a conclusion that larceny had been proved was not justified. MOULTON, L.J., no doubt took a different view. The difference of opinion on this point is, however, at most, only a difference as to the proper inference to be drawn from the facts.

I Upon the second point which was argued before us, no opinion was expressed by any member of the court in *Whitehorn Bros. v. Davison* (6). The question is whether, assuming that Hudson was guilty of larceny of the car, that fact renders it impossible that anyone can have obtained a title to the car from Hudson under the Factors Act, the argument being that no one can in those circum-

stances prove the owner's consent to the car being in Hudson's possession. The argument against this view was admirably put by Mr. Hamilton (as he then was) in *Oppenheimer v. Frazer and Wyatt* (1), but it was expressly rejected by every member of the court. The view taken by the court in that case as to the want of *bonâ fides* on the part of the purchaser of the goods rendered it unnecessary to decide the point, and the opinions of the members of the court are, therefore, I think, strictly speaking, obiter, and not binding upon us. They deserve, however, to be treated with the greatest respect, and it is only because I am unable, after full consideration, to agree with them that I venture to differ from the conclusion at which they arrived.

Section 2 of the Factors Act provides protection in statutory form to persons who, *bonâ fide* and without notice of any want of authority on the part of a mercantile agent have, among other things, purchased goods from the agent, he being in possession of the goods with the consent of the owner. I can see no reason why rules and principles of the criminal law are to be introduced for the purpose of putting a construction upon the language of the section. What the section refers to is the consent of the owner. To establish a consent it is no doubt necessary to consider what the state of mind of the owner of the goods was with reference to the possession of them by the mercantile agent. I fail to see how for this purpose, or for any purpose of applying the section, it can be material to look into the mind of the mercantile agent, any more than it would be to look into his pocket to ascertain whether he was in a position to pay for the goods. It is not universally true that no title can be obtained from a thief, as witness a sale by a thief in market overt. It is admitted that where possession of goods has been obtained by false pretences, or where a bailee has stolen them, a title by a *bonâ fide* purchaser can be made under the section. If so, why not where the goods have been stolen by a trick? The question of the guilt of the alleged thief, where his intention is all material, is as it appears to me so entirely immaterial in considering whether a title has been made under the Factors Act to the goods which it is alleged that he has stolen that the two considerations should be kept entirely distinct. To allow the one to be defeated by a consideration of the other is, in my opinion, to sweep away a great part of the protection which the Factors Act was intended to provide, and which, when incorporated into a statute, was not introducing any new principle but merely continuing one long known to the mercantile law. There may, no doubt, be cases in which an individual may have obtained possession of goods from the owner with his apparent consent, and yet without his real assent, for instance, where A. B. obtains possession of goods by representing himself to be C. D. In such a case the owner never has consented to any possession of the goods by A. B., and A. B. may be guilty of larceny if he intended to defraud. In such a case s. 2 of the Factors Act would not apply, not because A. B. was a thief, but because on looking into the owner's mind it appears that he never did consent to A. B. having any possession of the goods. The state of the mind of the latter appears to me to be quite immaterial and the question whether A. B.'s conduct amounted to larceny is beside the question.

The conclusions at which I have arrived upon the whole case are (i) that the true inference from the facts is that Hudson was not guilty of larceny of the car, and (ii) that, even if he was, it makes no difference in the result, because upon the evidence it is clear that the plaintiff did consent within the meaning of s. 2 of the Factors Act to Hudson being in possession of the car. For these reasons I think that the appeal must be allowed with costs, and the judgment for the plaintiff set aside and entered for the defendant with costs.

SCRUTTON, L.J.—This appeal raises a difficult and important question, on which there has been considerable differences of opinion among judges. The Factors Act, 1889, by s. 2, provides :

A "Where a mercantile agent is, with the consent of the owner, in possession of goods . . . any sale . . . made by him when acting in the ordinary course of business of a mercantile agent shall . . . be as valid"

as if he had express authority to make it, provided that the purchaser acts in good faith and without notice. The question is whether, if it is shown that the mercantile agent, though acquiring possession of the goods with the consent of the owner, acquired them by what amounts in the criminal law to "larceny by a trick," the actual possession by the agent or the actual consent by the owner is to be treated as non-existent, so that the conditions required by the Factors Act are not fulfilled. There is a further question whether the facts in this case constitute the offence of larceny by a trick, or only larceny by a bailee or obtaining goods by false pretences, for it is admitted that in the two latter cases the possession and consent are not invalidated and the Factors Act gives the purchaser a title.

B The facts are not in dispute. The plaintiff, Folkes, was the owner of a car. He authorised a Mr. Hudson, who (as he had notice) was a partner in a firm of Thomas H. Hudson, to sell the car for him at a price not less than £575 for a commission of £10. To enable Hudson & Co. to carry out the sale, the plaintiff handed the car over to Hudson. Hudson immediately sold it for £340 to one Alvarez, a motor car dealer in the Euston Road. Alvarez sold the car to a Mr. Simons, who in turn sold it to one Harris, who, in April, 1921, sold it to the defendant, King, for £500. The judge finds its market value to be £400. Hudson paid the price into his private account, out of which he was paying for other cars sold in a similar way, and credited his firm with £10 commission.

E While Hudson had been acting within his authority in some cases, it is quite clear that in a large number of other cases he was selling below his authorised price and using the money received for his own private purposes. It is extremely probable that in the present case he intended to do the same, though possibly the owner, if sufficiently pressing, might get his price at the expense of some other sufferer. I attach no importance to the distinction between Hudson and Hudson & Co., as the latter are affected by and responsible for the fraud of their partner. King, to get a title, must prove a title acquired by Alvarez from Hudson under the Factors Acts. It was not alleged below that Alvarez did not take from Hudson in good faith or that he took with knowledge of the excess of authority. But I think it right to say that Alvarez did take the car from Hudson without production of the book of registry. There was some suggestion of it being lost. If he had required its production, the fraud might never have been carried through. If the production of the book, or, if it was said to be lost, of a new one, was required by every purchaser, it would be very difficult to find a market for the cars which have lately been stolen in such large numbers, and the courts may have to take adverse notice of the conduct of a purchaser who does not require the production of the book of registry. On these facts the plaintiff contended that, though he handed possession of the car to Hudson intending him to sell it, as Hudson meant at the time he received it to convert the car to his own use he was guilty of larceny by a trick, which nullified the owner's consent and avoided the operation of the Factors Act. The defendant contended that, as the plaintiff handed the car to Hudson, authorising him to pass the property in it, though with certain limitations, the offence was not larceny by a trick, but larceny by a bailee or obtaining by false pretences, neither of which would prevent the operation of the Factors Act. He further contended that these artificial distinctions of the criminal law had no application to commercial transactions by operation of the Factors Acts, and that, if the owner did in fact consent to hand over possession, it was quite immaterial that for the purpose of criminal law the court would disregard the consent and the transfer of possession.

I

The state of the authorities is as follows. SIR JAMES SHAW WILLES, in *Fuentes v. Montis* (11), in an admirable judgment to which I refer without reading it, points out the effect of the Factors Acts in adding to that class of cases, such as negotiable instruments, secret limitations on an agent's ostensible authority, and sales in market overt, where a man can confer a title which he has not himself got in aid of commercial transactions which otherwise would be made too difficult by reason of the inquiries as to title involved. In *Cole v. North Western Bank* (12), BLACKBURN, J., discussing the words of the then Factors Act "agent intrusted with the possession," uses the following language (L.R. 10 C.P. at p. 373):

"So, it has been repeatedly decided that a sale or pledge of a delivery order or other document of title (not being a bill of lading) by the vendee does not defeat the unpaid vendor's rights, because the vendee is not intrusted as an agent: *Jenkyns v. Osborne* (13), *M'Ewan v. Smith* (14). And it may be observed that, in many of such cases, in which money has been advanced to the buyer on the faith of the document of title, the buyer must have been a person who carried on business as a commission merchant; yet it never seems to have occurred to anyone that that fact made any difference. So, it has been repeatedly held that, where either the goods or documents of title are obtained from the owner (not on a contract of sale good till defeated, though defeasible on account of fraud, but by some trick), a purchaser or pledgee acquires no title, for, the trickster is not 'an agent intrusted' with the possession: *Kingsford v. Merry* (9); *Hardman v. Booth* (8). Quite consistently with these latter decisions it was held, first by the Exchequer, on demurrer, in *Sheppard v. Union Bank of London* (15), and afterwards by the Court of Queen's Bench, on the facts, in *Baines v. Swainson* (10), that, if the true owner did in fact intrust the agent as an agent, though he was induced to do so by fraud, a pledge by the agent would be good."

Of the two latter cases which he cites, *Baines v. Swainson* (10) was a case where a factor obtained goods to deliver to S. by representing fraudulently he had an order from S. and then sold them to another firm, who, it was held, were protected by the Factors Act. In *Sheppard v. Union Bank of London* (15) it was held that if goods are intrusted to an agent for sale and he has possession and absolute dominion over them as agent, though he obtained it "by fraud or misrepresentation," he can give a title under the Factors Acts. These cases appear to show that BLACKBURN, J., in using the words "obtained by some trick," was thinking of cases such as *Hardman v. Booth* (8) which he cites, where the true owner actually delivered possession to A., being induced by his fraud to think he was delivering to B., cases of the class of which *Cundy v. Lindsay* (7) is an example. Next, COLLINS, L.J., in *Cahn v. Pockett's Bristol Channel Steam Packet Co.* (16), referring to and purporting to repeat the language of BLACKBURN, J., in *Cole v. North Western Bank* (12), says ([1899] 1 Q.B. at p. 659), that, however fraudulent the agent may be in obtaining actual possession, "provided it did not amount to larceny by a trick" he can give a title under the Factors Act. But the actual decision in the case was this. Under *Shepherd v. Harrison* (17), when a bill of lading with bill of exchange attached is sent by an owner to a purchaser it is sent on the terms that no property passes unless the bill of exchange is accepted. The purchaser kept the bill of lading but did not accept the bill of exchange, and sold the bill of lading to a third person. It was held that the third person got title, because the purchaser got the bill of lading with the consent of the sellers, and that the consent was not nullified because the purchaser did not assent to the terms on which it was sent. The language of COLLINS, L.J., was not necessary for the decision, and is, I think, only repeating the language of BLACKBURN, J., in reference to the cases of which that judge was speaking, cases where there was a trick preventing real assent, such as a fraudulent

A misrepresentation as to the person dealt with. I agree with the comments of CHANNELL, J., on these two cases in *Oppenheimer v. Frazer and Wyatt* (1).

Next come the two cases which create the difficulty of authority. In *Oppenheimer v. Frazer and Wyatt* (1) the true owner gave diamonds to one S., who represented he could sell them to named customers, but instead purported to sell them through one B. to Frazer, B. and Frazer being jointly interested. Frazer claimed either B the whole or half the goods by a title under the Factors Act, it being found that B. did not take in good faith. After a direction (which, with great respect to the learned judge from whom I have learnt much law, was not so clear as I have heard from him on other occasions) on the nature of larceny by a trick, the jury found that S. obtained possession by larceny by a trick. CHANNELL, J., on further consideration held (i) that larceny by a trick was immaterial unless there was such a trick as prevented the true owner from consenting to possession by that particular man, as in *Hardman v. Booth* (8); (ii) and that where there was consent to possession by the man, obtained by his fraudulent representation that he was going to fulfil the agency when he did not intend to fulfil it, the consent required by the Factors Act was not nullified and a good title could be obtained under the Factors Act; (iii) that the bad faith of B. did not interfere with the title of Frazer or prevent the Factors Act from applying. I agree with the argument of Mr. Hamilton and the judgment of CHANNELL, J., on the first two points. When the case went to the Court of Appeal all three judges agreed that the view of CHANNELL, J., that B.'s bad faith did not affect Frazer was erroneous, and that Frazer got no title under the Factors Act. After that finding SIR GORELL BARNES, P. ([1907] 2 K.B. at p. 63), said it was unnecessary to consider the other question, but he would say how it struck him. KENNEDY, L.J., said it was not necessary actually to decide the point. MOULTON, L.J., expressed a definite opinion "on the other ground on which the action failed." I think all the three judges expressed the opinion that if there was really larceny by a trick, it defeated the consent necessary for the Factors Act. MOULTON, L.J., thought there was larceny by a trick, defining it in the well-known passage (ibid. at p. 73) cited in most of the text-books. SIR GORELL BARNES, P., and KENNEDY, L.J., would have sent the case for a new trial on this question, evidently thinking the jury had not understood the distinction between larceny by a trick or by a bailee or obtaining by false pretences. KENNEDY, L.J., was inclined to agree with CHANNELL, J., that there was no larceny by a trick in that case. In these circumstances I think there was, as GREER, J., thought, no decision binding him or this court on the points in question here, though the conflicting views of the judges require, of course, most careful consideration.

Lastly, in *Whitehorn Bros. v. Davison* (6), Whitehorn gave pearls on sale or return to Bruford on the fraudulent representation that Bruford had a customer who would buy them. He had not, but promptly pledged them to Davison, who took them in good faith. The judge who tried the case told the jury that Davison must prove he took the pearls in good faith. This was held a misdirection as to the burden of proof, and KENNEDY, L.J., would have granted only a new trial, but VAUGHAN WILLIAMS, and BUCKLEY, L.J.J., held there was no evidence on which the jury could find lack of good faith in Davison, and entered judgment for him on the ground that the subsequent transaction was an out and out sale to Bruford, who could therefore pass title. But they went on to express opinions obiter that there was no evidence of larceny by a trick displacing consent of the true owner to Bruford's possession. VAUGHAN WILLIAMS, L.J., said he would have had great difficulty in holding there was larceny by a trick when possession was obtained under a contract for the purpose of selling to a customer. BUCKLEY, L.J., thought that where the owner intends to confer on an actual person possession and a power to pass property, even if induced by a trick to do so, the offence is false pretences and not larceny by a trick. You do not, he

said, "steal" a power to dispose of a chattel, though you may obtain that power by false pretences. KENNEDY, L.J., repeated in rather more emphatic terms his view in *Oppenheimer v. Frazer and Wyatt* (1), now agreeing with CHANNELL, J., that a bailment and delivery for the purpose of the person to whom the article was delivered himself exercising a disposing power over the property, though obtained with a fraudulent intention to use the power for his own purposes, was, not larceny by a trick, but obtaining by false pretences.

I agree with GREER, J., that these statements also, were obiter though entitled to the greatest consideration, and that we are at liberty to express our own views. I proceed to do so. First on the question whether to prove larceny by a trick is a defence to the Factors Act as excluding consent of the true owner, I can understand that where by a trick there is error in the person there is no true consent, and the Factors Act is excluded. But where there is agreement on the person and the true owner intends to give him possession, it does not seem to me that the fact that the person apparently agreeing to agency really means to disregard the agency and act for his own benefit destroys the consent of the true owner under the Factors Act. That Act intended to protect a purchaser in good faith carrying out an ordinary mercantile transaction with a person in the position of a mercantile agent. It does not do so completely, for it requires the purchaser to prove that the goods were in possession of the mercantile agent "with the consent of the true owner." But it does not require the purchaser in addition to prove that the mercantile agent agreed both openly and secretly, ostensibly and really, to the terms on which the true owner transferred possession to the mercantile agent. It appears to me to be enough to show that the true owner did intentionally deposit in the hands of that mercantile agent the goods in question. It is admitted that if he was induced to deposit the goods by a fraudulent misrepresentation as to external facts, he has yet consented to give possession and the Factors Act applies, but it is argued that if he deposits the goods in the possession of an agent who secretly intends to break his contract of agency the Factors Act does not apply. I do not think Parliament had any intention of applying the artificial distinctions of the criminal law to a commercial transaction, defeating it if there were larceny by a trick, but not if there were only larceny by a bailee or possession obtained by false pretences. I do not quite understand the view that there must be "consent in law," and if there is no contract there is no consent. There may be consent to a state of facts without any contract at all. The history of the Factors Acts is restriction of their language by the courts in favour of the true owner, followed by reversal of the courts' decisions by the legislature. WILLES, J.'s, decision in *Fuentes v. Montis* (11), that where the owner had revoked his consent to the agency the Factors Acts did not apply, was nullified by legislation reproduced in s. 2 (2) of the Act of 1889, and there are numerous other instances of the same tendency. The purport of the Act seems to be that an ostensible mercantile agent ostensibly in possession of goods can give a good title in the ordinary course of business to a bona fide purchaser, provided that he proves that the owner intended that man to have possession of the goods.

For these reasons I think the question of larceny by a trick of the sort suggested in this case was immaterial, and did not prevent the operation of the Factors Act. But there is further the question whether the facts in this case constitute larceny by a trick. On this point I take the view taken by CHANNELL, J., VAUGHAN WILLIAMS, and KENNEDY, L.J.J., all very experienced in trying criminal cases, that where an owner delivers goods to an agent, intending not only that he shall have possession, but that he shall dispose of the property, it is immaterial that the agent, ostensibly agreeing to the contract of agency, yet secretly intends to disregard it. The definition by MOULTON, L.J., in *Oppenheimer*

A *v. Frazer and Wyatt* (1) ([1907] 2 K.B. at p. 73), "a trick employed by a person animo furandi inducing the owner to part with possession, not intending to pass the property," should be revised by excluding cases where the principal intended that the agent to whom he gave possession should have power to pass the property. Such cases are either larceny by a bailee, or obtaining goods by false pretences, similar to the long firm cases, or the cases where a customer sits down in a restaurant, obtains a meal, and then refuses to pay. The offence commonly called larceny by a trick was supported by judicial decisions at a time when larceny by a bailee was not an offence, that is, before the Larceny Act, 1861, creating the offence of larceny by a bailee. A bailee being in possession by consent of the owner could not at common law deprive the owner of possession so as to commit larceny. The judges met this difficulty, as stated by HAWKINS in *PLEAS OF THE CROWN*, vol. i, ch. 19, s. 14 [Leach's Edn., p. 210; Curwood's Edn., p. 145], by holding that where the goods were obtained with a preconcerted design to steal them, the possession was supposed to continue with the true owner whatever might be the means or the pretence under which the goods were obtained. HAWKINS used the word "property" instead of "goods," but he is not, I think, referring to legal rights, but physical things, as it is clear that, if the legal property passes, dealing with it is not larceny. SIR JAMES FITZSTEPHEN in his *DIGEST OF THE CRIMINAL LAW* (5th Edn.) p. 259, art. 324, defined the offence thus :

E "Theft may be committed by fraudulently obtaining from the owner a transfer of the possession of a thing, the owner intending to reserve to himself his property therein, and the offender intending, at the time when the possession is obtained, to convert the thing without the owner's consent to such conversion."

The consolidating statute, the Larceny Act, 1916, is not helpful in the matter, as it includes in "taking" "obtaining the possession by any trick" without defining "a trick" or distinguishing "obtaining possession and property by a fraudulent pretence." GREER, J., substantially follows MOULTON, L.J.'s, definition and includes in larceny by a trick cases where the owner intended the agent to have limited power to pass the property. In the present case, if the agent had sold for the authorised price, as no doubt he intended to do if he could get the price, but then appropriated the price to himself, intending to do so from the start, I cannot conceive that he would not pass property in the car. I think the position is the same if the owner gives the agent power to dispose of the property in certain events only, the limitation of authority being secret. But this second point it is not necessary to decide if I am right in my first view that, even if this kind of facts does constitute larceny by a trick, it does not defeat the operation of the Factors Act. That is my view, and, in my opinion, therefore, the appeal should be allowed with costs and the judgment for the plaintiff for £400 with costs set aside, and judgment entered for the defendant with costs.

H **EYE, J.**—The question involved in this action is which of two innocent persons is to suffer for the fraudulent conduct of a third. [HIS LORDSHIP stated the facts.] No reflection is made on the *bonâ fides* of Alvarez, who was well acquainted with Hudson and had bought a number of cars from him prior to this transaction, or on those of the defendant or the intermediate purchasers, and, if the matter rested there, it cannot be doubted that the defendant's title would be unassailable and this action brought to recover the car must fail. Section 2 of the Factors Act, 1889, would be a complete answer to any claim by the plaintiff to impeach the transaction between Hudson and Alvarez, and his remedy for breach of his instructions not to sell for less than £575 would be restricted to the recovery of damages from his agents, Hudson's firm. But it is argued on behalf of the plaintiff that the circumstances in which Hudson became possessed of the car establish larceny by a trick on his part and that a person who has so obtained possession of goods cannot be held to be in possession of them with the consent

of the owner. The circumstances relied on are that at the material time Hudson had ceased to carry on any genuine business as a motor car dealer and had embarked on a criminal career—getting possession of cars on the representation that he could readily dispose of them, but selling them at once for what he could obtain for them and pocketing the proceeds in fraud not only of the owner of the car but also of his partner or partners. It appears from the evidence that at the time when the plaintiff's car was delivered to him or his firm these tactics had been resorted to in some fifty cases, and that Hudson was in desperate straits for money wherewith to meet cheques drawn to satisfy the demands of owners of cars previously disposed of by him. Assuming the proper inference to be drawn from the evidence is that Hudson was obtaining possession of the car with the deliberate and preconceived intent to steal it, was the transaction larceny by a trick? I think not, in a civil proceeding. I do not presume to offer an opinion whether it might not be so in criminal proceedings wherein the intent of the recipient may be a relevant factor. But here the plaintiff's own evidence is that he took the car to Hudson for the purpose of his selling it as soon as possible; in other words, he voluntarily parted with the possession of it intending to confer a power on Hudson to pass the property to anyone willing to give £575 for the car. It may well be that he was induced to do this in the belief, engendered by the letters which he received, that Hudson and his firm were carrying on a legitimate business, and in that sense possession of the car may be said to have been obtained by a trick, but not by larceny by a trick—possibly by false pretences if anything. I think the facts of the case bring it entirely within the decision of this court in *Whitehorn Bros. v. Davison* (6), and the extracts from the judgment of KENNEDY, L.J., in that case, which I am about to read, appear to me to apply exactly to the present case. The lord justice says ([1911] 1 K.B. at p. 485):

"I do not think that a case such as this, where, even on the plaintiff's view, there was a bailment and delivery, and not that alone, but a bailment and delivery for the purpose of the person to whom the article was delivered himself exercising a disposing power over the property, can be properly described for the purposes of such an action as the present as larceny by a trick, resulting in a void, and not a merely voidable contract. . . . Not only was the possession parted with, but a right was also given to the bailee to confer the property in the article on a third person."

I think the appeal should be allowed and the action be dismissed.

Appeal allowed.

Solicitors: *Newton G. Driver; Castle & Co.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

Re CHILD VILLIERS' APPLICATION. VILLIERS AND
ANOTHER v. ATTORNEY-GENERAL

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.),
January 23, 24, 1922]

[Reported [1922] 1 Ch. 394; 91 L.J.Ch. 473; 126 L.T. 555; 38 T.L.R. 291;
66 Sol. Jo. 266]

*Charity—Charity Commissioners—Exemption from jurisdiction—Mixed charity
—Time for determining nature of charity—Charitable Trusts Act, 1853 (16
& 17 Vict., c. 137), s. 62.*

By s. 62 of the Charitable Trusts Act, 1853: “. . . no donation or bequest unto or in trust for any [mixed] charity, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied . . . as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the [Charity Commissioners], or the powers or provisions of this Act. . . .”

Land within the area of compulsory registration under the Land Transfer Acts, 1875 and 1897, was conveyed to the trustees of a charity which had recently been established for general charitable purposes. There were no directions as to any “special application or appropriation” of the gift, and the land, or, if sold, its value, might be used by the trustees as income of the charity. At the time of conveyance the trustees of the charity had never received any gift or endowment apart from the land or any voluntary contributions, but later and before the matter came before the court a number of voluntary subscriptions and donations were received. When the trustees applied for registration of the land, the Acting Chief Registrar refused to register the title without the consent of the Charity Commissioners, and intimated that a restriction must be placed upon the register against dealing with the property in the future without that consent. On an appeal by the trustees,

Held: the time to determine whether or not the charity was a “mixed charity” and so bring it within the relevant provision of s. 62 was when the conveyance which it was sought to register was made and not when the application for registration was made or the matter came before the court; while it was true that the gift of the land was made voluntarily, that gift could not constitute the charity a charity “wholly maintained by voluntary contributions” within s. 62 as otherwise the Act could never apply to a newly founded charity; and, therefore, when the gift was made the charity was not a mixed charity and was not entitled to exemption from registration.

Notes. Applied: *Re Shakespeare Memorial Trust, Lytton v. A.-G.*, [1923] All E.R. Rep. 106.

As to the jurisdiction of the Charity Commissioners over the charities see 4 HALSBURY'S LAWS (3rd Edn.) 423 et seq.; and for cases see 8 DIGEST (Repl.) 510 et seq. For Charitable Trusts Act, 1853, see 2 HALSBURY'S STATUTES (2nd Edn.) 838.

Cases referred to:

- (1) *A.-G. v. Mathieson, Re Wilkinson and Fell's Contract*, [1907] 2 Ch. 383; 76 L.J.Ch. 682; 97 L.T. 450; 23 T.L.R. 754, C.A.; 8 Digest (Repl.) 476, 1792.
- (2) *Re Clergy Orphan Corpn.*, [1894] 3 Ch. 145; 64 L.J.Ch. 66; 71 L.T. 450; 43 W.R. 150; 10 T.L.R. 672; 38 Sol. Jo. 695; 7 R. 549, C.A.; 8 Digest (Repl.) 476, 1796.

Appeal from an order of PETERSON, J.

By an indenture dated Feb. 22, 1921, executed by the respondent, Arthur G. Child Villiers, it was recited that it was contemplated that he and other persons

might from time to time make voluntary subscriptions or donations of lands, stocks, moneys, and securities for the benefit of general charitable purposes in aid of or in addition to such voluntary subscriptions as might be received to be held by the trustees (who were Mr. Villiers and Gerald C. Wellesley) upon the trusts therein declared. The capital and income were to be applied as the trustee might think fit, and were not directed to be applied to any special purpose. On Mar. 17, 1921, two gifts of land were made to the charity, the first of freehold land at Leyton and the latter of freehold land at Shoreditch, within the area of compulsory registration under the Land Transfer Acts, 1875 and 1897, and both were conveyed to the trustees upon trusts declared by the deed. At that time no voluntary subscriptions or donations had been received by the trustees, but shortly afterwards several sums were received as such, including a donation in money from Mr. Villiers himself. Later, an application was made to register the land, but the Acting Chief Registrar decided that before granting registration he must be satisfied that the consent of the Charity Commissioners had been obtained, and he further intimated that a restriction would be entered upon the register against further dealing with the property without that consent. The trustees appealed, contending that the charity, being supported partly by endowment and partly by voluntary contribution, was a "mixed charity," and exempt from the jurisdiction of the commissioners under s. 62 of the Charitable Trusts Act, 1853, the material parts of which are as follows:

"This Act shall not extend to . . . any institution, establishment, or society for religious or other charitable purposes . . . wholly maintained by voluntary contributions . . . and where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the [Charity Commissioners] . . ."

PETERSON, J., said that the question was not whether the charity was at the date of the gift a mixed charity, but whether the charity to which the donation had been made was now a mixed charity, and the donation of the land in question came within the operation of the proviso and was exempt from the jurisdiction of the Charity Commissioners, with the result that the transfer ought to be registered without the restriction in favour of the commissioners. The Attorney-General appealed.

Tomlin, K.C. and Dighton Pollock for the Attorney-General.

C. A. Bennett for the trustees.

LORD STERNDALÉ, M.R., stated the facts and continued: The question arises: Is this property exempt from the jurisdiction of the commissioners, and are the trustees entitled to deal with it without the sanction of the commissioners? If it be, then the restriction which the officials of the land registry wished to put upon the registration is wrong; if it be not exempted, that restriction is right. In my opinion, that depends upon the proper construction of s. 62. That is a section which exempts certain charities from the jurisdiction of the commissioners. As I have said, this was an endowed charity, in my opinion, as soon as it got the land at Leyton at any rate. Before that I do not know that it can be said to have any existence at all. As an endowed charity it came under the jurisdiction of the commissioners unless there is something in s. 62 to take it out, and, in order to see whether there is, it is necessary to look at the terms. I do not

A propose to read them all. It is a very long section, and I do not propose to comment upon its wording. It has had a good deal of vituperation applied to it by other judges, and I do not see any reason for adding to it. It begins with exempting certain institutions like the universities of Oxford and Cambridge and other places. It then goes on to exempt Queen Anne's Bounty and the British Museum and a few other places of that kind. Then it says

B "or any friendly or benefit society, or savings bank, or any institution, establishment, or society for religious or other charitable purposes, or to the auxiliary or branch associations connected therewith, wholly maintained by voluntary contributions, or any bookselling or publishing business carried on by or under the direction of any society wholly or partially exempted from this Act, so far as such business is or shall be carried on by means of voluntary contributions only."

C I have already said that, in my opinion, this was not wholly maintained by voluntary contributions, because until it got the land at Leyton, it was not maintained by anything, and after that the only source of maintenance it had was that land, and it was not until some considerable time later that some voluntary subscriptions came in, and when the voluntary subscriptions came in it obviously was not wholly maintained by them. That was after the conveyance of the land with which we have to deal, and, therefore, I think it is immaterial. It does not, in my opinion, come under that, and, therefore, to come within any part of the section it must come within this :

E ". . . and where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof,"

F which would include the investments which had been made with the voluntary subscriptions. Was this charity partly maintained by an endowment and partly by voluntary subscriptions? As I have said, I think it was, after those subscriptions were given. The section goes on :

G ". . . and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this Act."

H Therefore, if I may take the language of LORD COZENS HARDY, M.R., in *A.-G. v. Mathieson* (1) in order to bring it within the section one has to have certain requisites. In the first place one starts with its being an endowed charity, because one wants to see whether an endowed charity is exempt or not. Then in the second place, as he says,

I "no charity can claim the benefit of the particular clause which was construed in *Re Clergy Orphan Corpn.* (2) . . . unless it is a charity maintained partly by voluntary subscriptions, and partly by income arising from endowments. In other words, it must be what has been called a 'mixed charity.' "

As I have said, I think this was such a mixed charity from the time when the voluntary contributions were given, at the time when the application to register was made, at the time when the matter was considered by PETERSON, J., and now. The Master of the Rolls goes on :

"In the third place, in the case of a mixed charity, a donation which would otherwise be an endowment of which no special application or appropriation

shall be directed or declared by the donor, and which may be legally applied as income in aid of voluntary subscriptions, is not subject to the Act."

We have that here. This land is held on those terms. LORD COZENS HARDY continues:

"In the fourth place, so long as property which may be applied as income is invested, whether in real or personal property, so that it is still legally competent to the governing body to convert the investment into money and apply that money as income, such investment will in like manner be exempt from the Act."

I think the Master of the Rolls was only repeating what had been laid down as necessary by LORD DAVEY in the *Clergy Orphan Corpn. Case* (2). I apply that to the present matter. We have here a mixed charity, which became so some months after this transaction. We have a bequest or donation to that charity which is applicable in the way that is necessary for exemption under the Act.

I agree with what PETERSON, J., said in his judgment, that the one and only question in the case is at what time is one to look at the position of the charity in order to see whether it is a mixed charity or not? If it be not a mixed charity at that time, whatever that time may be, the first requisite of its exemption does not exist. Reading the section, I should have thought, but for the respect with which I treat PETERSON, J.'s, judgment, that it was pretty clear.

"And where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof . . ."

I should have thought it was abundantly clear that that charity must satisfy the condition of being "such charity as last aforesaid" at the time that the donation or bequest was made. That was not, I think, the date which was taken by the officials of the Land Registry. They took the time of application. The time of application was a purely arbitrary thing, and I do not think could possibly have been contemplated, but on the words of the Act I can see no reasonable construction of it except this. It speaks of a donation or bequest "unto or in trust for any such charity as last aforesaid." It must mean that the charity shall possess that character and satisfy that requirement at the time the donation or bequest is made. The learned judge has construed it as meaning at the time when the matter comes under the consideration of the court. I cannot think that that is so. Counsel for the trustees very frankly admitted that he had great difficulty with the words of the Act, but he said that they were controlled by certain authorities. Of course, where there is a question of registration, the matter must come under the notice of the court pretty early, because the controversy would arise as soon as the application for registration was made, but if the land be situated in any part of the country where registration is not necessary, the matter may not come under the notice of the court for five, ten, fifteen, twenty or even fifty years. When the trustees of the charity attempt to dispose of the land, the question may arise, because the purchaser may take an objection, or it may arise in a number of other ways. During that long course of years the charity may have changed its nature. It may have become a mixed charity, and ceased to be a mixed charity, and become a mixed charity again several times, and I cannot think that these plain words can ever have been meant to be capable of the construction which has been put on them. The learned judge alludes to very great difficulties that might arise in putting the construction upon the Act which I think is the right one. He does not specify that, but I cannot think that they could produce results so very curious as the results which would

A be produced from fixing—not a date which can be very easily arrived at—but a date which is dependent upon any number of accidents and merely upon the volition of the trustees as to the time at which they wish to dispose of their land. But I really, if I may say so with the greatest respect, care very little indeed about what consequences may be produced by one or other construction of the Act. What I have to do, I think, is to look at the Act and see what the Act says. In my opinion, it says, as clearly as words can do without putting it into exact language, that the time to be looked at is the time when the donation or bequest is made because it is a donation or bequest to “such charity as last aforesaid”; that is to say, a charity maintained in the way I have said, partly by voluntary contributions and partly otherwise.

C For those reasons I think the judgment was wrong, because I think it is perfectly clear that this was not a mixed charity, as it is called for shortness, at the time when the donation or bequest was made. I said that I should deal very shortly with the authorities upon which counsel for the respondent relies. He admits that none of these cases raises the point at all, but he says that, looking at the judgments as they are given, we must take it that, if the point had been raised, it would have been decided contrary to the way in which I am now deciding it. I confess I cannot attach any importance to that. In all the cases the question was not only not under the consideration directly of the court, but, as far as I can see, it never was raised in any form by either side, and I cannot accept as a sort of proposition, as I think was stated by YOUNGER, L.J., the words being pretty plain in the section itself, that we must assume that the judges who gave those judgments would have departed from the plain meaning of the words, because they have said nothing about it in cases in which the point was not raised. It seems to me that those authorities have no bearing upon the point, and we are left to decide it as a new point, and, deciding it as a new point, I have come to the conclusion that it should be decided as I have said, and that the appeal should be allowed.

F **WARRINGTON, L.J.**, stated the facts and continued: I come to consider the question—Was that endowed charity one to which the Act shall not extend? Section 62 provides:

“This Act shall not extend to . . . any institution, establishment, or society for religious or other charitable purposes . . . wholly maintained by voluntary contributions. . . .”

G It is impossible to say that this was a charity wholly maintained by voluntary contributions, for there were at this time no voluntary contributions being received at all. It is perfectly true that the original endowment was given voluntarily, but that cannot be included for this purpose in the expression “wholly maintained by voluntary contributions,” otherwise the Act could never apply to a charity at all, or certainly not to a newly founded one. It seems to me, therefore, that the charity, at the time this conveyance with which we have to deal, which was dated Mar. 17, 1921, was made, was a charity to which the Act extended, because it was an endowed charity, and not one maintained wholly by voluntary contributions. If it were maintained at all, it was maintained by the rents and profits of this land, if there had been any, but it was either not maintained at all or it was certainly not maintained by voluntary contributions. The conveyance of Mar. 17 was of land which happened to be subject to the compulsory registration provisions, and it is by reason of that fact that the question comes before us in the form in which it is. With reference to that land the question is a different one. It is not whether the Act extends to the charity; that question I have already answered in the affirmative, but it is whether that land is a donation or bequest not subject to the jurisdiction of the commissioners. Those are words which appear in a later part of the section. They appear in this context.

"... where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the [commissioners], or the powers or provision of this Act..."

This land was conveyed to the trustees, and the trusts to which it is subject enabled the trustees to dispose both of capital and of income for the purposes of their charity. So far it satisfies the definition of the donation or bequest which is not to be subject to the jurisdiction or control of the commissioners. But is the previous part of the definition satisfied? That is "no donation or bequest unto or in trust for any such charity as last aforesaid." The charity "last aforesaid" is a charity which is maintained partly by voluntary contributions, and partly by income arising from any endowment. At the date when this conveyance was made, as I have already said, there were no voluntary contributions, and, therefore, the charity was not at that time maintained partly by voluntary contributions. If it were maintained at all, it was maintained by the income of the endowment.

It would, therefore, seem, so far, to be clear that this property is not such a donation or bequest as is mentioned in the Act, but it is said, and PETERSON, J., adopted the argument that in order to obtain exemption by this part of the section it is enough if you show that at the time when the matter comes up for decision the charity is one maintained partly by the income of the endowment, and partly by voluntary contributions. It is from that view of PETERSON, J., that I venture to differ. How can it possibly depend upon a perfectly uncertain period at which the question may come up whether a donation made to a charity answers a certain description? PETERSON, J., has alluded to some absurd results which might follow from the view which the Master of the Rolls has expressed, and which I am about to express, but he has neglected to notice the equally absurd results which might follow from such a view as he has expressed. For example, supposing this court were to come to a conclusion that on this day, Jan. 24, 1922, the institution was not partly maintained by voluntary subscriptions, and a man were to-morrow to make a subscription of one guinea, they could then go to the House of Lords and obtain a reversal of this judgment, not because the judgment was incorrect when it was pronounced, but because something had happened since to make it incorrect. So one may put any number of extraordinary consequences which would flow from adopting any such uncertain period as the time when either the question comes up for decision by the court, or, as respondent's counsel preferred to put it, the time when the trustees want to dispose of the property in question. In truth, when one talks of making a gift to a person or number of persons answering a certain description, surely it means answering that description at the time the gift is made? Counsel for the trustees indeed admitted that on the words of the section, unobscured by subsequent authority or decision, that would be the correct conclusion to arrive at, but he said that certain decisions had obscured the plain meaning of the words taken by themselves. In my opinion, they have done no such thing, for the simple reason that the question which we have to decide did not come up before the court in those cases at all. The conclusion I have arrived at is that this charity is not one to which the Act does not extend, nor is this particular property of the charity one which by the provisions of s. 62 is exempt from the jurisdiction and control of the board. The result is that, in my opinion, the appeal succeeds.

- A YOUNGER, L.J.**—I confess that this case presents itself to my mind as one of great difficulty, because I am very conscious of the inconvenient results which would appear to follow from any decision that may be given with reference to it. I feel with my Lord and the lord justice that there are serious inconveniences following the view expressed by the learned judge, and I wish I could feel confident that the inconveniences which flow from the decision of this court are less serious.
- B** The inconveniences arise, I think, from the fact that the court is bound on the true construction of this Act which previous authorities have placed on its relevant provisions.

The word "endowment" as defined in s. 66 of the Act of 1853, and as interpreted by LORD DAVEY in the *Clergy Orphan Case* (2), is a word of the widest signification, and I could well have understood that, however wide that interpretation was, the legislature had thought it right to provide by this statute that all endowments to a charity, and their disposition, were to be in some sense under the control or supervision of the Charity Commissioners who were appointed under the statute. But the difficulty of the case arises from the fact that the legislature has not thought fit so to provide, and it is undoubtedly true that in the case of some charities an endowment for general purposes, the corpus as well as the income of which is legally applicable to the maintenance of the charity, is not subject to the jurisdiction of the commissioners. The difficulty one is in when one finds that there are some charities possessing an endowment of that character which are at liberty to dispose of it as they will without any external control is to ascertain why the same power with reference to similar endowments is not given to all charities, and that is the question which arises in this case.

E It is agreed that, on the evidence filed in this case, and on the effect of it as accepted by both sides, this charity to-day is a mixed charity, and that if Mr. Villiers were minded to convey to-day to this charity real estate in the identical terms in which the real estate now in question was conveyed to it at an earlier date the trustees would be entitled to have that conveyance registered free from restriction. One asks oneself the question: Is there any intelligible reason, apart from the words of the Act, why the right which the trustees in that event would have with reference to property then and so conveyed should not equally extend to their application now to have this particular conveyance to themselves as trustees registered with the same freedom from restriction? I think myself that, presenting the case in that way, if one is bound to accept the view that such liberty was not being permitted to any charity other than a mixed charity, one is perhaps led to the view that the learned judge took, namely, that no such restriction would be imposed on the registration irrespective of the position of the charity at the date of conveyance if the charity had in point of fact become a mixed charity when the application to register was made, or when, putting it in definite words, the question actually does arise, and I think that is so, for this reason. Impliedly, although, perhaps, never expressly stated, the construction from that point of view which is put on s. 62 of the Act in this respect is this: True it is that according to the terms of that section it is only in respect of "such charity as last aforesaid," that is to say, a mixed charity, that this provision is inserted. The reason why it is so inserted with reference to that charity alone is that until the charity did become a mixed charity there was no difference in the way in which the property could be disposed of by the trustees when there had been no declaration made by the donor and the way in which any of the other property of that charity could be disposed of, because until the charity became a mixed charity the assumption would be that all its property could be disposed of, both as to corpus and income, unless there is something to the contrary, as the trustees might think fit, but if the conveyance be made to trustees of a mixed charity, then, inasmuch as a mixed charity involves that it is partly maintained by the income, it does not become necessary to make plain whether

the property so transferred to the trustees is to be dealt with in that sense as if it were an endowment the income of which only was to be so applied, or is to be left free to be disposed of as if it were the proceeds of subscriptions. The section says in that case the latter is to be right unless the contrary is stated. That is really what it comes to. I think that is the implied construction of the section which would be relied upon by those who say that the date when the question is raised is the proper date, because it is then that the question arises, and one has to see whether this particular property, being part of the property of the charity, may or may not be freely disposed of, and that one has to see by reference to the provisions of this part of the Act. I should have thought myself that it might be possible to say that was the true construction of s. 62, if I could find authority for the proposition for which I have been searching all through the argument, namely, that in the case of a charity that is not a mixed charity, it is permissible for the trustees who hold an endowment for general purposes, the corpus as well as the income of which may be applied for charitable purposes to dispose of that endowment if it be invested in real estate without obtaining the consent of the commissioners. Counsel for the trustees was not able to produce any authority to that effect, and I have myself been unable to discover any, although in the interests of good sense I should have desired very much to do so.

I must, therefore, deal with this case upon the footing that that which is, I think, the implied understanding of those who support the view of the learned judges' construction of this section is not to be justified on any authority, and accordingly one has to construe s. 62 without reference to it. My lord and the lord justice arrived at the conclusion that on the words of that section and on the words of the section alone, there is sufficient to point to this, that the moment at which it has to be ascertained whether the charity to which this conveyance has been made is or is not a mixed charity is the moment at which the conveyance is made, and inasmuch as it is agreed that the moment this conveyance in question was made to the trustees the charity was not a mixed charity, it would follow on that view that this property is not entitled to the exemption which would have been given by s. 62 to that property had it been at that moment conveyed to trustees of a mixed charity. Accordingly, I agree on that point in thinking that this appeal must be allowed.

Appeal allowed.

Solicitors : *Treasury Solicitor ; Slaughter & May.*

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

A

Re FARROW'S BANK, LTD.

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), October 19, 1922]

[Reported [1923] 1 Ch. 41; 92 L.J.Ch. 153; 128 L.T. 332; 67 Sol. Jo. 78; [1925] B. & C.R. 8]

B

Bank—Holder for value of cheque paid in by customer—Cheque credited to customer before clearance—Debtor to customer—Cheque paid in by customer and sent for clearing—Bank customer's clearing agent and not debtor until cheque finally cleared—Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 82—Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17), s. 1.

C

On Dec. 16, 1920, V. paid into a country branch of F. Bank, of which he was a customer, to his current account a crossed cheque. The country branch credited the cheque to V.'s account immediately upon it being paid in, and on Dec. 17 V. drew a cheque against the proceeds, but there was no arrangement between V. and F. Bank that he should draw against an uncleared cheque, and there was a note in V.'s paying-in book that the proceeds of remittances would only be available after receipt of the same by the bank. The first-named cheque was in due course cleared at 12.30 p.m. on Dec. 20 by the clearing agents of F. Bank who then held the proceeds in their hands as agents of the F. Bank. On that day the F. Bank had suspended payment and had not opened its doors, and at 2.30 p.m. the bank presented a petition for winding-up, upon which an order for compulsory winding-up was made.

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E

Held: (i) although the F. Bank had credited V. with the amount of the cheque on the day on which it was received, the bank were not holders for value; (ii) the proceeds of the cheque were not received by the F. Bank, and their capacity did not change from that of collecting agents acting on behalf of their principal, V., to that of debtors to a creditor, until the cheque was finally cleared on Dec. 20; that clearance took place after the bank had ceased to operate as a bank; and, therefore, the liquidator in the winding-up must pay to V. the full amount of the cheque out of the assets of the bank.

F

Notes. Section 82 of the Bills of Exchange Act, 1882, and s. 1 of the Bills of Exchange (Crossed Cheques) Act, 1906, have been replaced by s. 4 of the Cheques Act, 1957.

G

As to the position of a banker crediting a cheque to a customer's account before receiving the proceeds see 2 HALSBURY'S LAWS (3rd Edn.) 185, 194; and for cases see 3 DIGEST 168 et seq. For Cheques Act, 1957, see 37 HALSBURY'S STATUTES (2nd Edn.) 51.

Appeal from an order of ASTBURY, J., made on an adjourned summons, taken out by the liquidator in the winding-up of Farrow's Bank, Ltd.

H

On Dec. 16, 1920, H. J. Voyce paid into his account with the Birmingham branch of Farrow's Bank, Ltd., a crossed cheque drawn to his order on the West Bromwich branch of the London Joint City and Midland Bank. On payment in of the cheque Farrow's Bank credited his account in the books of the Birmingham branch with £1,493 15s. 2d., the amount of the cheque, but Voyce did not know of this. The head office of Farrow's Bank was in London, but the bank was not a member of the Clearing House, and on Dec. 17 the cheque was sent in the usual course of business to Barclay's Bank, who acted as their clearing agents. On Dec. 18, which was a Saturday, the West Bromwich branch of the City and Midland Bank debited the drawer's account with the amount of the cheque, and informed their head office in London that the cheque was cleared. On Monday, Dec. 20, the head office settled at the Clearing House with Barclay's Bank, as agents for Farrow's Bank, and at 12.30 p.m. on that day the money was available as cash in the hands of Barclay's Bank. On Dec. 20, however, Farrow's Bank did not open its doors for business, but suspended payment,

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having done no business after Saturday, Dec. 18. At 2.30 p.m. on Dec. 20 Farrow's Bank presented a petition for winding-up, upon which an order for compulsory winding-up was made. In Voyce's pass book at the Birmingham branch of Farrow's Bank the following notice was printed:

"Current accounts are opened on the terms usually adopted by bankers. The bank will not be responsible for any cheques, bills, notes, coupons, or securities, forwarded by post for collection or acceptance, nor for any delay which may arise. Proceeds of remittances will only be available after receipt of the same by the bank."

There was a note upon the paying-in slip as follows:

"Customers are respectfully informed that the bank reserves to itself the right at its discretion to defer payments of cheques drawn against uncleared effects which may have been credited to the account."

The official receiver, as liquidator in the winding-up of Farrow's Bank, issued this summons for directions whether he should pay to Voyce a dividend on the amount of the cheque with other creditor, or whether Voyce was entitled to be paid in full, the question being whether Farrow's Bank was in possession of the cheque as holders for value or only as collectors for Voyce until the cheque was cleared. In his affidavit the liquidator said that all arrivals of cash at Farrow's Bank on the Monday had been returned. Voyce in his affidavit stated: "No arrangement has ever been made or has ever existed between the bank and me whereby cheques paid in shall become the property of the bank, or whereby I should obtain the benefit of immediate credit for any cheques paid in by me to the bank." It appeared that on Dec. 17 Voyce had in fact drawn a cheque against the amount of the cheque paid in. One Hodgkinson, who, prior to the winding-up order, was the chief cashier of Farrow's Bank at the head office, in an affidavit stated as follows: "In accordance with the usual practice of the bank the credit slip and the counterfoil would be initialled by the cashier; the counterfoil would be returned, and [Voyce] would be credited in the books of the bank with the amount of the cheque. Had he been overdrawn he would have been credited with the amount of the cheque before calculating interest on his overdraft, but cheques drawn by him against the sum so credited would not as a rule be paid until the third day after the date of payment in."

By the Bills of Exchange Act, 1882, s. 82:

"Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the bank shall not incur any liability to the true owner of a cheque by reason only of having received such payment."

By the Bills of Exchange (Crossed Cheques) Act, 1906, s. 1:

"A banker receives payment of a crossed cheque for a customer within the meaning of s. 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

In giving judgment, ASTBURY, J., said that there were two questions to be determined on this summons—(i) whether the bank took the cheque as a holder for value on Dec. 16 or whether it received it, according to the more usual practice of bankers, for collection; (ii) if it received it for collection, did the bank so collect the money as to convert the relationship between it and Voyce from that of principal and agent into that of debtor and creditor?

On the first point he held that the bank became agents for collection in respect of the cheque in question, and not holders of the cheque for value. On the second point he said that after the bank had ceased to act as a going concern and had stated

- A its intention that it was not going any longer to act as a going concern, it had no longer any authority from Voyce to take what was in fact his money received after the stoppage and convert it into money forming part of the bank's assets, in respect of which they were entitled to assume the position of debtors instead of agents. Those moneys, therefore, never were in fact collected by Farrow's Bank at a time when they were entitled to claim them as part of their assets.
- B There must be a declaration that the liquidator must pay out of the assets the full amount of the cheque in question. The liquidator appealed.

Topham, K.C. and Cohen for the liquidator.

Micklem, K.C. and Bischoff for the respondent, Voyce.

- LORD STERNDALE, M.R.**—This is an appeal from a judgment of **ASTBURY, J.**, on a question arising in the liquidation of Farrow's Bank. I will take the facts as stated in the affidavit of Mr. Drysdale. "On Dec. 16, 1920, Mr. H. J. Voyce paid into the Birmingham branch of the bank a cheque for £1,493 15s. 2d. payable to him or his order and drawn on the London Joint City and Midland Bank, West Bromwich. On the same day the Birmingham branch remitted this cheque with others amounting altogether to £2,310 19s. 2d. to Barclay's Bank, Fenchurch Street, for clearance," the meaning of that being that Farrow's Bank are not one of the clearing banks, but employ as their clearing agents Barclay's Bank. "On Dec. 17, 1920, Barclay's Bank received these cheques for clearance and gave credit for £2,310 19s. 2d. to the head office of Farrow's Bank on the clearance sheet for that day. Such credit was given subject to recourse in the event of the non-payment of the cheques." There is nothing to show any communication between Barclay's Bank and Farrow's Bank with regard to that, but I shall assume that Farrow's Bank would know that Barclay's Bank would give them credit in that way for all cheques received upon the clearance sheet. "On the same day Barclay's Bank passed these cheques through the Clearing House, and the said cheque for £1,493 15s. 2d. was taken up by the London Joint City and Midland Bank who posted it to their West Bromwich branch the same day. On Dec. 18, 1920 (which was a Saturday) the West Bromwich branch received the cheque, and after ascertaining that the drawer had funds to meet the cheque debited the drawer's account and credited their head office with the amount, and on the same day they sent an advice to their head office that the cheque was cleared." That, of course, cannot be quite an accurate statement, the cheque was not cleared until it had been cleared at the clearing house; what is meant is that the cheque was good and would be met. "On Dec. 20, 1920 (being the day on which the petition in this matter was filed), the London office of the London Joint City and Midland Bank received the advice from their branch and settled with Barclay's Bank through the clearing house, and on the same day Barclay's Bank advised the head office of Farrow's Bank that the said cheques comprising the total of £2,310 19s. 2d. were cleared."
- H What takes place at the clearing house is set out in the affidavit of Mr. Sykes, the secretary of the Institute of Bankers, and all that it is necessary to read with regard to this matter is this paragraph: "At the clearing house a cheque is said to be cleared when the final settlement between the banks is made by a transfer in the books of the Bank of England. . . . In the case of the country cheque clearing, the final agreement of the balance to be paid is made at 12.30 p.m. of the day on which the payment is to be made by transfer at the Bank of England (Saturdays, at 11 p.m.)."
- I

The question is, When did Farrow's Bank receive this money? If they received it before they suspended payment, they then held the money simply in the relation of debtors to their customer; if they did not receive it till after the suspension, they had then given up all their functions as a bank, and they had no right to receive the money and retain it, and the customer would be entitled to recover it. There was a question raised whether Farrow's Bank received the

cheque as holders or simply as agents for collection. The learned judge below has decided that they held it only as agents for collection, and no appeal is brought before us against that decision. I should mention that in spite of their so holding it they had in their books credited the customer with the amount of the cheque on the day that it was received, but there is on the paying-in slip a note that, although the bank do that, they reserve to themselves the right not to allow any drawing against the cheque and not to allow it to be treated as cash until it is cleared. A B

I shall first deal with the matter as if Farrow's Bank were themselves a clearing bank, and had themselves done all that Barclay's Bank did for them. In that case it seems to me that the money is not received by them, and their capacity does not, therefore, change from that of agents to a principal to debtors to a creditor until the transfers have been made at the Bank of England, as stated by Mr. Sykes. All that was done upon the Saturday by the West Bromwich branch of the London Joint City and Midland Bank in accepting a cheque as one that they would honour, and so informing their head office, was done merely for the purpose of enabling the clerk of the head office of the London Joint City and Midland Bank, when the final balance came to be settled between that bank and the bank which had brought the cheque to the clearing house, to deal with the cheque as one that came through the clearing house. In the hypothetical case of Farrow's Bank being a clearing bank, the payment was not in fact, in my opinion, made until the transfer at the Bank of England, which placed that money at the disposal of Farrow's Bank. Therefore, it seems to me to be quite clear that the learned judge was right if Farrow's Bank had been a clearing bank and this matter had been carried through by them without an agent. But there is another point which is raised and that is that, although Barclay's Bank, who were a clearing bank and brought this cheque to the clearing house, may not have received the money until Monday, Dec. 20. Farrow's Bank, their principals, had received the money before that date, that is, on the 18th, or perhaps earlier, when Barclay's Bank credited them with recourse in their, Barclay's books or in the clearance sheet. If the meaning of that credit is that on the credit being given Farrow's Bank were entitled to draw against that amount so credited by Barclay's Bank or to deal with it for any purpose at that time, then I think there would be a very great deal to be said for that argument. The argument is put in this way. It is said that this was an absolute credit except that there was a right in Barclay's Bank of recovery if the cheque was dishonoured, that as the cheque was not dishonoured it was an absolute credit, and, therefore, it was a payment to Farrow's Bank on that day. I think in order to establish such a point as that we should require a very great deal more evidence as to the dealings between Farrow's Bank and Barclay's Bank with regard to this matter than we have before us at present. It is said that we must treat what was done as stated by Mr. Drysdale, namely, that Barclay's Bank gave credit to Farrow's Bank, and that such credit was given subject to recourse in the event of the non-payment of the cheques, as being the same thing as Barclay's Bank handing the amount in cash to Farrow's Bank, so that the latter could do what they liked with it, Barclay's Bank simply reserving to themselves the right to get the amount back again in case of the non-payment of the cheques. I do not think there is anything like sufficient material here for us to say that a point like that is established. It seems to me that, on the materials we have, there is no ground for saying that the credit given by Barclay's Bank to Farrow's Bank with regard to that cheque was anything more than the credit given by Farrow's Bank to their customer Mr. Voyce, and that there is nothing to show that the agents intended to pay the principals before they, the agents, were themselves paid. I do not say whether or not on further or better materials such a point could be established, but there certainly is nothing before us to establish it. I think, C D E F G H I

A therefore, that the decision of the learned judge was right and that the appeal must be dismissed.

WARRINGTON, L.J.—I am of the same opinion and if I were to give a judgment of my own, I should repeat in practically the same words the judgment of the Master of the Rolls. I think, therefore, it is unnecessary to add anything.

B YOUNGER, L.J.—I entirely agree.

Appeal dismissed.

Solicitors: *Lawrance, Webster, Messer & Nicholls; Sharpe, Pritchard & Co., for Matthews, James & Crosskey, Birmingham.*

C [Reported by J. L. DENISON, Esq., Barrister-at-Law.]

D

HULLEY v. SILVERSPRINGS BLEACHING AND DYEING CO., LTD.

E [CHANCERY DIVISION (Eve, J.), November 16, 17, 21, 22, 23, 24, 25, 28, December 21, 1921, January 11, 1922]

[Reported [1922] 2 Ch. 268; 91 L.J.Ch. 207; 126 L.T. 499; 86 J.P. 30; 66 Sol. Jo. 195]

Easement—User by which prescriptive right claimed—Progressive user—Destruction of necessary certainty and uniformity of user—Illegal user—Contrary to statute—No presumption of lost grant.

F Where the owners of a mill, in their defence to an action for an injunction, claimed to have a prescriptive right to discharge the effluent from the mill into, and so to pollute, a natural stream,

G **Held:** (i) a progressive increase in the plant in the mill and in the volume of water consequently polluted was destructive of that certainty and uniformity essential for the measurement and determination of the user by which the extent of the prescriptive right claimed was to be ascertained; (ii) the user on which the mill owners relied as establishing an easement was contrary to the Rivers Pollution Prevention Act, 1876, and a lost grant could not be presumed where the grant would have been in contravention of a statute; and, therefore, the defence of the mill owners failed.

H *Married Woman—Easement—Defence to claim—Time not running against feme covert—Woman married after 1882—Prescription Act, 1832 (2 & 3 Will. 4, c 71), s. 7—Married Women's Property Act, 1882 (45 & 46 Vict., c. 75), s. 2*

I By s. 7 of the Prescription Act, 1832, the time during which any person otherwise capable of resisting a claim to an easement shall have been a feme covert shall be excluded in the computation of the period mentioned in the Act as giving a claimant a right to the easement. By s. 2 of the Married Women's Property Act, 1882, a woman married after Jan. 1, 1883, when the Act came into force, was entitled to hold as her separate property all real and personal property belonging to her at the time of her marriage or acquired thereafter.

Held: the effect of s. 2 of the Act of 1882 was that s. 7 of the Act of 1832 had no application in the case of a woman married after 1882.

Lowe v. Fox (1) (1887), 12 App. Cas. 206, applied.

Notes. Section 2 of the Married Women's Property Act, 1882, has been replaced by ss. 1 and 2 of the Law Reform (Married Women and Tortfeasors) Act, 1935 (11 HALSBURY'S STATUTES (2nd Edn.) 811). Restraints upon anticipation or alienation were abolished by the Married Women (Restraint upon Anticipation) Act, 1949.

Followed: *Green v. Matthews & Co.* (1930), 46 T.L.R. 206. Referred to: *Legge & Son, Ltd. v. Wenlock Corpn.*, [1936] 2 All E.R. 1367.

As to the creation of easements by prescription and time running against persons under a disability see 12 HALSBURY'S LAWS (3rd Edn.) 529-560; and for cases see 19 DIGEST 53 et seq.

Cases referred to:

- (1) *Lowe v. Fox* (1885), 15 Q.B.D. 667; 54 L.J.Q.B. 561; 53 L.T. 886; 50 J.P. 244; 34 W.R. 144, C.A.; on appeal (1887), 12 App. Cas. 206; 56 L.J.Q.B. 480; 56 L.T. 406; 51 J.P. 468; 36 W.R. 25, H.L.; 27 Digest (Repl.) 251, 2020.
- (2) *Re Hastings, Hallett v. Hastings* (1887), 35 Ch.D. 94; 56 L.J.Ch. 631; 57 L.T. 126; 52 J.P. 100; 35 W.R. 584; 3 T.L.R. 499, C.A.; 27 Digest (Repl.) 204, 1615.
- (3) *McIntyre Bros. v. McGavin*, [1893] A.C. 268; 69 L.T. 389; 87 J.P. 548; I.R. 246, H.L.; 19 Digest 158, 1090.
- (4) *Millington v. Griffiths* (1874), 30 L.T. 65; 19 Digest 158, 1091.
- (5) *Neaverson v. Peterborough R.D.C.*, [1902] 1 Ch. 557; 71 L.J.Ch. 378; 86 L.T. 738; 66 J.P. 404; 50 W.R. 549; 18 T.L.R. 360, C.A.; 19 Digest 63, 360.

Also referred to in argument:

- Sturges v. Bridgman* (1879), 11 Ch.D. 852; 48 L.J.Ch. 785; 41 L.T. 219; 43 J.P. 716; 28 W.R. 200, C.A.; 19 Digest 19, 57.
- Eaton v. Swansea Waterworks Co.* (1851), 17 Q.B. 267; 20 L.J.Q.B. 482; 17 L.T.O.S. 154; 15 Jur. 675; 117 E.R. 1282; 19 Digest 71, 413.
- Butterworth v. West Riding of Yorkshire Rivers Board*, [1909] A.C. 45; 78 L.J.K.B. 203; 100 L.T. 85; 73 J.P. 89; 25 T.L.R. 117; 7 L.G.R. 189, H.L.; 44 Digest 42, 301.
- Foster v. Warblington U.D.C.*, [1906] 1 K.B. 648; 75 L.J.K.B. 514; 94 L.T. 876; 70 J.P. 233; 54 W.R. 575; 22 T.L.R. 421; 4 L.G.R. 735, C.A.; 19 Digest 57, 323.
- Owen v. Faversham Corpn.* (1908), 73 J.P. 33, C.A.; 19 Digest 57, 324.
- Livett v. Wilson* (1825), 3 Bing. 115; 10 Moore, C.P. 439; 3 L.J.O.S.C.P. 186; 130 E.R. 457; 19 Digest 66, 378.
- Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A.C. 229; 72 L.J.Ch. 558; 88 L.T. 698; 52 W.R. 17; 19 T.L.R. 458, H.L.; 19 Digest 53, 298.
- Jones v. Williams* (1837), 2 M. & W. 326; Murp. & H. 51; 6 L.J.Ex. 107; 150 E.R. 781; 44 Digest 90, 715.
- Dalton v. Angus* (1881), 6 App. Cas. 740; 46 J.P. 132; 30 W.R. 191; sub nom. *Public Works Comrs. v. Angus & Co.*, *Dalton v. Angus & Co.*, 50 L.J.Q.B. 689; 44 L.T. 844, H.L.; 19 Digest 7, 4.
- Lyell v. Lord Hothfield*, [1914] 3 K.B. 911; 84 L.J.K.B. 251; 30 T.L.R. 630; 19 Digest 62, 352.
- Roberts and Lovell v. James* (1903), 89 L.T. 282; 19 T.L.R. 573, C.A.; 19 Digest 67, 384.
- Tickle v. Brown* (1836), 4 Ad. & El. 369; 1 Har. & W. 769; 6 Nev. & M.K.B. 230; 5 L.J.K.B. 119; 111 E.R. 826; 19 Digest 70, 407.
- Crossley & Sons, Ltd. v. Lightowler* (1867), 2 Ch. App. 478; 36 L.J.Ch. 584; 16 L.T. 438; 15 W.R. 801, L.C.; 19 Digest 83, 494.
- Baxendale v. McMurray* (1867), 2 Ch. App. 790; 31 J.P. 821; 16 W.R. 32, L.J.J.; 19 Digest 158, 1087.

- A** *Taff Vale Rail. Co. v. Gordon Canning*, [1909] 2 Ch. 48; 78 L.J.Ch. 492; 100 L.T. 845; 19 Digest 114, 743.
Trail v. McAllister (1890), L.R. 25 Ir. 524; 19 Digest 70, a.
Wimbledon and Putney Commons Conservators v. Dixon (1875), 1 Ch.D. 362; 45 L.J.Ch. 353; 33 L.T. 679; 40 J.P. 102; 24 W.R. 466, C.A.; 19 Digest 15, 37.
- B** *Pennington v. Brinsop Hall Coal Co.* (1877), 5 Ch.D. 769; 46 L.J.Ch. 773; 37 L.T. 149; 25 W.R. 874; 19 Digest 192, 1445.
Jones v. Llanrwst U.D.C., [1911] 1 Ch. 393; 80 L.J.Ch. 145; 103 L.T. 751; 75 J.P. 68; 27 T.L.R. 133; 55 Sol. Jo. 125; 9 L.G.R. 222; 44 Digest 38, 273.

Witness Action.

- C** The plaintiff, Walter Hulley, a cotton doubler and owner of a mill on the banks of a natural stream, claimed an injunction restraining the defendants, riparian owners of mill premises higher up the same stream, from polluting it by wrongfully discharging dyeing and bleaching effluent from their works. The alleged pollution had been commenced by Thomas Royle, the defendants' predecessor, prior to Oct. 5, 1900, and he and the defendants, who acquired the
- D** premises from him on June 20, 1901, continued to pollute the stream by discharging effluent from bleaching and dyeing vats. The progressively increasing discharge from the defendants' works, while not so noxious, was more continuous than that of their predecessor, and was proved to be polluting and sometimes of a poisonous nature. Royle and the defendants had compounded by payments and otherwise with various riparian proprietors other than the plaintiff who had
- E** protested against the pollution. Before the year 1906 they had brought the point of discharge 130 yards nearer to the plaintiff's boundary. The defendants claimed under a lost grant and alternatively under the Prescription Act, 1831, s. 2, as having exercised the right to pollute the stream for more than twenty years. The action was commenced on Oct. 5, 1920. One of the owners of the
- F** plaintiff's mill and premises for some six or seven years during the prescriptive period relied on by the defendants was a woman, Mary Jane Barrow, married in the year 1884, her husband dying on Jan. 11, 1909, and the defendants contended that, owing to the amendments of the Acts relating to the property of married women in 1882, she never was a feme covert within the meaning and intent of s. 7 of the Prescription Act, 1832, and that the marriage period ought not to be excluded from the period of enjoyment of the alleged right to pollute.
- G** *Courthope Wilson, K.C., C. E. R. Abbott, and David Bowen* for the plaintiff.
J. M. Gover, K.C. and Stafford Crossman for the defendants.

Cur. adv. vult.

- H** Dec. 21. **EVE, J.**—The writ in this action was issued on Oct. 5, 1920. The plaintiff, as the owner of hereditaments and premises known as Pool Bank Mill at Buglawton, near Congleton in the county of Chester, and situate on the banks of a natural stream or brook known as Timbersbrook is a riparian proprietor in regard to the said stream. The defendants are the owners of premises known as the Silversprings Bleaching and Dyeing Works, situate higher up the stream than Pool Bank Mill, and the plaintiff has, in my opinion, incontestibly established
- I** that the defendants, in carrying on their business as bleachers and dyers, had, at the date of the writ, and have since, polluted the water flowing through their premises and thence to the plaintiff's property, and have thereby so sensibly altered its character and quality as to entitle the plaintiff to relief by way of an injunction unless the defendants have satisfied the court that they have a prescriptive right to do as they have done. Herein lies the substantial question in the action, for the defendants assert by their defence that at the time of the acts alleged by the plaintiff—that is, to say, the discharge into the stream of foul and noxious

matter from their works—they had the right as owners and occupiers of their works to do the said acts and to pollute the said stream and render it impure opposite to the plaintiff's premises by reason of their and their predecessors having enjoyed such right as of right and without interruption—and these are the only relevant parts of the plea—by virtue of a grant by deed from all necessary parties since lost or destroyed, or, alternatively, for a period of twenty years next before the commencement of the action. The defendants, therefore, assert an easement under the doctrine of a lost modern grant, or, alternatively, under the provisions of the Prescription Act, and in support of both alternatives they have sought to make out an open uninterrupted enjoyment as of right for a period of some twenty and a quarter years before the issue of the writ. They have proved to my satisfaction that at a date some three months or so prior to Oct. 5, 1900, their predecessor in title, having installed a small bleaching and dyeing plant at the mill—theretofore used for purposes not injuriously, or indeed at all, affecting the stream—did commence to pollute it, and thereafter he and they down to the present time have continued to pollute it by discharging into it the effluent from their bleaching kiers and dyeing vats.

A number of objections have been raised on behalf of the plaintiff to the defendants' claim to an easement. The following relevant facts in addition to those I have already stated have been clearly established by the evidence. (i) When bleaching and dyeing was first started the contents of the bleaching kiers and dyeing vats were emptied by Mr. Royle, the then owner of the mill, direct into the stream without any attempt to filter or purify them. This was done surreptitiously and not under any claim of right, Mr. Royle's own evidence being that he "took the liberty of turning the first few kiers loose into the brook. There was such a strong flow of water I thought it would be away and not noticed; we had not got any filter beds, and if we did any work at all we had to take the liberty. I did something I thought I was not entitled to do. I did not claim to be entitled to pollute the brook." When a little later he is asked about a complaint made by the district council, he says he "told them a tale," in other words, an untruth, in attributing the polluted condition of the brook to a defective pipe. (ii) Within a few weeks after Royle had started work a pony belonging to a farmer whose land abutted on the stream, was poisoned by drinking the water, and Royle paid compensation to the owner. (iii) Between August and October, 1900, a trench was dug and filled with cinders and used as a filter for the kier and dye vat contents before they were poured into the stream. Its use probably intercepted some of the solid matter, but did not materially improve the character of the effluent. (iv) Prior to Oct. 5, 1900, and for some considerable time thereafter, certainly down to 1903, possibly 1906, the polluting element was discharged into the stream close to the mill, and at a spot some 130 yards higher up the stream than that at which the effluent is now discharged. Royle did not acquire the land in which the present outlet exists until May, 1901. (v) The defendants who acquired the premises from Royle in June, 1901, installed a better system of filtration in 1903, and in 1905–6 a still more elaborate plant was erected. Both of these installations were placed on the land purchased by Royle in 1901. The evidence is inconclusive upon the point whether the outlet made in 1903 was in the same place as the one made in 1906 and still in use. Some additions have been made to the purification plant since 1906. (vi) The bleaching and dyeing plant in the defendants mill has been considerably increased since their purchase in 1901, and the volume of pure water abstracted from the stream and returned to it in an impure condition has been gradually increasing, and is now enormously greater than it was at the date of the defendants' purchase. (vii) The unfiltered contents of the kiers and dye vats discharged by Royle direct into the stream and probably those also discharged through his first filter bed were more noxious and of a more poisonous and polluting character than is the effluent normally discharged by the defendants after full treatment in the purifying

A plant, but the pollution caused by the defendants is at all times more continuous than was any pollution caused by Royle, and the defendants are down to the present time still discharging into the stream, and not merely on occasions or as the result of accident, liquid of a noxious and polluting and sometimes of a poisonous nature. (viii) The defendants have from time to time made payments to, erected fences, and, in one case, laid on an alternative water supply for, riparian proprietors on the stream who have protested against and made claims for damages in respect of the pollution caused by their works. The payments in some cases were stated in the receipts to be "without prejudice," but there are several receipts proved in which no such words are to be found. No payment or other consideration has ever passed from the defendants to the plaintiff or any of his predecessors.

C Before dealing with the position brought about by the findings of fact which I have enumerated, and the legal results which follow from those findings, I must state my conclusion on a point which was elaborately argued, and which goes to the root of the whole matter and, if sound, disposes effectually of the defendants' claim under the Prescription Act, though not necessarily of their claim under the fiction of a lost grant. By s. 7 of the Prescription Act, 1832, there is to be excluded, in the computation of the prescriptive periods mentioned in the Act, the time during which any person capable of resisting any claim shall have been an infant, idiot, non compos mentis, feme covert, or tenant for life, and, for some six or seven years out of the prescriptive period relied upon by the defendants, one of the owners of the plaintiff's mill was a married woman.

E It was argued, therefore, that the easement claimed by the defendants has not been enjoyed for the necessary period. But the lady in question was married in 1884, and the defendants contend that by virtue of the provisions of the Married Women's Property Act, 1882, she never was a feme covert within the meaning and intent of s. 7 of the Prescription Act. By this last-mentioned section it was, of course, intended to preserve the rights—to the extent therein

F mentioned—of persons incapable of making the grant on the presumption of which the whole structure of statutory prescription is founded, or of suing to prevent an invasion of their rights and property, and in the category of such persons the feme covert was obviously included in 1832. Whether, apart altogether from the Married Women's Property Act, a married woman possessed of separate property free from any restraint on anticipation would have been regarded in

G respect of that separate estate as a feme covert within the section I need not pause to consider, but the judgments in the Court of Appeal in *Re Hastings, Hallett v. Hastings* (2), clearly recognise that in regard to her separate estate the courts had created an "imaginary creature": see per COTTON, L.J., 35 Ch.D. at p. 105; namely a married woman with the powers of a feme sole, that is to say, a married woman capable of dealing with her separate estate as a feme sole.

H The effect of s. 2 of the Married Women's Property Act is to add the incidents of separate use to the interest of a woman married after 1882 in all property belonging to her at the date of her marriage or accruing after that event, and by analogy to the "imaginary creature" created in respect of the separate estate prior to the Act, one is, I think, entitled to regard a woman married since 1882 as on the same footing in respect of all her property. She is no longer

I a feme covert, but is, in fact, discovert—not released from her marriage but so far released from the former disabilities of coverture as to be made capable of resisting any claim to any of the easements in the Prescription Act mentioned. For these reasons I do not think that s. 7 has any application in the case of a woman married since 1882 and I so hold. This conclusion is, I think, in accordance with the result arrived at and the judgments pronounced in *Lowe v. Fox* (1), in which case it was decided that a woman married after 1882 became discovert within the meaning of the Statute of Limitations, 1623, s. 7, on the coming into

operation of the Married Women's Property Act, and that time began to run against her from the last-mentioned date. A

Reverting now to the findings of fact, I think the following conclusions of law are to be deduced therefrom. (i) That the easement claimed, in whatever way it may be defined—and in the course of the trial several attempts were made to state its nature concisely—was not enjoyed as of right during the statutory period. It originated with Royle, and unless the period of his working, from June to October, 1900, is included, the twenty years had not run when the writ was issued. In the face of his evidence it is, I think, impossible to hold that the easement was ever enjoyed by him "claiming right thereto," and unless the enjoyment was as of right for the full twenty years no grant can be presumed, nor can the claim under the Act be supported. It is not necessary for me to decide how far the payments and other considerations passing from the defendants to other riparian owners—put in evidence by the defendants themselves—could be used by the plaintiff to negative an enjoyment as of right, but it is difficult to reconcile such conduct with a continuous assertion of a right to inflict the injury for which such payments were made and treated as compensation. (ii) The prescriptive right, if any, was a right to discharge the effluent from the land belonging to Royle in 1900 and not from the land purchased in 1901. The defendants had no right in 1903 or 1906 to bring the discharge to a spot 130 yards nearer to the plaintiff's boundary unless they were in a position to show that the change could not by any possibility affect the plaintiff. The onus of proving this rests on the defendants (*McIntyre Bros. v. McGavin* (3) [1893] A.C. at pp. 274 and 277), and they have not discharged it. The evidence goes to show that in the 130 yards sedimentation and oxygenation would have materially improved the polluting effluent carried down to the plaintiff's land. (iii) The progressive increase in the plant in the defendants' mill and in the volume of water polluted is destructive of that certainty and uniformity essential for the measurement and determination of the user by which the extent of the prescriptive right is to be ascertained. As at present advised, I am of opinion that in view of these increases no prescriptive right to pollute could have been established even if other difficulties had been overcome: *Millington v. Griffiths* (4). (iv) The prescriptive easement claimed is contrary to the provisions of the Rivers Pollution Prevention Act, 1876 [repealed by Rivers (Prevention of Pollution) Act, 1951]. Each time the defendants cause or knowingly permit to fall or flow into the brook any poisonous, noxious or polluting liquid proceeding from their works, they are, in my opinion, committing an offence under s. 4 of that Act. The words, "subject as in this Act mentioned," in ss. 3 and 4 refer to the latter part of each section and do not—as was urged on behalf of the defendants—qualify the first paragraph of the section by introducing into it the provisions of the Act relating to legal proceedings and make the offence incomplete unless and until an order has been made against the offender to abstain from the commission of the offence. As I read and construe s. 4, the discharge of the liquid constitutes an offence unless the circumstances can be brought within the second part of the section and the later sections dealing with legal proceedings—that is to say, s. 10 and the following ones—and which are expressly framed for cases where an offence has already been committed cannot properly be read into the section which creates the offence. The evidence on both sides satisfies me that the defendants have continually and down to very recent dates in this year, been committing offences against the Act—in other words, that the user on which they rely as establishing the easement is a user contrary to statute. A lost grant cannot be presumed where such a grant would have been in contravention of a statute, and, as title by prescription is founded upon the presumption of a grant, if no grant could lawfully have been made, no presumption of the kind can arise, and the claim must fail: *Neaverson v. Peterborough R.D.C.* (5). B C D E F G H I

A From these conclusions it follows that in my opinion the defendants have failed in their defence both on the facts and the law, and in these circumstances the plaintiff is entitled to the injunction he claims, and there must be an inquiry as to what—if any—damages he has sustained. The defendants must pay the costs down to and including this judgment—subsequent costs will be reserved. [Jan. 11, 1922.—On the application of counsel for the defendants, who referred to *Jones v. Llanrwst U.D.C.* per PARKER, J. ([1911] 1 Ch. at p. 411), and SETON ON DECREES (7th Edn.), p. 607, instead of the injunction in general terms granted at the hearing the injunction was limited to restraining discharge of effluent by the defendants so as to cause pollution to the water of the stream as it flowed past the plaintiff's land.]

C Solicitors: *Williamson, Hill & Co.*, for *H. E. Kay*, Manchester; *G. F. Hudson, Matthews & Co.*, for *H. L. and W. P. Reade*, Conkleton.

[Reported by W. P. PAIN, Esq., Barrister-at-Law.]

D

SALES v. LAKE AND OTHERS

[KING'S BENCH DIVISION (Lord Trevethin, C.J., Avory and McCardie, JJ.), January 20, 1922]

E

[Reported [1922] 1 K.B. 553; 91 L.J.K.B. 563; 126 L.T. 636; 86 J.P. 80; 38 T.L.R. 336; 66 Sol. Jo. 453; 20 L.G.R. 259; 27 Cox, C.C. 170]

Road Traffic—Stage carriage—Metropolitan police district—Charabanc excursions—Seats booked in advance—"Plies for hire"—Metropolitan Public Carriage Act, 1869 (32 & 33 Vict., c. 115), s. 7—Order dated May 1, 1917, made by the Secretary of State (S.R. & O. 1917, No. 426), art. 17 (2).

F

The respondents organised tours from London to various parts of the country and appointed agents to issue tickets, the seats being booked and the tickets paid for in advance. Intending passengers were asked at the time of booking where they wished to be picked up, and the driver was not authorised to pick up persons other than those who presented tickets to him. When the number of passengers for a particular journey had been ascertained a charabanc was hired to carry them, the driver of which proceeded to pick up the passengers who held tickets at the places arranged. He did not pick up anyone else. The charabanc was not licensed under the Metropolitan Public Carriage Act, 1869, to ply for hire in the metropolitan police district.

G

H

Held: there was no "plying for hire" within the meaning of art. 17 (2) of the order dated May 1, 1917 (S.R. & O. 1917, No. 426), which applied the provisions of the Metropolitan Public Carriage Act, 1869, s. 7, under which, if an unlicensed stage carriage plied for hire, the owner and driver thereof were liable to a penalty.

I

Notes. The Order dated May 1, 1917, and made by the Secretary of State in pursuance of the Metropolitan Public Carriage Act, 1869, and the London Cab and Stage Carriage Act, 1907 (S.R. & O. 1917 No. 426), was revoked by the London Cab Order, 1924 (S.R. & O. 1924 No. 1149), which in turn was revoked by the London Cab Order, 1934 (S.R. & O. 1934 No. 1346). Article 17 (2) of the 1917 Order was replaced in the London Cab Order, 1924, but has not been replaced in the London Cab Order, 1934.

Distinguished: *Armstrong v. Ogle*, [1926] 2 K.B. 438. Followed: *Leonard v. Western Services*, [1927] 1 K.B. 702. Distinguished: *Greyhound Motors v. Lambert*, [1928] 1 K.B. 322; *Griffin v. Grey Coaches* (1928), 45 T.L.R. 109.

As to metropolitan hackney and stage carriages, see 31 HALSBURY'S LAWS (2nd Edn.) 712 et seq.; and for cases see 42 DIGEST 850 et seq. For the Metropolitan Public Carriage Act, 1869, s. 7, see 24 HALSBURY'S STATUTES (2nd Edn.) 871.

Cases referred to :

- (1) *Cavill v. Amos* (1900), 64 J.P. 309; 16 T.L.R. 156, D.C.; 42 Digest 855, 89.
- (2) *Bateson v. Oddy* (1874), 43 L.J.M.C. 131; 30 L.T. 712; 38 J.P. 598; 22 W.R. 703; 42 Digest 853, 79.
- (3) *Allen v. Tunbridge* (1871), L.R. 6 C.P. 481; 40 L.J.M.C. 197; 24 L.T. 796; 19 W.R. 849; sub nom. *Allen v. Trowbridge*, 35 J.P. 695; 42 Digest 853, 78.
- (4) *Birmingham and Midland Omnibus Co. v. Thompson*, [1918] 2 K.B. 105; 87 L.J.K.B. 915; 119 L.T. 140; 82 J.P. 213; 16 L.G.R. 544, D.C.; 42 Digest 853, 76.

Case Stated by a metropolitan police magistrate.

At the Westminster Police Court on July 28, 1921, the appellant preferred an information against the respondents, charging that the respondent Lake on June 12, 1921, was the driver of an unlicensed carriage which unlawfully plied for hire within the metropolitan police district, that the respondent Caney was the owner of an unlicensed carriage which unlawfully plied for hire within the district, and that the respondents, Charabancs (London), Ltd., on June 12, 1921, did unlawfully aid and abet Lake in the commission of the offence charged against him.

The following facts were proved or admitted. On May 1, 1917, an order was made by the Secretary of State for the Home Department which provided, by art. 17 (2), that, in pursuance of s. 3 of the London Cab and Stage Carriage Act, 1907, all Acts and orders relating to stage carriages in London should apply to every carriage constructed in the form of an omnibus, charabanc, wagonette, cab, or other vehicle, intended or used for the conveyance of passengers and plying for hire in any street, road, or place, in which the passengers or any of them were charged to pay separate and distinct or at the rate of separate and distinct fares for their respective places or seats therein, and which on every journey went to or came from some town or place beyond London. On June 12, 1921, a charabanc, with hackney carriage plates and yearly road licence affixed, was driven by the respondent Lake to Grosvenor Gardens, in the metropolitan police district, where it stopped, and several persons were seen to approach Lake with tickets which he inspected. He then allowed the bearers of the tickets to board the charabanc. This was in accordance with the practice described below. The respondent Caney was the owner of the charabanc, which had not been licensed under the Metropolitan Public Carriage Act, 1869, to ply for hire within the metropolitan police district. The charabanc had been hired on June 11, 1921, from the respondent Caney by the respondents Charabancs (London), Ltd. for the purpose of conveying passengers on June 12, 1921, from London to Brighton. The business of Charabancs (London), Ltd. was to organise tours from London to various parts of the country, and for this purpose agents were appointed in various parts of London and the provinces to supply information and issue tickets to intending passengers, and advertisements were issued advertising the trips. The seats were booked by the passengers and the tickets were paid for before the journey, and, when the tickets had been issued and the number of passengers for the particular journey ascertained, it was the practice of Charabancs (London), Ltd. to hire a charabanc from Caney to carry the passengers. This practice was followed in this case. Numerous advertisements were exhibited by Charabancs (London), Ltd., containing an illustration of a charabanc and announcing day and half-day tours to the seaside and countryside, starting from Charing Cross, and picking up passengers en route at Grosvenor Gardens, Vauxhall Bridge Road, Kensington, Brixton, Clapham, Streatham, Camberwell, Peckham, New Cross,

A Lewisham and Deptford every day in each week from May 7 to Sept. 30, 1921. A trip to Brighton and back to London was advertised as leaving Charing Cross daily at 9 a.m. Intending passengers were asked at the time of booking tickets where they wished to be picked up, and the driver was instructed accordingly where he was to meet them. A sheet was made out and given to the driver (there was no person other than the driver in charge of the vehicle), showing the number of seats booked and tickets issued. The driver was not authorised to pick up day passengers other than those who presented tickets to him. On June 12, 1921, the practice above described was strictly followed by all the respondents, and the driver picked up only the passengers booked as aforesaid and no other persons.

C It was contended for the appellant that the charabanc was a stage carriage plying for hire in Grosvenor Gardens by reason of the advertisement announcing that passengers would be picked up at Grosvenor Gardens amongst other places en route, and that the fact that all seats were booked in advance was immaterial, and alternatively, that the charabanc was a hackney carriage plying for hire within the metropolitan police district. It was contended for the respondents **D** that the charabanc was not a stage carriage, that Charabancs (London), Ltd. had formed a party and hired the vehicle in question to accommodate them, and that there was no plying for hire, and that the facts disclosed no offence.

The magistrate was of opinion that there was no plying for hire within the meaning of s. 7 of the Metropolitan Public Carriage Act, 1869, inasmuch as no members of the public could have obtained at Grosvenor Gardens a seat in that vehicle for the journey who had not previously booked their tickets elsewhere, and he, therefore, dismissed the information against all the respondents. The appellant now appealed.

By the Metropolitan Public Carriage Act, 1869, s. 7 :

F "If any unlicensed hackney or stage carriage plies for hire, the owner of such carriage shall be liable to a penalty not exceeding £5 for every day during which such unlicensed carriage plies. And if any unlicensed hackney carriage is found on any stand within the limits of this Act, the owner of such carriage shall be liable to a penalty not exceeding £5 for each time it is so found. The driver also shall in every case be liable to a like penalty unless he proves that he was ignorant of the fact of the carriage being an unlicensed carriage. Any hackney or stage carriage plying for hire, and any hackney **G** carriage found on any stand without having such distinguishing mark, or being otherwise distinguished in such manner as may for the time being be prescribed by the said Secretary of State, shall be deemed to be an unlicensed carriage."

H By art. 17 of an order dated May 1, 1917 (S.R. & O. 1917 No. 426), the Home Secretary, in pursuance of s. 3 of the London Cab and Stage Carriage Act, 1907, ordered :

I "... that all Acts and orders relating to stage carriages in London shall apply to . . . (2) Every carriage constructed in the form of an omnibus, charabanc, wagonette, cab, or other vehicle which is intended or used for the conveyance of passengers and which plies for hire in any street, road or place, and in which the passengers or any of them are charged to pay separate and distinct or at the rate of separate and distinct fares for their respective places or seats therein, and which on every journey goes to or comes from some town or place beyond London . . ."

Artemus Jones, K.C. (H. D. Roome with him) for the appellant.

Bernard Campion for the respondents.

Cur. adv. vult.

Feb. 13.—**LORD TREVETHIN, C.J.**, stated the facts, and continued: In my judgment, the second alternative submission attributed to the appellant in the case, viz., that the charabanc was a hackney carriage within s. 4 of the Metropolitan Public Carriage Act, 1869, may be disposed of briefly. For it is clear from the advertisement which forms part of the Case, and is, indeed, impliedly stated in the Case itself, that the passengers by this charabanc were charged separate or at the rate of separate fares. By s. 4 of the Act of 1869, a stage carriage is distinguished from a hackney carriage by the fact that the passengers are thus separately charged. But it is common ground that, if this charabanc is a stage carriage, it can only come within the provisions of the Act of 1869 by virtue of art. 17 (2) of the Secretary of State's Order of May 1, 1917. The question, therefore, which we have to determine is whether art. 17 (2) is applicable to this charabanc. [His Lordship read art. 17 (2), and continued:] The charabanc would, therefore, not be within art. 17 (2) of the order unless it "plies for hire in any street, road or place." In my judgment, a carriage cannot accurately be said to ply for hire unless two conditions are satisfied. (i) There must be a soliciting or waiting to secure passengers by the driver, or other person in control, without any previous contract with them; and (ii) the owner or person in control, who is engaged in or authorises the soliciting or waiting, must be in possession of a carriage for which he is soliciting or waiting to obtain passengers. If I may so express myself, he must have appropriated, or be able at the time to appropriate, a carriage to the soliciting or waiting. Unless there is a carriage so appropriated or capable of appropriation, it is a misuse of words to say that it is plying for hire. The proper phrase would be that a man is soliciting or waiting for persons to make a contract with him, which he proposes to fulfil by providing the necessary carriage. No doubt in popular language a cab is sometimes said to ply for hire when the process of soliciting or waiting is over, and the passenger obtained by this process is being driven on his journey. In my opinion, this is an inaccurate expression, natural enough, since, before the journey began, the cab was plying for hire, and as soon as the journey is over it will in the normal course be plying for hire again. But it is to be observed that, even in this loose application of the phrase, the idea of soliciting passengers is present; the phrase would not be used unless the speaker thought that the passenger had been obtained in this way, and that the process of soliciting or waiting for passengers would in due course be renewed as soon as the journey was over.

The information in the present case charged that the driver was plying for hire while he was in Grosvenor Gardens. The learned magistrate has, however, found that, when the carriage was in Grosvenor Gardens, no member of the public could have obtained a seat in the vehicle for that journey who had not previously booked his ticket elsewhere. That is to say, the process of soliciting was then over, and the driver was merely receiving passengers who had already booked their seats. On this ground alone, in my judgment, the magistrate was right in refusing to convict. If there had been any empty seats for which the driver was prepared to take in casual passengers, I think he would have been plying for hire, but the magistrate's finding negatives this suggestion. But, further, in my judgment, on the findings of the learned magistrate, there is no evidence that this charabanc was ever plying for hire, for, on the facts as found by him at the time when the advertisements and tickets were issued, which was the only time when Charabancs (London), Ltd. were soliciting passengers, no carriage was appropriated to the proposed journey. It was only after they had ascertained the number of passengers that the company ordered this charabanc. I observe that, in their advertisement, Charabancs (London), Ltd. reserved the right to cancel the journey when less than fifteen persons have booked seats prior to the advertised starting time. This is strong evidence that, at the time

A they began to solicit passengers, they had not even made up their minds that they would ever procure this carriage; and, in any event, they certainly had no carriage in their possession until after the stage of soliciting or waiting for passengers was over.

B The distinction I seek to make is, I think, suggested in *Cavill v. Amos* (1). In that case, the defendant owned a licensed cab, and also an unlicensed wagonette. He was at the station with his cab and solicited passengers for it, but the wagonette was in his coach-house. A party of nine passengers came out of the station, and the defendant invited them to take his cab, but, as they all wanted to be in the same conveyance and the cab would not hold them all, they refused to take it. They added, however, that, if the defendant had a carriage which would take them all, they would hire it. Thereupon the defendant took them to his stables and they hired his wagonette. On these facts, it was held that the defendant could not be convicted, and CHANNELL, J., observed (64 J.P. at p. 310):

D "It is, however, possible that a man might ply for hire with a carriage without exhibiting it, by going round touting for customers. That, however, is not this case. The appellant was touting for customers for his licensed carriage (i.e., the cab). He did not solicit persons to go in the wagonette in the first instance, and therefore there was no plying for hire with the wagonette."

E I agree with those remarks and, in my judgment, they show that *Cavill's Case* (1), was a stronger case. For in that case the defendant owned the wagonette at the time he was soliciting passengers, yet, because the soliciting was not connected with, or to repeat the expression I used before "appropriated to," the wagonette, it was held that the defendant was not plying for hire with the wagonette. In the present case, not only was the soliciting not appropriated to the charabanc, but the respondents, Charabancs (London), Ltd., were not in possession, and had not, on the evidence, any right to the possession of this or any charabanc at the time they solicited the passengers. And, indeed, in view of their reservation of the right to cancel the trip if they did not obtain fifteen passengers, it is fair to say that they had no definite intention to procure this charabanc when they began soliciting.

F It follows, in my opinion, that the charabanc was not plying for hire in Grosvenor Gardens within the meaning of art. 17 (2) of the order of May 1, 1917. Consequently, the Act of 1869 does not apply, and the charge fails in limine. It follows also, from the view I take, that the charabanc was not plying for hire within s. 7 of the Act of 1869. In my judgment, therefore, the learned magistrate was right in refusing to convict.

G **AVORY, J.**—The information in this case was laid under s. 7 of the Metropolitan Public Carriage Act, 1869, which makes the owner and driver of an unlicensed stage carriage that plies for hire within the limits of the Act liable to a penalty, and provides that any stage carriage plying for hire shall be deemed to be an unlicensed carriage. Prior to the coming into operation of the London Cab and Stage Carriage Act, 1907, stage carriages which, on every journey, go to or come from some town or place beyond the limits of the metropolitan police district, were exempt from the provisions of the statutes regulating hackney and stage carriages in the Metropolis, but, under s. 3 of the Act of 1907, the Secretary of State has made an order that all Acts and orders relating to stage carriages in London shall apply to every charabanc or other vehicle which is intended or used for the conveyance of passengers and which plies for hire in any street, road or place, and in which the passengers are charged separate and distinct fares, and which on every journey goes to or comes from some town or place beyond London. By s. 6 of the Act of 1907, the expression "stage carriage" is to have the same meaning as in the Metropolitan Public Carriage Act, 1869, as

amended by the Act of 1907, and by s. 4 of the Act of 1869 "stage carriage" is defined to mean any carriage for the conveyance of passengers which plies for hire in any public street, road or place within the limits of the Act, and in which the passengers are charged separate fares. The charabanc in question, which was being driven by the respondent Lake on June 12, 1921, had affixed to it a hackney carriage plate indicating that a licence had been taken out for it as a hackney carriage under the Finance Act, 1920, s. 13. By Sched. II to that Act, hackney carriages are defined as in s. 4 of the Customs and Inland Revenue Act, 1888, and in that Act of 1888 a hackney carriage means any carriage standing or plying for hire, and includes any carriage let for hire by any person whose trade or business it is to let carriages for hire; but although, for revenue purposes, this was a hackney carriage, the Metropolitan Public Carriage Act, 1869, defines a hackney carriage as a carriage for the conveyance of passengers which plies for hire and is not a stage carriage. But the charabanc in question was undoubtedly a stage carriage, and the question for decision, therefore, appears to be whether, on the facts stated in the Special Case, it can be said to have been plying for hire in any public street, road or place within the metropolitan police district. The omission of the word "public" before "street, road or place," in art. 17 (2) of the order dated May 1, 1917, made by the Secretary of State under the Act of 1907, may give rise to a question whether the order is not ultra vires; but, whether it is so or not, I have come to the conclusion that it was necessary, under the circumstances in this case, to prove that the carriage was plying for hire in a public street, road or place, and not merely within the metropolitan police district; otherwise it would not be a stage carriage within the meaning of the Act of 1869. *Bateson v. Oddy* (2), and *Allen v. Tunbridge* (3) are, perhaps, the most favourable authorities in support of the appellant's contention. In neither of these cases, however, was it necessary to prove that the carriage was plying for hire in a public street, road or place, and, as MONTAGUE SMITH, J., said in the latter case (L.R. 6 C.P. at p. 485): "plying for hire" is very different from a customer going to a job-master to hire a carriage, and I think Mr. Meadows White was right in his argument in that case when he said "plying for hire" meant soliciting custom without any previous contract. I do not think the decision in *Birmingham and Midland Omnibus Co. v. Thompson* (4), which turned on the meaning of the word "omnibus" in the Town Police Clauses Act, 1889, assists the appellant's contention.

In the result, I cannot say the magistrate was wrong in holding that there was no plying for hire by a stage carriage within the meaning of s. 7 of the Act of 1869, although the case seems to be within the mischief contemplated by the Act, as amended by the Act of 1907. Therefore I agree that the appeal should be dismissed.

McCARDIE, J., desires me to say that he has read the judgment which I have just delivered, and he agrees with it.

Appeal dismissed.

Solicitors: *Wontner & Sons; Engall & Crane.*

[Reported by J. F. WALKER, Esq., Barrister-at-Law.]

A R. v. ADAMS AND ANOTHER. Ex parte POPE

[KING'S BENCH DIVISION (Lord Hewart, C.J., Darling and Salter, JJ.), December 12, 1922]

[Reported [1923] 1 K.B. 415; 92 L.J.K.B. 120; 128 L.T. 597; 87 J.P. 61; 39 T.L.R. 165; 67 Sol. Jo. 315; 21 L.G.R. 144]

B *Highway—Repair—Licence to take materials—Form of licence—Need to state duration of licence and repairs in respect of which licence granted—Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 51, s. 54, Schedule, Form 10.*

C A licence granted by justices under the Highway Act, 1835, s. 51 and s. 54, authorising a highway authority to take materials for the repair of highways from enclosed land, is not bad on its face because it does not specify the duration of the licence or the repairs in respect of which it is granted.

D **Notes.** The Highway Act, 1835, s. 51, s. 54 and Schedule, have been repealed by the Highways Act, 1959, s. 312 (2) and Sched. XXX. The corresponding provisions to s. 51 and s. 54 of the Act of 1835 are s. 48 (1)–(3), (4), (7) of the Act of 1959. The Schedule to the 1835 Act has not been reproduced in the 1959 Act, but, by s. 280 (2), the Minister may by regulations prescribe the forms which were formerly set out in the Schedule. No regulations have yet been made.

As to the taking of materials for the repair of highways, see 19 HALSBURY'S LAWS 3rd Edn.) 132 et seq. and for cases see 26 DIGEST (Repl.) 385 et seq. For the Highways Act, 1959, see 39 HALSBURY'S STATUTES (2nd Edn.) 402.

Cases referred to :

- E (1) *R. v. Bradford*, [1908] 1 K.B. 365; 77 L.J.K.B. 475; sub nom. *R. v. Bradford, Ex parte Chambers*, 98 L.T. 620; 72 J.P. 61; 24 T.L.R. 195; 6 L.G.R. 333, D.C.; 26 Digest (Repl.) 388, 959.
- (2) *Earl Manners and Browne v. Bartholomew* (1878), 4 Q.B.D. 5; 48 L.J.M.C. 3; 39 L.T. 327; 43 J.P. 54; 27 W.R. 167, D.C.; 26 Digest (Repl.) 388, 964.
- F (3) *R. v. Badger* (1856), 6 E. & B. 137; 25 L.J.M.C. 81; 26 L.T.O.S. 324; 20 J.P. 164; 2 Jur. N.S. 419; 119 E.R. 816; 16 Digest 441, 3069.

G **Rule nisi** to justices for Devonshire to show cause why a writ of certiorari should not issue to remove into the King's Bench Division, for the purpose of being quashed, an order made by them on June 7, 1922, whereby they granted to the Crediton Rural District Council a licence to dig, take and carry away certain materials from land known as Henstill Quarry, which was owned and occupied by Alfred Pope, the applicant for the rule.

The following was a copy of the licence :

H "Whereas by the statutes in that behalf made and provided the Crediton Rural District Council are authorised to dig, get, take, and carry away materials lying upon any lands or grounds within any parish within their district for the use and benefit of the highways, but not without the consent of the occupier or the owner of such lands or grounds or his agent or a licence from the justices in petty sessions assembled : And Whereas it appears to us, two of his Majesty's Justices of the Peace for the said county [Devon] and acting within the said district in petty sessions assembled, upon the oath of Frank Horbury, the surveyor of the said district council, that he hath applied to Alfred Pope, of Henstill Farm, Sandford, for his consent to dig, get, take, and carry away materials from the land called or known by the name of Henstill Quarry . . . of which he is the owner and occupier in the parish of Sandford within the said district for the purpose aforesaid and that the said materials are necessary for the repairs of the highways and that the said Alfred Pope hath refused to permit the same to be dug, got, taken and carried away; and the said Alfred Pope, having been duly summoned to appear before us to show cause why such permission should not be granted,

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and having appeared before us accordingly, we have heard what has been alleged and taken the said matter into consideration and are of opinion that the said materials are necessary and ought to be dug, got, taken and carried away for the purposes aforesaid: Therefore we do hereby give our licence for the said district council to dig, get, take, and carry away the same accordingly, the said council making satisfaction for the same and also for the damage done to such lands in the manner directed by the said Act. Given under our hands this 7th day of June, 1922.—(Signed) WILLIAM H. ADAMS, A. D. MONTAGUE; Justices of the Peace for the County of Devon."

The rule was obtained on the following grounds: (i) that the justices wrongly decided a question which was preliminary to the exercise of jurisdiction by them, namely, that the materials were required and were necessary and ought to be got and taken away at the time for the making or repairing of the highways; (ii) that the justices had no power in law to grant a licence for an indefinite period of time; (iii) that the justices had no power in law to grant a licence in respect of unspecified repairs; and (iv) that the justices did not decide the question of the period of time during which the licence should operate or in respect of what particular repairs or necessities it should operate.

Scholefield, K.C., and G. D. Roberts showed cause.

Macmorran, K.C., and R. P. Croom-Johnson in support of the rule.

LORD HEWART, C.J.—This is a rule nisi for a writ of certiorari, and it has to do with a licence dated June 7, 1922, whereby the justices granted to the rural district council of Crediton a licence to dig, get, take, and carry away certain materials "from the land called or known by the name of Henstill Quarry," of which the applicant for the rule is owner and occupier. The matter arises under s. 51 and s. 54 of the Highway Act, 1835. The licence which the justices granted follows, not indeed exactly, but, as it is admitted, in substance, the form of licence set out in the Schedule to the Act in form No. 10. It is provided by the Act itself, by s. 170, that no order made

"or any other matter or thing done or transacted in or relative to the execution of this Act, shall be vacated or quashed for want of form, or be removed or removable, [subject to certain exceptions which, for the present purpose, are immaterial,] by certiorari, or any other writ or process whatsoever, into any of His Majesty's Courts of record at Westminster."

In order, therefore, to ground the claim for a writ of certiorari, an allegation is made that the justices here acted in excess of their jurisdiction. That was an allegation made with success in *R. v. Bradford* (1), but that was a very different case. In the present case, in order to lend colour to the argument that there has been an excess of jurisdiction two matters are alleged. The first is, as is stated in the grounds contained in the rule: "That the justices wrongly decided a question which was preliminary to the exercise of jurisdiction by them, namely, that the materials were required and were necessary and ought to be got and taken away at the time for the making or repairing of the highways." That seems a strange allegation of excess of jurisdiction because precisely one of the most important questions which the justices had to decide was whether the materials were required for the repair of these highways. There is a suggestion in the affidavits that that allegation really means something a little different; that it really means, in other words, that there was no evidence before the justices from which they could draw the inference that these materials were required for repairs to the highway. But, if that is indeed the real allegation under that head, it is clearly contradicted by the affidavit of the justices themselves. They had evidence before them on this very matter, and they decided the matter on the evidence, and it was a matter which they had jurisdiction to decide.

A The second allegation is, and this is apparently the real point which the applicant desires to submit, that this licence is bad on its face. Counsel for the applicant in his argument admitted that, in substance, the licence which is attacked in that way conforms to the form of licence set out in the Schedule to the Act. It seems a somewhat paradoxical proposition to urge that a licence is bad on its face although it is substantially identical with the form in the

B Schedule. Two matters are alleged, both of which really put the same point in somewhat different ways. It is said that the licence improperly omits to specify the limitation of time within which it is to run and at the expiration of which it is to be spent. It is alleged further—and this, as it seems to me, is another aspect of the same argument—that the licence improperly omits to specify, or does not specify with sufficient particularity, the repairs which are referred to,

C that is to say, the repairs for the execution of which alone the materials to be got are to be employed. Attention has been directed in the course of the argument to *R. v. Bradford* (1) and to *Earl Manvers and Browne v. Bartholomew* (2). Reference was also made to *R. v. Badger* (3). As I understand the judgments in those cases, what they say is this, that when the form in the Schedule is read, as of course it must be, side by side with the provisions of the statute, it means that

D the licence is limited by the necessities for repair existing at the time when the licence is granted. So, for example, if a licence is granted for a term certain of five years it is bad; non constat that the repairs needing to be done at the time when the licence is granted may not be completed long before the expiration of five years, and if they were so completed the licence would be given a currency extending beyond the period necessary for those repairs. In other words, it

E would be a licence of a kind which the Act does not contemplate. Exactly the same kind of reasoning, as it seems to me, might be applied to a licence for almost any period if the period be named. The period of one year at first blush appears attractive, but in one case the period of one year might be just as excessive as in another case, *mutatis mutandis*, the period of five years is excessive. Those cases seem to me to illustrate very forcibly the difficulty which

F may arise when justices, going beyond the form in the Act, take it on themselves to name a particular period. A difficulty of that kind would be surmounted if the limited expression were “during such time as may be necessary to carry out the repairs needing to be carried out at the time when this licence is granted, and, in any event, a period not exceeding so much,” and naming a maximum; but, as the very object of the licence is to enable the material to be got for

G carrying out the repairs necessary at the time when the licence is granted, it seems otiose to say that. I do not believe that any of the judgments which have been referred to indicate that the naming of a particular period is necessary at all, and, indeed, the judgment of MELLOR, J., in *Earl Manvers and Browne v. Bartholomew* (2), seems in terms to express the view that no particular period

H needs to be named. But it is said that, if one looks at the form in the Schedule, the words about the repairs are also vague. So they are, and they are to be read in conjunction with the provisions of the statute. The words in this licence, so far as the work to be done is concerned, follow almost exactly the words of the form in the Schedule. It may very well be that it may be convenient and desirable that, notwithstanding that form, the justices should with some more

I particularity specify the work to be done; that would be convenient, but, in face of the form, it is exceedingly difficult to say that, because a particular licence does not exhibit further and better particularity, it is bad on its face.

It is admitted that there is a right of appeal to quarter sessions, and the applicant, therefore, is in this singular difficulty, that not merely has he to allege an excess of jurisdiction on the part of the justices who have determined the question that they have to determine and who have issued a licence in the form of the Schedule, but also that, although there is an appeal provided by the Act to the

court of quarter sessions, this licence should be quashed on certiorari. We are to exercise our discretion, so the argument runs, in circumstances like those. Speaking for myself, I cannot see any reason why that course should be taken.

DARLING, J.—I am of the same opinion. It appears to me that this power is capable of being very easily abused, but that can be guarded against, and one way of doing that is that, if such an order as this is made on terms which are considered too vague, the person who objects to it can go to quarter sessions and there the matter can be investigated by people who have some local knowledge of the roads; and in this particular case, if the appeal had gone to quarter sessions, it would have gone to quarter sessions presided over by a learned judge of very great experience and, in fact, a member of this Court of King's Bench. Why that remedy was not taken I cannot think. At the same time, it does seem to me that the justices might do, although there is this form in the statute, a little more than they did, without infringing the statute; they could follow the form, as it seems to me, and say that it is made to appear before them that the stone is necessary for the repair of the roads and give a licence to take the stone which is necessary; and I should have thought that it would have been much more convenient to limit the licence to a certain number of tons of stone than to limit it by time. On the cases that have been decided, one can see that a time limit is of practically no use at all, because, if the licence is limited to a year, far more may be got out in a year than is required for the purpose; but if the justices have evidence before them, which they ought to have, as to the state of the roads in order to arrive at a decision whether the repairs are necessary, it seems to me that they might easily ascertain at the same time about how many tons of material would be required to put the roads in the condition in which they ought to be. This form, I think, limits no time because it is intended not to be for all time; it is an order *pro hac vice*, but it would be a much better order if, after hearing evidence, the justices could give permission to take so many tons of material. I quite agree with what my Lord has said as to this not being a case in which this court could successfully be asked to interpose by certiorari.

SALTER, J.—I agree.

Rule discharged.

Solicitors: *Guscotte, Wadham, Tickell & Thurland*, for *Sparkes & Co.*, Crediton; *Taylor, Jelf & Co.*, for *J. & S. P. Pope*, Exeter.

[Reported by J. F. WALKER, Esq., Barrister-at-Law.]

A

BROOKS v. BLOUNT

[KING'S BENCH DIVISION (Lord Hewart, C.J., Darling and Salter, JJ.), December 14, 1922]

[Reported [1923] 1 K.B. 257; 92 L.J.K.B. 302; 128 L.T. 607; 87 J.P. 64; 39 T.L.R. 168; 67 Sol. Jo. 299; 21 L.G.R. 150; 27 Cox, C.C. 399]

B

Children and Young Persons—Neglect—Custody of child—Legal presumption that father has custody—Separation agreement between husband and wife giving custody of child to wife—Children Act, 1908 (8 Edw. 7, c. 67), s. 12 (1), s. 38 (2).

C

The father of a child cannot get rid of the legal presumption under the Children Act, 1908, s. 38 (2), that he has the custody of the child by entering into a separation agreement under which he makes certain payments to his wife who has "the sole custody and control without any interference whatsoever" by the father. If he fails to make the payments under the agreement and as a result the child is caused, or is likely to be caused, suffering or injury to health he is liable to conviction under s. 12 (1) of the Act.

D

Per SALTER, J.: I do not think that a person who, under the statute, would have the custody of a child can be heard to say that he has not such custody unless he has been deprived of it by the order of a competent court.

Dictum of ATKIN, J., in *Liverpool Society for the Prevention of Cruelty to Children v. Jones* (1), [1914] 3 K.B. at p. 818, applied.

E

Notes. The Children Act, 1908, s. 12 and s. 32, have been repealed by the Children and Young Persons Act, 1933, s. 109 (4) and Sched. VI. See, now, s. 1 (1) and (2) (a) and s. 17 of the Act of 1933.

As to the responsibility of a parent for the maintenance of his child, see 21 HALSBURY'S LAWS (3rd Edn.) 189 et seq., and for cases see 28 DIGEST (Repl.) 562 et seq. For the Children and Young Persons Act, 1933, s. 1 and s. 17, see 12 HALSBURY'S STATUTES (2nd Edn.) 977, 987.

F

Cases referred to:

(1) *Liverpool Society for Prevention of Cruelty to Children v. Jones*, [1914] 3 K.B. 813; 84 L.J.K.B. 222; 111 L.T. 806; 79 J.P. 20; 30 T.L.R. 584; 58 Sol. Jo. 723; 24 Cox, C.C. 434; 12 L.G.R. 1103, D.C.; 15 Digest (Repl.) 1034, 10,173.

G

(2) *Poole v. Stokes* (1914), 110 L.T. 1020; 78 J.P. 231; 30 T.L.R. 371; 24 Cox, C.C. 169; 12 L.G.R. 629, D.C.; 15 Digest (Repl.) 1035, 10,175.

Case Stated by justices sitting at Kettering.

H

At a court of summary jurisdiction sitting at Kettering in the county of Northampton on Aug. 9, 1922, the appellant, William Brooks, preferred an information against the respondent, Frank Blount, under s. 12 of the Children Act, 1908, charging that, on July 21, 1922, and divers previous dates, in the parish of Kettering, being a person over the age of sixteen years and having the custody, charge or care of a certain child, to wit, Hilda Kate Blount, aged five years, he unlawfully and wilfully did neglect such child in a manner likely to cause her unnecessary suffering or injury to her health. The following facts were admitted or proved. The respondent was married to Linda Beatrice Blount at Kettering on July 22, 1916. There was issue of the marriage one child, viz., the said Hilda Kate Blount, who was born on April 22, 1917. On Sept. 1, 1920, the respondent entered into a written agreement with his wife for separation, the following being express terms thereof:

I

"(a) The said Frank Blount shall during the joint lives of himself and the said Linda Beatrice Blount if the said Linda Beatrice Blount shall continue to perform and observe the stipulations herein contained and on her part to be performed and observed pay to the said Linda Beatrice Blount the

clear weekly sum of one pound five shillings. . . . (b) The said Linda Beatrice Blount shall out of the provisions made for her by this agreement or otherwise . . . in all respects support and maintain herself, child, and dependents. (c) The said Linda Beatrice Blount shall have the sole custody and control of the said child and of her education and bringing up until she attains the age of twenty-one years without any interference whatsoever on the part of the said Frank Blount, but the said Frank Blount shall be entitled to have reasonable access and communication with the said child at any time by appointment, but not oftener than once a week."

The respondent, shortly after the signing of the agreement, failed to carry out his part thereunder. For the first few weeks he remitted the weekly payments of 25s.; then he paid 15s. a week; later he varied the amount of his payments, and thereafter ceased to make any payment whatever. The only payment made by him to his wife during the twelve months preceding the hearing was 30s. in May, 1922. In May, 1921, the wife commenced proceedings against the respondent in the county court at Kettering. On June 7, 1921, an order was made by that court for payment to the wife by the respondent of 25s. a week, and of 8s. a month in reduction of the arrears then due under the agreement. The respondent ignored the order of the court, and on Sept. 6, 1921, an order of committal was made against him for twenty-one days, but such order was not executed until January, 1922, in consequence of the respondent's absconding from his address, when the respondent was sent to prison for twenty-one days in pursuance of the order of Sept. 6, 1921. In May, 1922, the respondent was working for a firm of boot factors in Leicester, and was earning £3 a week, out of which he paid 25s. a week for board and lodging. The arrears under the agreement amounted, on Aug. 9, 1922, the date of the hearing, to about £100. The wife was, on Aug. 9, 1922, destitute and unable to support the respondent's child, and the child accordingly on the said date and for a long time previously depended for her support entirely on the charity of the wife's parents. The child had not suffered injury to her health.

It was contended on behalf of the respondent that: (a) by reason of the agreement for separation he had not the custody of the child and that, consequently, he had committed no offence under s. 12 of the Act; alternatively (b) the child had suffered no injury to her health, and, therefore, no offence had been committed under s. 12. It was contended on behalf of the appellant that: (a) the respondent was liable under s. 12 (1) of the Act to provide for his child, and that the agreement for mutual separation could not discharge him from his liability, nor could he discharge himself from that liability by delegating it to another person; (b) by reason of s. 38 (2) of the Act, the respondent must be presumed and deemed to have the custody of the child in law; (c) the fact that the child had not suffered actual injury to her health was immaterial.

The justices dismissed the information, being of opinion that, having regard to the terms of the agreement for mutual separation, the respondent had not in fact the custody of the child and that the presumption of law in s. 38 (2) of the Act was rebutted by the agreement, and, consequently, that the respondent had committed no offence under s. 12 of the Act. The appellant now appealed.

The Children Act, 1908, provides :

"12 (1) : If any person over the age of sixteen years, who has the custody, charge, or care of any child or young person, wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person, or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child or young person unnecessary suffering or injury to his health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour . . . and for the purposes

A of this section, a parent or other person legally liable to maintain a child or
young person shall be deemed to have neglected him in a manner likely to
cause injury to his health if he fails to provide adequate food, clothing, medical
aid, or lodging for the child or young person, or if, being unable otherwise to
provide such food, clothing, medical aid, or lodging, he fails to take steps to
procure the same to be provided under the Acts relating to the relief of the
B poor. . . .

C "38 (2): For the purposes of this Part of this Act—any person who is
the parent or legal guardian of a child or young person or who is legally
liable to maintain a child or young person shall be presumed to have the
custody of the child or young person, and as between father and mother the
father shall not be deemed to have ceased to have the custody of the child
or young person by reason only that he has deserted, or otherwise does not
reside with, the mother and child or young person; and any person to whose
charge a child or young person is committed by any person who has the custody
of the child or young person shall be presumed to have charge of the child
or young person; and any other person having actual possession or control
of a child or young person shall be presumed to have the care of the child or
D young person."

W. T. Monckton for the appellant.

B. Campion for the respondent.

LORD HEWART, C.J.—This case raises a point of considerable importance
under the Children Act, 1908. The justices have dismissed the charge against
E the respondent under s. 12 (1) of that Act on the ground that the separation
agreement between the respondent and his wife was a sufficient answer to the
charge, and that, in view of the terms of that agreement, the respondent had
not, in fact, the custody of the child, and that the legal presumption under s. 38
(2) was rebutted by the agreement. With regard to s. 12 (1), it is obvious that,
F so far as concerns the persons there referred to, that provision is framed in the
most comprehensive terms. It includes any person over the age of sixteen years
who is in a certain position in relation to a child. It is also obvious that a distinction
is drawn between the custody, the charge, and the care of a child. It is further
obvious that, for a person to be convicted of wilful neglect of a child, it is not
necessary to prove that the neglect caused actual suffering or injury to the
child's health; it is sufficient to prove that it was likely to cause suffering or
G injury to the child's health. Section 12 (1) is to some extent amplified by s. 38
(2), which distinguishes between different classes of persons, and between the
custody, charge and care of a child. In that subsection there is a scale of persons
in a descending degree of importance, and there is a presumption in regard to
each of them. Certain persons are presumed, because of their blood relationship
or legal positions, to have the custody of the child. Certain persons are presumed
H to have the charge of a child because the child has been committed to them
by the person having the custody of the child. Finally there are the persons
who de facto have the care of a child. For a person to be convicted under s. 12
(1), it is necessary to show that he is a person of the class against which that
provision is directed, and that he has committed an act to which it refers. In
this case, the justices did not go beyond the first of these two questions, and
I they dismissed the information because they thought that the presumption as to
a parent under s. 38 (2) was rebutted by the mere existence of the separation
agreement without regard to the way in which its terms have, or have not, been
carried out.

A similar question was considered in *Poole v. Stokes* (2), in which CHANNELL, J.,
in giving judgment, said (110 L.T. at p. 1022):

"The respondent and his wife had entered into a separation agreement. There
was a voluntary separation and a voluntary payment by the husband, and

he had been paying her 20s. a week under that agreement for the maintenance of herself and her children. The justices have found in the supplemental case that this sum was sufficient, and therefore he has provided her with a sum of money and he has sent that money to her. The respondent intrusted to his wife the spending of that money, and delegated to her the duty of providing clothing and food for them. That might be satisfactory for a time, but it is clear that he became aware of the fact that his wife was not properly using the money and that she was not providing for the children, and consequently he was in the position of having employed an agent to perform his duty and of having the knowledge that that agent was not performing the duty. The consequence is that he was not doing his duty, and he has failed to do his duty. He was sending the money to his agent to do it, and that agent did not do it. He has failed to provide adequate food for the children, and therefore he is clearly liable. What he did was to go to the Society for the Prevention of Cruelty to Children and to draw their attention to the facts; but the fact that he went to the society, apparently for the purpose of protecting the children, does not relieve him from the obligation to perform his duty himself. There was nothing, as far as we can see, to prevent him from taking his children away from his wife. Section 12 (1) of the Act says that a parent who is legally liable to maintain a child shall be deemed to have neglected him if he fails to provide adequate food, clothing, and so forth."

Two distinctions have been suggested between that case and the present case. First, it is said that, in that case, the separation agreement was oral. That seems to me to be a matter of no moment. If a parent could by a voluntary agreement get rid of the legal presumption that he has the custody of his child, it would not matter whether the agreement was oral or written. Secondly, it is said that, in the terms agreed between the parents in *Poole v. Stokes* (2), nothing was said about the custody of the children, as distinguished from their charge or care. Is it possible for a parent by a voluntary agreement to get rid of the legal presumption under s. 38 (2) that he has the custody of a child? In my opinion, it is not possible for a parent by his own act to get rid of this legal presumption. It appears to me that the proposition which I am endeavouring to express is really involved in the latter part of the judgment of ATKIN, J., in *Liverpool Society for the Prevention of Cruelty to Children v. Jones* (1), although the matter was not directly considered. There ATKIN, J., said ([1914] 3 K.B. at p. 818):

"To my mind the effect of s. 38 (2) is that the persons who are there named and who are respectively presumed to have the custody, charge, or care of the child may, if they wilfully neglect it, be convicted under s. 12 even though they have not, in fact, either the custody, charge, or care."

I am confirmed in the view which I am expressing by s. 2 of the Custody of Infants Act, 1873, which provides:

"No agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or the control thereof to the mother: Provided always, that no court shall enforce any such agreement, if the court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto."

The words "as between father and mother," in s. 38 (2) of the Children Act, 1908, appear to have been used by the legislature in order to draw a distinction between that which may be done by either of them to regulate their relation as individuals and that which may be done by either of them in purported subtraction from the obligations which they owe to the community in regard to their children. The

A justices were wrong in holding that the separation agreement rebutted the presumption under s. 38 (2) that the respondent had the custody of the child. No separation agreement can rebut that presumption. The case must, therefore, go back to the justices for them to consider whether there has, in fact, been the wilful neglect contemplated by the Act.

B **DARLING, J.**—I agree.

SALTER, J.—I am of the same opinion. Section 12 (1) of the Children Act, 1908, defines three classes: those having (i) the custody, (ii) the charge, and (iii) the care of a child, and provides a penalty for persons of these classes for neglect or ill treatment of the child. The question whether a person falls within one of these classes is a question of fact. Section 38 (2) provides that certain persons shall be presumed to be in each of these classes. This is a presumption of law. I do not think that the person who, under the statute, would have the custody of a child can be heard to say that he has not such custody, unless he has been deprived of it by the order of a competent court. A person to whom the custodian of the child has committed the charge of the child cannot be heard to deny that he has such charge; and a person who has the actual possession or control of a child cannot be heard to say that he has not the care of the child.

Appeal allowed; Case remitted.

Solicitors: *Church, Rackham & Co.; Indermaur & Brown*, for *J. C. Wilson*, Kettering.

[Reported by J. F. WALKER, Esq., Barrister-at-Law.]

F **SHILLITO v. HINCHLIFFE**

[KING'S BENCH DIVISION (Lord Hewart, C.J., Shearman and Salter, JJ.), April 25, 1922]

[Reported [1922] 2 K.B. 236; 91 L.J.K.B. 730; 127 L.T. 367; 86 J.P. 110; 20 L.G.R. 492; 2 B.R.A. 919]

G *Rates—Distress—Defence to application—Invalidity of rate—Competency.*

On an application for a distress warrant for non-payment of rates the justices have no jurisdiction to entertain a defence alleging that the rate itself was invalid because the valuation list on which it was based was bad in law.

Notes. Applied: *East Barnet U.D.C. v. Allen Trenarry (Barnet), Ltd.*, [1948] 2 All E.R. 583. Referred to: *Kershaw, Leese & Co. v. Stockport Overseers*, [1923] 2 K.B. 129; *Kingston Mill, Stockport v. Owen* (1928), 92 J.P. Jo. 782; *L.C.C. v. Hackney Borough Council*, [1928] All E.R. Rep. 614; *Crook and Willington Rating Authority v. Simpson*, [1942] 1 K.B. 134.

I As to jurisdiction of justices on hearing application for distress warrant for unpaid rates see 12 HALSBURY'S LAWS (3rd Edn.) 170 et seq., and for cases see 18 DIGEST (Repl.) 390 et seq.

Cases referred to:

- (1) *Stirk & Sons, Ltd. v. Halifax Assessment Committee*, [1922] 1 K.B. 264; 91 L.J.K.B. 258; 126 L.T. 338; 86 J.P. 9; 38 T.L.R. 83; 66 Sol. Jo. 236; 20 L.G.R. 43; 2 B.R.A. 838, D.C.; 38 Digest 581, 1157.
- (2) *Whenman v. Clark*, [1916] 1 K.B. 94; 85 L.J.K.B. 424; 114 L.T. 116; 80 J.P. 128; 60 Sol. Jo. 174; 14 L.G.R. 149; 1 B.R.A. 450, C.A.; 18 Digest (Repl.) 392, 1426.

- (3) *Dixon v. Blackpool and Fleetwood Tramroad Co.*, [1909] 1 K.B. 860; 78 L.J.K.B. 637; 100 L.T. 403; 73 J.P. 219; 25 T.L.R. 323; 7 L.G.R. 390; Konst. & W. Rat. App. 114, D.C.; 18 Digest (Repl.) 410, 1587. A
- (4) *Wixon v. Thomas, Lambert v. Thomas, Burrows v. Thomas*, [1911] 1 K.B. 43; 80 L.J.K.B. 104; 103 L.T. 731; 75 J.P. 58; 8 L.G.R. 1042; Konst. & W. Rat. App. 236, D.C.; on appeal [1912] 1 K.B. 690, C.A.; 18 Digest (Repl.) 392, 1425. B
- (5) *London and North Western Rail. Co. v. Bedford* (1852), 17 Q.B. 978; 18 L.T.O.S. 256; 16 J.P. Jo. 132; 117 E.R. 1555; 18 Digest (Repl.) 388, 1391.
- (6) *Leicester Waterworks Co. v. Cropstone (Overseers and Churchwardens)* (1875), 44 L.J.M.C. 92; 32 L.T. 567, 752; 40 J.P. 165, D.C.; 18 Digest (Repl.) 388, 1392.
- (7) *Blackpool and Fleetwood Tramroad Co. v. Bispham with Norbreck U.D.C.*, [1910] 1 K.B. 592; 79 L.J.K.B. 322; 102 L.T. 238; 74 J.P. 141; 8 L.G.R. 149; Konst. & W. Rat. App. 162, D.C.; 38 Digest 626, 1464. C

Case Stated by justices for the county borough of Halifax.

A complaint was preferred on Dec. 12, 1921, by the appellant, William Shillito, assistant overseer of the poor of the parish of Halifax and collector of the rates and water charges of the said borough, against Ernest William Hinchliffe (hereinafter called the respondent) for that the respondent, being a person duly rated and assessed to the consolidated rate of the parish of Halifax and to the water charges in the sum of £27 15s. 10d., had not paid the second moiety of the same, being the sum of £13 17s. 11d., but had refused or neglected so to do after lawful demand thereof. The sum of £27 15s. 10d. was based on an assessment which was the same as the amount at which the property had been assessed for the year 1920-21, which amount had been arrived at by increasing the previous assessment by twenty-five per cent. The complaint was heard and determined by the justices at a petty sessions on Dec. 30, 1921, adjourned to Jan. 13, 1922, and upon such adjourned hearing they declined to issue a distress warrant and ordered the appellant to pay special costs of £21. D

Upon the hearing of the complaint the following facts were proved or admitted. The rate was duly made on April 7, 1921, and duly published and allowed. The respondent was the occupier and was duly assessed in and to the rate in the sum of £27 3s. 1d., and 12s. 9d. water charges, making together the total of £27 15s. 10d. The rate was payable on demand, but the overseers had intimated on the demand note that they were prepared to accept payment of the rate, and the corporation also intimated that they were prepared to accept payment of the water charges, in two moieties, the first moiety on or before June 1, and the second on or before Dec. 7, and on May 27, 1921, the respondent paid the sum of £13 17s. 11d., being the first moiety of the rate for the year 1921-22. The payment of the rate and water charges had been duly demanded from the respondent. The respondent had refused to pay the amount of the second moiety of the rate and the water charges unless credit was given for the amounts overpaid. The second moiety was still unpaid. The respondent had, on Dec. 9, 1921, by his solicitor, tendered the sum of £3 10s. 9d. in settlement of the amount demanded, which tender was refused. In October, 1921, there was an appeal to quarter sessions by John Stirk & Sons, Ltd., against the Halifax Assessment Committee and Overseers against a rate or assessment made for the relief of the poor on April 1, 1920, in respect of certain hereditaments of which the said John Stirk & Sons, Ltd., were the occupiers, which appeal the court of quarter sessions allowed on Jan. 4, 1921, and on a Case Stated by quarter sessions the Divisional Court held ([1922] 1 K.B. 264) that the order of the sessions allowing the appeal against a rate or assessment made for the relief of the poor on April 1, 1920, in respect of certain hereditaments of which John Stirk & Sons, Ltd., were the occupiers be affirmed with costs. Subsequently in January, 1922, a further E
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A application was made to quarter sessions in the appeal of John Stirk & Sons, Ltd., and in respect of certain other appellants whose cases had been respited from time to time from October, 1920, to quash the poor rate made on the supplemental valuation list, on which the rate under appeal was based, and at the hearing the court of quarter sessions held, according to the newspaper reports, that, as the supplemental valuation list increasing the assessments by twenty-five per cent.

B was bad in law, the rate made thereon must be quashed, but no order of court had at the date of the justices' decision been issued. The order of the court of quarter sessions had since been issued. For the year 1920-21 the rates levied on the assessment against which John Stirk & Sons, Ltd., appealed were three in number, namely, a borough rate and a general district rate, made, levied, and collected by the Halifax corporation under their local Acts and a poor rate by the overseers. The Halifax Corporation Act, 1920, so far as regarded the rating sections thereof, came into operation from and after Mar. 31, 1921, with the result that the only rate levied in 1921-22 was a poor rate levied by the overseers and called the consolidated rate. Whilst the appeal in *Stirk's Case* (1) was pending the appellant laid the consolidated rate of April, 1921, in which the respondent was rated, on the same assessment as that on which the rates for 1920-21 were based (including the twenty-five per cent. increase). The respondent had paid under protest the rates levied in the year 1920-21, which was the first year in which any rate had been laid on the increased assessment, as follows:

	£	s.	d.
Poor rate	2	19	7
Borough rate	12	5	2
General district rate	11	18	4
Water charges	12	9	
	£27	15	10

F At the hearing the appellant said that he would accept payment of £8 7s. 11d., being the amount demanded less the sum consequent upon the increase in assessment of twenty-five per cent. for the year 1921-22, which amount the respondent refused to pay, claiming that he had the right to be fully credited with a percentage of all the rates paid by him as in the last paragraph aforesaid.

G The appellant thereupon contended (a) that if the respondent had any right of claim or appeal against the appellant in respect of the amount alleged to be overpaid by him in respect of the previous year, his remedy was by process in another court and not in a court of summary jurisdiction, and/or that he could not claim, as against a claim in respect of a poor rate, over-payments (if any) made in respect of the borough or district rates, and therefore a court of summary jurisdiction could not entertain the defence of set-off, which, if entertained,

H would be giving to the respondent indirectly a relief that he could not obtain directly in the same court, even if the claim were a valid one; (b) that what the justices had to adjudicate upon was, whether the rate of 1921-22 was duly made, published, allowed, and demanded, whether payment had been refused, and whether the respondent was the occupier, and that, such facts being admitted, they were acting ministerially and had no alternative but to issue a distress warrant; (c) that the respondent was not a party to the appeal in *Stirk & Sons, Ltd. v. Halifax Assessment Committee* (1), and that, as the respondent had not given notice of objection to, or appealed against, the 1920-21 rates or assessments within the time allowed by statute for giving notice of objection and appealing, he could not avail himself of the decision in such case; (d) that the appeal of *Stirk & Sons, Ltd. v. Halifax Assessment Committee* (1), was only against the twenty-five per cent. increase in the assessment, and that, as the appellant had offered to accept the sum of £8 7s. 11d., which was the amount due, calculated on

the assessment before the increase was made, the appellant was entitled to a warrant for such reduced amount of £8 7s. 11d.; (e) that the rates levied in the year 1920-21 consisted of general district rate, and a borough rate made, levied, and collected by the corporation, and poor rate made, levied, and collected by the overseers, but that in accordance with the Halifax Corporation Act, 1920, s. 44, the rate levied in the year 1921-22 was a poor rate (called the consolidated rate), and therefore, even if the respondent's claim that he had made an over-payment in the year 1920-21 were correct, he could not claim to set off against the consolidated rate, levied by the overseers, the over-payment (if any) which there might have been in respect of the three rates levied for 1920-21 or of any one of such rates; (f) that a matter which might be the subject of an appeal against the rate or assessment, and particularly objections in relation to the assessment on which the rate was based could not properly be urged against the issue or enforcement of a distress warrant; (g) on the adjourned hearing, after the application to quarter sessions in *Stirk & Sons, Ltd. v. Halifax Assessment Committee* (1) and the other respited cases, the appellant offered, as this decision (the order of court not being to hand, newspaper reports had to be relied on) was given on an appeal against the poor rate, to reduce further the amount demanded by deducting the sum of 11s. 11d., being the amount of poor rate received from the respondent for the year 1920-21 on so much of the assessment of his property as represented the twenty-five per cent. increase, and, this being refused by the respondent, the appellant contended that he was entitled to a distress warrant for the sum of £7 16s., and even if the respondent's contention that the whole rate was quashed were correct the appellant was entitled to a distress warrant for such less sum as would remain after deducting the whole of the poor rate paid by the respondent for the year 1920-21; (h) on an application by the respondent for costs and special costs the appellant contended that, except for the purpose of stating a case, the Summary Jurisdiction Acts did not apply to the recovery of poor rates, and these were the Acts which generally governed the award or refusal of costs, and that, although the Distress for Rates Act, 1849, s. 1, empowered justices to order costs to be paid to the overseers or persons applying for a distress warrant, it did not either directly or by implication empower them to order costs to be paid by the overseers or person applying for a distress warrant. The respondent contended (a) that the rate for 1921-22, which the appellant was seeking to enforce, was based on a valuation list containing the twenty-five per cent. increased assessment and was identical with the 1920-21 list, which, by the decision of the Divisional Court and the court of quarter sessions was found to be illegal, and that the rate was subsequently quashed by the court of quarter sessions; (b) that the supplemental valuation list was the basis of all the rates, and that as the supplemental valuation list was declared invalid, all the rates made thereon were bad, whether poor, general, district, or borough rates; (c) that the respondent had overpaid his rates in the year 1920-21 by paying on the increased assessment, and therefore was entitled to deduct the amount of all the rates, including the borough and district rates, so overpaid, from the amount demanded for the year 1921-22; (d) that the facts in this case were identical with the facts in *Stirk & Sons, Ltd. v. Halifax Assessment Committee* (1), and that, as the court had ordered the excess rates paid by John Stirk & Sons, Ltd., to be refunded, so the excess rates paid by respondent should be refunded.

The justices were of opinion that there was sufficient cause shown for non-payment of the rate, as this case was governed by the decision of the Divisional Court in *Stirk's Case* (1), and the court of quarter sessions had quashed the rate, and as the 1921-22 rate was based on a valuation list similar to the one in 1920-21, and that the successful party should be awarded costs. The question for the opinion of the court was whether, upon the above statement of facts, the

A justices came to a correct determination in point of law, and, if not, what should be done in the premises.

Montgomery, K.C., Jeeves, K.C., and Maurice FitzGerald for the appellant.
Konstam, K.C., and S. A. Kyffin for the respondent.

B **LORD HEWART, C.J.**—The real question raised is whether justices hearing a complaint that a certain person who was duly rated and assessed to the consolidated rate for the parish of Halifax and to certain water charges had failed to pay such rate and water charges could raise before them the question whether the rate was itself good.

C Various questions are indicated in the Case Stated and have been discussed before us, but I think it is apparent that the only question which is really raised by the Case is the question which I have mentioned. Until a comparatively recent case the law upon the matter was fairly clear, and I do not think that that case, when it is carefully looked at, involves any substantial extension of the doctrine previously held. The case is *Whenman v. Clark* (2). SWINFEN EADY, L.J., in the course of his judgment says ([1916] 1 K.B. at p. 111):

D “The rule was laid down by BRAY and ATKIN, JJ., in the Divisional Court in the following terms: ‘That the justices have jurisdiction if the question is whether the defendant ought to have been rated at all, or, if at all, for the full rateable value.’ ”

E That, I think, was all that was really decided or re-affirmed in *Whenman v. Clark* (2). It is quite true, if one looks at individual passages elsewhere, that the doctrine does seem to be a little extended. It is not necessary to go into any questions raised by those passages. Here what happened was that, before the matter came before the justices on Dec. 30, 1921, a Case Stated with reference to the rate of the previous year had been argued in this court. That was *Stirk & Sons, Ltd. v. Halifax Assessment Committee* (1). In that case it had been held that the rate according to which the appellants, Stirk & Sons, had been rated was invalid. It was held that quarter sessions were entitled to find that no supplemental valuation list had been made within the Union Assessment Committee Act, 1862, and, secondly, that the list, which purported to be valuation list, was unfair, unequal, and bad in law. Counsel for the respondent has admitted very frankly that the mere circumstance that judgment had been delivered in *Stirk & Sons, Ltd. v. Halifax Assessment Committee* (1) before the day upon which the complaint in this case was preferred is an immaterial fact; it is a fact in the nature of an accident and he puts his case very frankly upon the ground that in all such cases, whether or not there has been an antecedent appeal to this court which may afford a clue to the true nature of the valuation list, a ratepayer, when complaint is made that he has not paid his rates and the justices are asked to issue a distress warrant, may take the point that he is not liable inasmuch as the rate is ineffective for the reason that there are flaws in the valuation list.

H If that were, indeed, the true doctrine it would involve a very serious extension of the law as it was stated in the other cases, and re-stated in *Whenman v. Clark* (2). A defendant raising that contention is not saying, on the one hand, that he ought not to have been rated at all; he is not raising any question as to his being entitled to be exempt from rateability; nor, on the other hand, is he contending that, though rateable, he ought not to have been rated for the full rateable value of his hereditaments. He is raising a far wider and deeper question of the validity of the rate itself. In my opinion, that is something which cannot in those proceedings be done, and the justices were not entitled to entertain arguments of that character in this case. Accordingly, the answer, in my judgment, to give to the question, and the only question, raised by this case is that the justices did not come to a correct determination in point of law, and that on the contrary a distress warrant ought to have been issued.

I

SHEARMAN, J.—I am of the same opinion. I do not look upon the proceedings of the overseers of the parish of Halifax with any approbation in this case, but I think they are entitled to succeed on this appeal. They first conjointly with the assessment committee, as we know from another case, raised a number of assessments by a sort of leaden rule which they had no right to apply, and that raised a crop of appeals, and while that crop of appeals was pending, and, I think, after the quarter sessions had allowed a test one, they then levied another rate on exactly the same valuation list that was question. Eventually on the test appeal which was taken on the improper valuation list, this court held that the assessment committee had no power whatever to do what they had done, namely, to raise the rates by a fixed percentage without considering each particular case, and, as I understand, the court said that the committee had proceeded within their jurisdiction but upon a wrong principle, and therefore the court affirmed the decision of quarter sessions, allowing the appeal of certain test appellants. The matter went back to the quarter sessions, which thereupon quashed the rate, but meanwhile, before they had quashed the rate for the succeeding year, the overseers and the assessment committee had on exactly the same bad valuation list—I use the word “bad” as describing something which was capable of being set aside—levied another rate, and in this particular case, instead of levying a number of different rates which had all been made on the same valuation list they levied one consolidated rate both for the corporation and for the union, all of which was collected in one rate by the overseers. The respondent in this case, who had overpaid considerable sums, went to them and asked that these over-payments should be taken into account. Some of them clearly could not be taken into account, because he was claiming against the overseers, who had paid the corporation. There was no reason why all the parties should not have come together and the corporation have made an allowance, but this corporation would not do it; they took some objections, one of them being that this was a set-off which could not be allowed. Then eventually the parties got into warfare, and then the bold point was taken by the present respondent, “I am not bound to pay anything at all because this rate is bad.” As I understand the finding of the justices they did find this, that as this rate was made upon a valuation list, which the court of King’s Bench had held to be a bad valuation list, therefore the whole rate was bad, and they declined to enforce it at all. In my judgment, they had no jurisdiction to do such a thing.

As I understand the principle of the cases from the earliest times in regard to what is the precise jurisdiction of a stipendiary magistrate, or two or more justices in petty sessions who are asked to issue a distress warrant, some of the older cases say that their duty is merely ministerial, but eventually I think the law became settled in a way which is, I think, very correctly stated in *RYDE ON RATING* (4th Edn.) at p. 758, and I will proceed to read what I conceive in my judgment to be the proper position :

“It is clear that (apart from payment, which of course is a good defence) some objections to the rate can be raised on behalf of the ratepayer when the justices are asked to issue a distress warrant to enforce a rate. The question whether a particular objection can then be raised seems at one time to have been taken to depend upon the following distinction. The rate is to be made by the overseers, and allowed by the justices; does the objection taken amount to an allegation (1) that these functionaries have acted in excess of their jurisdiction, or (2) that they have acted erroneously in the exercise of their jurisdiction? If the objection belonged to the former class, it could be raised when application was made for the distress warrant; if it belonged to the latter class, it could not.”

As I look at the case I think that that is still the law and it seems to me that it brings the assistant overseer who is the appellant here just within the line. This

A was a valuation list which, upon inquiry into the circumstances of the case, was found to be improperly made in the improper exercise of the powers of the assessment committee; they had levied a rate in accordance with the amended valuation list, but that amended valuation list had been made according to a wrong and improper exercise of jurisdiction. I think it came into the second class and not into the first class. No functionary had acted in excess of jurisdiction. Having read this passage from Mr. RYDE's book I would like to say that the book goes on to say this :

"But the most recent decision (*Whenman v. Clark* (2)) seems to lay down that the justices can consider (1) any objection belonging to the former class, and in addition, (2) if no facts are in dispute, any other question of law."

C That statement rests entirely upon some dicta of PHILLIMORE, L.J., approving some other dicta of LORD ALVERSTONE, C.J., and WALTON, J., in *Dixon v. Blackpool and Fleetwood Tramroad Co.* (7) and *Wixon v. Thomas* (4). Speaking for myself, I cannot see that the question whether the facts are in dispute or not in dispute can alter a principle; otherwise it would be open to a person to admit the facts and so give a basis for jurisdiction, or by disputing the facts to oust the jurisdiction. D I do not think there is any real foundation in the decided cases for further extending the principle. I should like to add that there does seem to be one other ground on which the justices can decline to act, and that rests on three cases to which counsel for the respondent referred us, *London and North Western Rail. Co. v. Bedford* (5), *Leicester Waterworks Co. v. Cropstone (Overseers and Churchwardens)* (6), and *Blackpool and Fleetwood Tramroad Co. v. Bispham with Norbreck U.D.C.* (7), all of which were cases in which the local authorities were acting in flagrant violation of good faith. This court held that the justices were quite right in those circumstances not to issue a distress warrant, because it was contrary to good morals to do so. On these grounds, and on these grounds alone, I think, without deciding any other point as to what amount of set-off there is or should be allowed, it follows that the justices ought to have issued the distress warrant, and this appeal must be allowed.

F **SALTER, J.**—I am of the same opinion and desire to add nothing to what has been said.

Case remitted.

Solicitors: *Sharpe, Pritchard & Co.*, for *Percy Saunders*, Halifax; *Helliwell, Harby & Evershed*, for *Jubb, Booth & Helliwell*, Halifax.

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

NITRATE PRODUCERS STEAMSHIP CO., LTD. v. SHORT BROS., LTD.

[HOUSE OF LORDS (Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Wrenbury and Lord Carson), June 16, 1922]

[Reported 91 L.J.K.B. 871; 127 L.T. 726; 38 T.L.R. 747]

House of Lords—Judgment—Effective date—Judgment for first time directed to be entered for party to action—Judgment to bear date of order of House—Effective date when judgment of court of first instance restored.

On April 2, 1919, BAILHACHE, J., dismissed an action by the appellants against the respondents for damages for breach of contract, but he provisionally assessed the damages at £50,000. On Oct. 30, 1919, the Court of Appeal affirmed that decision. On July 1, 1921, the House of Lords reversed the order of the Court of Appeal, ordered that judgment be entered for the plaintiffs for £50,000 and remitted the cause to the King's Bench Division to do therein as should be just and consistent with their Lordships' judgment. The Divisional Court ordered the judgment to be made an order of the High Court, and referred all questions arising under the judgment of the House of Lords to BAILHACHE, J., who decided that judgment should be entered as of April 2, 1919.

Held: in the absence of a direction by the House of Lords to the contrary, where judgment was for the first time directed by the House to be entered in favour of a party to an action the date which that judgment bore must be the date when the order was made by the House, and, therefore, the judgment to which the plaintiffs were entitled should be entered as of July 1, 1921, and not as of April 2, 1919.

Per CURIAM: It is a totally different proposition where the effect of an order in the House of Lords is to restore a judgment of the court of first instance which has been reversed by an order of the Court of Appeal. In that case the judgment of the court of first instance which is restored remains standing as from the date when it was given.

House of Lords—Judgment—Application to vary—To be made at time of hearing appeal.

An application to the House of Lords to add to or vary a judgment which it has pronounced should be made when the case is heard to the members of the House who have heard the appeal, and not after a substantial time to a differently constituted House.

Notes. As to dates of judgments see 22 HALSBURY'S LAWS (3rd Edn.) 777-779, 782-784; and for cases see 30 DIGEST (Repl.) 206-208 and DIGEST, Practice, 611, 612.

Cases referred to:

- (1) *Deeley v. Lloyds Bank* (1912), 57 Sol. Jo. 158, C.A.
- (2) *Macbeth & Co., Ltd. v. Maritime Insurance Co., Ltd.* (1908), 24 T.L.R. 559; 30 Digest (Repl.) 210, 532.
- (3) *Rajah Lelanund Singh v. Maharajah Luckmissur Singh, Bahadoor* (1870), 13 Moo. Ind. App. 490.
- (4) *Rodger v. Comptoir d'Escompte de Paris* (1871), L.R. 3 C.P. 465; 7 Moo. P.C.C.N.S. 314; 40 L.J.P.C. 1; 24 L.T. 111; 19 W.R. 449; 17 E.R. 120, P.C.; 16 Digest 148, 483.
- (5) *Borthwick v. Elderslie Steamship Co.* (No. 2), [1905] 2 K.B. 516; 74 L.J.K.B. 772; 93 L.T. 387; 53 W.R. 643; 21 T.L.R. 630; 49 Sol. Jo.; 10 Asp. M.L.C. 121, C.A.; Digest Practice 612, 2510.

Also referred to in argument:

Belgian Grain and Produce Co., Ltd. v. Cox & Co. (France), Ltd., [1919] W.N. 308, 317; 148 L.T. Jo. 233, C.A.; Digest Practice 612, 2511.

Whitehead and Morton v. Galbraith, Cullen, and Galbraith (1861), 4 Macq. 283.

A **Appeal** by the plaintiffs from an order of the Court of Appeal.

An action was brought by the plaintiffs to recover damages for breach of contract by reason of the alleged faulty construction of certain engines placed in a ship built by the defendants. BAILHACHE, J., by whom the action was tried, found, by his judgment dated April 2, 1919, that the defendants had not committed a breach of contract as alleged, but he assessed at £50,000 the damages which the plaintiffs would be entitled to recover if it were decided on appeal that he was wrong in his decision on the question of breach. The Court of Appeal affirmed his judgment (SCRUTTON, L.J., dissenting). On July 1, 1921, the House of Lords, by a majority, reversed the judgments of BAILHACHE, J., and of the Court of Appeal, and ordered that judgment should be entered for the plaintiffs, and "that the cause be and the same is hereby remitted back to the King's Bench Division of the High Court of Justice, to do therein as shall be just and consistent with this judgment." By notice of motion dated July 20, 1921, the plaintiffs applied to the Divisional Court of the King's Bench Division for an order that the order of the House of Lords be made an order of the High Court and they be at liberty to sign judgment as of April 2, 1919 (the date on which BAILHACHE, J., delivered judgment) for the sum of £50,000, or, alternatively, that they be at liberty to sign judgment for the sum of £50,000 together with interest from April 2, 1919. On July 26, 1921, the Divisional Court made an order that the order of the House of Lords be entered and made an order of the High Court, and further ordered that all questions, if any, arising under the judgment of the House of Lords be referred to BAILHACHE, J. On July 28, 1921, BAILHACHE, J., on the application of the plaintiffs, ordered that the judgment of the High Court under the order of July 26, 1921, be entered as of April 2, 1919. The defendants, by leave, appealed to the Court of Appeal from so much of the last-mentioned order as directed the judgment to be entered as of April 2, 1919. The Court of Appeal held that the High Court had no jurisdiction to direct that the judgment be dated as of any other date than the date of the order of the House of Lords, namely, July 1, 1921, and allowed the appeal. The plaintiffs appealed.

Dunlop, K.C. and Harold Stranger for the appellants.

R. I. Simey for the respondents.

LORD BUCKMASTER.—On May 18, 1918, the appellants instituted proceedings to recover against the respondents a sum of unliquidated damages for breach of a contract to build and deliver a steamship. The dispute came before BAILHACHE, J., on April 2, 1919, when he decided that the plaintiffs had failed to establish their case. He accordingly directed that judgment should be entered for the defendants, but, with a view to saving time and cost, he also considered what the position between the parties ought to be if, in fact, he was wrong in the conclusion that no breach of contract had been established. Accordingly the judgment as drawn up contains this statement: "That the plaintiffs recover nothing against the defendants, that the defendants recover from the plaintiffs their costs to be taxed, but that, if upon appeal this judgment be reversed, the damages be fixed at £50,000." That judgment was appealed to the Court of Appeal and the appeal was dismissed on Oct. 30, 1919, and a further appeal was brought to this House and was heard on July 1, 1921. The order of this House reversed the judgments of the Court of Appeal and of BAILHACHE, J., and directed that judgment should be entered for the appellants for the sum of £50,000, and, in accordance with the usual and necessary practice, further directed that the cause should be remitted to the King's Bench Division of the High Court of Justice "to do therein as shall be just and consistent with this judgment."

It is important to pause there for a moment before reciting the subsequent

history of this dispute in order to consider what the effect of such a judgment is. A
It certainly does not mean that the High Court have any discretion to vary a
judgment of this House; their power is limited to doing what is just and con-
sistent with the judgment for the purpose of making it effective as between the
parties. It might well be as in a case to which reference has been made before
your Lordships to-day—*Deeley v. Lloyds Bank* (1)—that the judgment of your
Lordships' House would be confined to part only of the original dispute and B
that the judgments of the courts below upon other portions of the controversy
would remain undisturbed, so that in such a case it would be the duty of the
King's Bench Division, or the Chancery Division (according as the one Division
or the other had seized of the dispute) to mould the judgment which was given
by this House with the remaining judgment which had been unchallenged so
as to make one consistent whole, and to incorporate the whole into one final and C
conclusive order.

Application was, in due course, made to the Divisional Court to make the order
of your Lordships' House an order of the court, and it was then suggested that
your Lordships' order gave greater and wider powers, and that it was open to the
Divisional Court so to deal with the judgment as to make it date, not from the
date when it was given here, but from the date when the matter was first before D
BAILHACHE, J., on April 2, 1919, or, as I understand it, on any other intervening
date as between that date and July 1, 1921, the object of that alteration being
to secure that the amount incorporated in the judgment should carry the interest
which a judgment always bears. BAILHACHE, J., thought that that view was
right, and on July 28, 1921, he made an order which directs that the £50,000
damages which had never been impeached, should carry interest as from April 2, E
1919. His judgment was reversed by the Court of Appeal, and from that decision
of the Court of Appeal this present appeal proceeds. In spite of the careful
argument which has been placed before your Lordships by counsel for the
appellants, it appears to me that this case is free from difficulty. If at the time
when the matter originally came before your Lordships' House on July 1, 1921,
it had been desired that the order then made should speak as from a date different F
from that on which it was pronounced, it was incumbent upon counsel to ask that
this should be done. In the absence of any such direction, where judgment is,
for the first time, directed to be entered in favour of any litigant party by this
House, the date which that judgment will bear must be the date when the order
is made. It is, of course, a totally different proposition where the effect of an
order in this House is to restore a judgment of the court of first instance which G
has been reversed by an order of the Court of Appeal. In that case the judgment
of the court of first instance is expressly restored and remains standing as from the
date when it was given. But, in this case, there was no judgment until the
time when it was directed that that judgment should be entered and made. I,
therefore, entertain no doubt that there was no power whatever reserved by the
order of this House for any of the judges who were to make that order operative H
to make it operative on any date different from that which it bore.

It is suggested that there are authorities which show that that is not the correct
view, but the scantiest investigation of those authorities will, I think, satisfy your
Lordships that they have no application to the present issue. In *Macbeth & Co.,
Ltd. v. Maritime Insurance Co., Ltd.* (2), a case which, at the first glance, I
appears to be the nearest to the present, there was a claim upon a policy of
marine insurance where power is given by statute to award interest as part of
the damages, this House had directed that the whole question of damages should
be determined by the Court of King's Bench, and, in pursuance of this direction,
interest was given from the date when the matter had first come to judgment.
Deeley v. Lloyds Bank (1) has already been mentioned, and the cases that were
referred to, *Rajah Lelanund Singh v. Maharajah Luckmissur Singh, Bahadoor* (3)
and *Rodger v. Comptoir d'Escompte de Paris* (4), really have no effect at all

A except for the purpose of showing that certain judgments, as, for example, a judgment for possession of land, would necessarily carry by its own weight the incidental and consequential claim for mesne profits although not expressed. On the other hand, *Borthwick v. Elderslie Steamship Co.* (No. 2) (5), to which counsel for the respondents had directed attention, does appear to show that the rule which I have stated to be the rule applicable to the orders of your Lordships' House is one that is acted on with regard to judgments in the High Court. That was a case in which a claim had been refused in the court of first instance, and the judgment had been overruled by the Court of Appeal, and it was asked that the interest should run as from the date when the first judgment had been given and it was refused. It is there pointed out that judgments must stand as on the day when they are first pronounced, and that, if it is desired to make a case for the exercise of the discretion conferred by the rules for ante-dating a judgment, a definite and substantial case must be established on which that discretion can rest.

C So far, therefore, as this appeal from the Court of Appeal is concerned, I invite your Lordships to say that it should be dismissed with costs. But then there follows another application by the appellants, asking your Lordships to add to or vary the order which was originally made by allowing this sum for interest. Some question has been raised whether this House has power to do anything of the kind. With that I do not propose to deal because it appears to me that any such application ought to be made at the time when the case is heard to the members of your Lordships' House who hear it when the matter is fresh in their minds and the whole issues in the controversy have been argued and are clearly understood. It would not be in accordance with the usual practice of your Lordships' House, after a lapse of very nearly twelve months, to add to and vary in an important and substantial degree an order originally made by a differently constituted tribunal. I, therefore, ask your Lordships also to dismiss that application with the same consequences.

F **LORD ATKINSON.**—I concur.

G **LORD SUMNER.**—I concur. To say that the effect of allowing an appeal in your Lordships' House is to direct that the High Court should do now what it should have done at the trial, is a rough, but a not ineffective way of describing the result of a successful appeal. But it is obviously a different thing to go on to say that the High Court should do so now in such a fashion as to produce all the results that would have followed if it had done so at the trial. It may or may not be right to make such a further order. It is, however, for the House to order it. Had the order of your Lordships' House been interpreted in the High Court as a direction to enter in the year 1921 a judgment for the plaintiffs, dated April 2, 1919, and had the High Court done so, it would have entered a judgment that was not true, because it would have entered a judgment of 1919 which never had existed in 1919 or at all until July 1, 1921. I take it, therefore, that when your Lordships do not direct that to be done, your Lordships' order is that the judgment which is directed to be entered shall be the judgment which comes into existence for the first time when the appeal succeeds and when the order is made in favour of the plaintiffs.

I **LORD WRENBURY.**—I agree. It seems to me that the order which was made was obtained in July, 1921.

LORD CARSON.—I concur.

Appeal dismissed.

Solicitors: *Holman, Fenwick & Willan; Maude & Tunnicliffe, for Middleton & Co., Sunderland.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

Re LEACH. MILNE v. DAUBENY

[CHANCERY DIVISION (Eve, J.), December 1, 1922]

[Reported [1923] 1 Ch. 161; 92 L.J.Ch. 225; 128 L.T. 525; 67 Sol. Jo. 198]

Will—Legacy—Priority—Burden of proof—Priority of settled legacies over all other pecuniary legacies.

Will—Legacy—Specific legacy—Cost of packing and dispatch borne by legatees.

By her will the testatrix made certain specific bequests and gave certain settled legacies and other pecuniary legacies including those to her executors. By the expressions "firstly," "secondly" and "thirdly" the order of administering the assets was declared, and provision was made, in case the estate should prove insufficient to pay all the legacies, for one pecuniary legacy, not settled, of £600, to be reduced to £500. The estate proved insufficient and the question arose whether the settled legacies were entitled to be paid in priority to all the other pecuniary legacies and also how the cost of packing and dispatching the specific bequests was to be borne.

Held: the burden of proving priority lying on those who asserted it, there was insufficient indication in the will to show that the testatrix intended that the settled legacies should be paid in priority to the other pecuniary legacies; consequently, the £600 legacy must be reduced to £500 and abate rateably with the other pecuniary legacies including those to the executors; further, the cost of packing and dispatching the specific bequests must be borne by the specific legatees.

Notes. As to abatement of legacies see 16 HALSBURY'S LAWS (3rd Edn.) p. 330 et seq.; and as to costs of moving objects bequeathed see, *ibid.*, p. 356, and for cases see 23 DIGEST (Repl.) 423 et seq., 481, 482, 542.

Case referred to:

(1) *Re Sivewright, Law v. Fenwick* (1922), 128 L.T. 416; 67 Sol. Jo. 168; 23 Digest (Repl.) 482, 5494.

Also referred to in argument:

Lewin v. Lewin (1752), 2 Ves. Sen. 415; 28 E.R. 265, L.C.; 23 Digest (Repl.) 423, 4946.

Re Hardy, Wells v. Borwick (1881), 17 Ch.D. 798; 50 L.J.Ch. 241; 41 L.T. 49; 29 W.R. 834; 23 Digest (Repl.) 424, 4955.

Thwaites v. Foreman (1846), 15 L.J.Ch. 397; 7 L.T.O.S. 297; 10 Jur. 483, L.C.; 23 Digest (Repl.) 424, 4951.

Re Hewett, Eldridge v. Hewett (1920), 90 L.J.Ch. 126; 65 Sol. Jo. 116; 23 Digest (Repl.) 482, 5493.

Re Grosvenor, Grosvenor v. Grosvenor, [1916] 2 Ch. 375; 85 L.J.Ch. 735; 115 L.T. 298; 60 Sol. Jo. 681; 23 Digest (Repl.) 397, 4676.

Adjourned Summons.

By her will, the testatrix, after appointing executors and trustees and giving a number of specific bequests, gave, first, a number of pecuniary legacies which she settled, and, secondly and thirdly, other pecuniary legacies not settled and other legacies to the executors, and directed that one of the pecuniary legacies not settled of £600 should abate to £500 in the event of her estate proving insufficient for the payment of all the legacies bequeathed. The estate was insufficient for this purpose, and the trustees took out a summons asking, whether the settled legacies were entitled to be paid in full in priority to the other legacies; whether, in the event of abatement of any of the legacies, those to the executors

A were to abate rateably with the others; and how the cost of packing and dispatching the specific legacies was to be borne.

Riviere for the trustees.

Bryan Farrer for the legatees of the settled legacies.

Archer for other pecuniary legatees.

B *Kenneth Swan* for the legatee of the £600 legacy.

J. W. Beaumont, for other pecuniary legatees.

Broughton for the specific legatees.

C **EVE, J.**—The first question is whether the testatrix intended any of the legacies bequeathed by her will to be paid in priority to the other legacies, and, in order to answer that question, it is necessary to find out what indications there are in the will of such intention, and what is their net result. Three are relied upon by those who claim priority first, the expressions “firstly,” “secondly,” and “thirdly”; secondly the clause showing that the testatrix contemplated the possibility of her estate being insufficient to discharge all the legacies, and thirdly the terms in which she provided for the settled legacies. Counsel, who claims priority for the settled legacies, argues that the presence of the clause indicating D that the testatrix contemplated a possible insufficiency of her estate imposes on the expressions “firstly,” “secondly,” and “thirdly” a more effective meaning than that of mere enumeration, in short, that read in conjunction with that clause, they must be construed as fixing priorities. This conclusion, he contends, is supported by the directions as to the setting aside of the settled legacies.

E The conclusion at which I have arrived on the whole will is that the testatrix did intend the settled legacies to be provided for in priority to the other pecuniary legacies. It is a question of intention, and it lies on those who assert priority to establish it. I think the cumulative effect of the three indications I have mentioned does show that the testatrix intended the distribution of her estate to be in accordance with the priorities indicated by the expressions “firstly,” “secondly,” and “thirdly,” and accordingly that the settled legacies must be F paid before any funds are available for the others. In each case the legacy duty will have to be added to the legacy. As to the legacy of £600, this, in the event which has happened, must be reduced to £500. I do not think the testatrix intended this reduction to be in substitution for any abatement. The effect is that £500 must be inserted instead of £600, after the words of gift, and this reduced legacy plus the duty must abate pro rata with the other postponed legacies. The legacies G to the executors must also abate rateably with the others. As to the costs of packing and delivering specific legacies of jewellery and china I must follow my own decision in *Re Sivewright* (1) where also there was a deficient estate, and I held that these costs must be paid by the specific legatees. If the decisions on this point are in conflict it is for a higher court to determine what the law is.

Solicitors: *Joynton Hicks & Co.*; *Stow, Preston & Lyttelton*; *Harratt & Pollock.*

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.]

CRUIKSHANK v. SUTHERLAND

[HOUSE OF LORDS (Lord Dunedin, Lord Atkinson, Lord Sumner, Lord Wrenbury and Lord Carson), July 17, 18, 20, November 3, 1922]

[Reported 92 L.J.Ch. 136; 128 L.T. 449]

Partnership—Dissolution—Death of partner—Valuation of assets—Fair value to partnership, not book value—Immediate valuation of debts.

Under the provisions of a deed of partnership the value of the share of a partner who died was to be ascertained on the taking of a "full and general account" of the partnership dealings for the preceding year and of its property, credits and liabilities. The deed was silent as to the principle on which this account was to be prepared, and there was no evidence that any usage had been adopted by the partners regarding the matter. The assets of the partnership included shares in companies of which the partners were managing agents, and those shares were of greater value to the partnership than was represented by their book or market value in that they secured or assisted the continuance by the partnership of their employment by those companies,

Held: that the assets must be included in the account at their fair value to the partnership and not at their book value.

Held, further, that the deceased partner's executors were entitled to a present valuation of the debts against which sums were held in suspense and need not await the collection of the debts and subsequent division of any remaining balance of the suspense account.

Notes. As to proceedings on dissolution of partnership see 28 HALSBURY'S LAWS (3rd Edn.) 573 et seq., and for cases see 36 DIGEST (Repl.) 622 et seq.

Cases referred to:

- (1) *Coventry v. Barclay* (1863), 3 De G.J. & Sm. 320; 3 New Rep. 224; 9 L.T. 496; 9 Jur. N.S. 1331; 12 W.R. 500; 46 E.R. 659, L.C.; 36 Digest (Repl.) 579, 1376.
- (2) *Blisset v. Daniel* (1853), 10 Hare, 493; 1 Eq. Rep. 484; 18 Jur. 122; 1 W.R. 529; 68 E.R. 1022; 36 Digest (Repl.) 609, 1703.

Appeal from an order of the Court of Appeal (LORD STERNDALÉ, M.R., WARRINGTON and YOUNGER, L.J.J.).

The appellants were the executors of a Mr. Cruikshank, who had been in partnership with the respondents, and died on Oct. 27, 1916. The partnership was for four years from May 1, 1914, and the accounts for the years ending April 30, 1915, and April 30, 1916, were prepared upon the basis of bringing in the assets at their book values. The executors contended that the share of the deceased partner should be ascertained by bringing in the assets at their fair market value to the firm as settled by agreement, or, in default of agreement, by arbitration, as provided by the articles. The surviving partners contended that the share should be calculated on the book values as appearing in the accounts for the year ending April 30, 1917.

Tomlin, K.C. and *Sheldon* for the appellants.

Upjohn, K.C. and *Hildyard, K.C.* for the respondents.

The House took time for consideration.

Nov. 3. The following opinions were read.

LORD WRENBURY.—The order under appeal contains a declaration that Mr. Cruikshank's executors are, for the purpose of ascertaining his share, bound by the values appearing in the books of the partnership. The principal question in the case is whether this is right.

Upon Mr. Cruikshank's death on Oct. 27, 1916, cl. 16 of the partnership articles

A took effect, and the amount of his share, with share of profits calculated and made up to April 30 next after his decease, had to be ascertained as provided in cl. 15. Clause 15 relates to the case of a retiring partner, and provides that the share of a retiring partner shall be ascertained by preparation of the annual account in terms of cl. 13. The result is that the amount of the share of a deceased partner must be ascertained by reference to the account under cl. 13, B made on April 30 next after the death, and that the account is to be such as would be proper if he were a retiring partner. The account under cl. 13 is a "full and general account" of the partnership dealings for the preceding year, and of its property, credits and liabilities. The question between the parties is whether, so far as property is concerned, this is to be an account of its property at its fair value to the firm, or an account in which the property must be taken at the values C appearing in the books of the partnership. The current partnership was for four years from May 1, 1914, and was constituted by a deed of July 1, 1914. It was a renewal of partnership relations which had subsisted between the parties before, the last preceding partnership having been for two years from May, 1912. In forming the partnership of 1914, the assets of the previous firm were taken D over at the values appearing in the partnership books. The accounts of April 30, 1915, and April 30, 1916, were prepared upon the footing of bringing in the assets at their book values. Mr. Cruikshank was a party to the former of these. As to the latter, he was then in failing health and was not able to attend to business. He took no active part in the preparation of that account. But he took no exception to it, and no one contends that he was not bound by it.

E The above are, I think, all the facts which it is necessary to state before going on to inquire as to the course to be followed in ascertaining what, at Mr. Cruikshank's death, was the share to payment of which his executors are entitled under the articles. It is not, I think, disputed—and if it were, I should be of opinion that it could not successfully be disputed—that a full and general account of the partnership property will be an account at which the property will be brought in at its fair value. The articles are wholly silent as to the principle F to be adopted in preparing this full and general account of the property—it remains simply that it must be a proper account of the property—whatever that is. What are the values to be attributed to the several assets falls to be determined by the partners by agreement, and—in case of dispute—is matter for arbitration under cl. 21 of the deed. By way of illustration let me take the case of shares in companies of which the firm were managing agents—shares which, in G some cases, they were bound to hold as qualifying them for the office—shares which, in other cases, they held in order to secure a preponderating influence in a company whose managing agency they wish to be secure in retaining. These would be shares which an arbitrator presumably would not value—or necessarily value—at the fluctuating price of the day. The question for him would be as to the value of those shares to the firm, having regard, on the one hand, to the fact that they gave the firm certain advantages, and, on the other, to the fact that they were not in the circumstances a saleable asset in the firm's hands. No one has contended before us that such shares must be taken at the market price of the day—the contention of the appellants is that they ought to be taken at the fair value to this firm, and that this value may not be the book value. I What the value is does not concern us. That is for an arbitrator, if there be a dispute. Your Lordships are concerned only to say what is the principle on which an arbitrator ought to act.

So far I have confined myself to the partnership articles, but these considerations do not conclude the matter. The respondents are entitled to look outside the ipsissima verba of the partnership articles. They may and do appeal to two considerations. The one is the language of LORD WESTBURY, L.C., in 1864 in *Coventry v. Barclay* (1) (3 De G.J. & Sm. at p. 327). If a

"usage, which on this subject has been uniform and without variation, be not strictly in accordance with the written articles, it becomes evidence of a new agreement by the partners, and is as binding as if it had originally been clearly prescribed by the articles."

The uniform usage in that case had been one and the same for thirty years. The other is s. 19 of the Partnership Act, 1890:

"The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all partners, and such consent may be either express or inferred from a course of dealing."

Was there here any usage or course of dealing such as that an inference is to be drawn that on the death of a partner his share is to be paid out on the footing of book values? How could there be a practice and usage uniform and without variation to pay a deceased partner's share on the footing of book values and not of fair values, where no partner had died before and no partner had retired before? The only practice which existed—and that only on two occasions, namely, in April, 1915, and April, 1916—was to prepare the account—when the interest of all the partners was the same—on the footing of book values. When a partner died or retired, the interests of all parties were not the same. The executors of a deceased partner were, so to say, vendors whose interest it was to put the highest sustainable value on the assets—the continuing partners were, so to say, purchasers whose interest was the reverse. Where was the practice and usage evidencing a new agreement outside the written articles to found a right to buy out the deceased partner on the terms which were best for the purchasers? The only case that happened which would throw any light upon the subject is that of *Mr. Begg*, and in fact it throws none at all. He was, so to speak, a retiring partner to the extent of one half his interest in profits. But he parted with that half interest under cl. 2, and upon the terms there provided. At the moment when he had to hand over half his share of profits, one of the liabilities of the company was a liability to him by way of capital of Rs. 2,40,000 being interest at seven per cent., and he was entitled to twelve sixty-fourth shares of the profits. After the transaction the liabilities of the company included a liability to him by way of capital of Rs. 1,20,000, and by way of deposit of Rs. 1,20,000, each bearing interest at seven per cent. as before, and he lost six of his twelve sixty-fourths of the profits, receiving nothing for it. The transaction, therefore, throws no light at all upon the matter. Even if there were a usage to state an account for one purpose in one way, that is not a usage to state it for another purpose in the same way. There is a passage in *Blisset v. Daniel* (2) (10 Hare at p. 515) which is useful reading in this connection. An account stated for one purpose is not necessarily stated for another purpose. The fact is that in this partnership an account has never been stated with a view to fitting the case of a retiring partner, or a deceased partner, or a senior partner who is going to exercise an option of taking over all the assets. The partners have never had any such event in view in making the account which they have made. There has never been an account prepared which was intended to meet all the various contingencies of events such as these.

Let me see where the respondents' contention leads them. Assume it is the fact, as stated in the respondents' case, that when this firm in 1914 took over the assets of the previous firm at their book value the selling values largely exceeded the book values, and, further, that the book values continued afterwards to appreciate largely, and let us suppose that a partner gives, under cl. 14, six months' notice of his desire to retire from the partnership on the next April 30. On April 30 the account has to be prepared. It is, or may be, the interest of the retiring partner to say that the book values are not the fair values. Is he bound to concur in stating an account on the footing of book values? Must he submit to being paid out at what may be less than his proportionate share in

A the partnership assets? Again, under cl. 17, upon the expiration of the partnership by effluxion of time, the senior partner for the time being has the option of purchasing and acquiring the shares of all the other partners on terms similar to those which, under cl. 15, apply to a retiring partner. Are the partners, other than the senior partner, bound to concur in an account on the footing of book values, with the result that the whole appreciated value of the assets will pass into the pocket of the senior partner? And this, notwithstanding the fact that if the senior partner does not exercise his option under cl. 17, the assets will be sold under cl. 18, and each partner will receive his proper proportional share of the true value? These considerations make, to my mind, irresistible a conclusion to which I should have arrived independently of them, and upon the language of cl. 13 alone, and that conclusion is that a full and general account of the property under art. 13 is a real, and not an arbitrary ascertainment or valuation of the property, and that the fact that the partners have, in April, 1915 and 1916, been content to take book values in no way makes an account on that footing compellable upon a partner who is leaving the partnership and claims payment of his share upon the footing of values in which he and his co-partner agree, or which, in default of agreement, an arbitrator shall ascertain. The declaration that, for the purpose of ascertaining the share of the deceased, his executors are bound by the book values is, in my opinion, wrong.

The second and much less important question in the case is as to the suspense account. Upon this two questions arise. The first is that the order under appeal contains a declaration the effect of which is that the executors are not entitled to a present determination of what is, as matter of estimate or valuation, the value of the debts against which sums are held in suspense, but are to await the working out in the future of the collection of these debts, and that the surplus, if any, of the special suspense account is, or will be, divisible between themselves and the surviving partners. I can see no justification at all for remitting this matter to the future. The executors are entitled to a present valuation at such sum as, in case of difference, an arbitrator shall determine. The second is this: In respect of each of these debts a separate sum was reserved. The declaration under appeal throws the aggregate amount of the debts into one sum, and the aggregate amount of the reserves into another, and deals with the matter on that footing. This, again, in my opinion, is wrong. The reserve was not of one aggregate sum against an aggregate of debts, but of a separate reserve against each debt.

The result is that, in my opinion, this appeal must be allowed, and a declaration made to give effect to the views above expressed. The attention of counsel for the respondents was called to the form of declaration in the notice of motion to the Court of Appeal, with a view to their pointing out how, if at all, that declaration was erroneous, if the House were against them on the different points argued. The only matter to which they called attention lay in the use of the words "fair commercial value to the firm." I see no objection to using simply the words "fair value," and with that alteration I think that the declarations will be right. I express, of course, no opinion at all as to what values should be taken—that is for arbitration in case of dispute—I only say that the executors are not bound by the book values—and that a full and general account of the property under art. 13 will be an account at the fair values.

LORD DUNEDIN, LORD ATKINSON, LORD SUMNER and LORD CARSON concurred.

Appeal allowed.

Solicitors: *Sanderson, Lee, Eddis & Tennant; Trollope & Winckworth.*

[*Reported by W. C. SANDFORD, ESQ., Barrister-at-Law.*]

THE SAN ONOFRE

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), May 21, 1922]

[Reported [1922] P. 243; 92 L.J.P. 17; 127 L.T. 540; 38 T.L.R. 707; 16 Asp. M.L.C. 1]

Shipping—Collision—Damages—Consequential damage—Attempt by innocent ship to beach ship in fault—Damage suffered by innocent ship—Statutory duty to assist other ship—Test of breach of duty—Success of possible prosecution for failure—Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60), s. 422.

The steamer *M.* was damaged in a collision which occurred between her and the *S.* in thick fog, for which collision the *M.* was found alone to blame. After the collision, despite the weather conditions, the *S.* lashed herself alongside and endeavoured to beach the *M.*, but in doing so she, without any negligence on her part, went aground and was damaged. On the question whether the *S.* was entitled to recover from the *M.* in respect of this damage in addition to the collision damage,

Held (ATKIN, L.J., dubitante) (i) the damage suffered by the *S.* in the collision was not the cause of, nor did it contribute to, the stranding damage; (ii) a prosecution of the master of the *S.* under s. 422 of the Merchant Shipping Act, 1894, for not rendering the *M.* such assistance as might be practical must have failed on the ground that in the prevalent weather conditions he could not have rendered such assistance without danger to the *S.*, and so he was not in breach of his statutory duty to render assistance and acted as a volunteer; therefore, the *S.* was not entitled to recover in the collision action in respect of the stranding damage.

Notes. As to rendering assistance after a collision see 30 HALSBURY'S LAWS (2nd Edn.) 674, 675, and for cases see 41 DIGEST 711–713. For Merchant Shipping Act, 1894, see 23 HALSBURY'S STATUTES (2nd Edn.) 395.

Cases referred to :

- (1) *Weld-Blundell v. Stephens*, [1920] A.C. 956; 89 L.J.K.B. 705; 123 L.T. 593; 36 T.L.R. 640; 64 Sol. Jo. 529, H.L.; 36 Digest (Repl.) 201, 1064.
- (2) *The Despatch* (1860), Lush 98; 14 Moo. P.C.C. 83; 3 L.T. 219; 15 E.R. 237, P.C.; 41 Digest 769, 6236.
- (3) *The City of Lincoln* (1889), 15 P.D. 15; 59 L.J.P. 1; 62 L.T. 49; 38 W.R. 345; 6 Asp. M.L.C. 475, C.A.; 41 Digest 770, 6248.
- (4) *The Pensher* (1857), Sw. 211; 29 L.T.O.S. 12; 166 E.R. 1100; 41 Digest 770, 6255.
- (5) *The Mellona* (1847), 3 Wm. Rob. 7; 5 Notes of Cases, 450; 9 L.T.O.S. 474; 11 Jur. 783; 166 E.R. 865; 41 Digest 690, 5194.
- (6) *Wilson v. Newport Dock Co.* (1866), L.R. 1 Exch. 177; 4 H. & C. 232; 35 L.J.Ex. 97; 14 L.T. 280; 12 Jur. N.S. 233; 14 W.R. 558; 2 Mar. L.C. 313; 41 Digest 976, 8658.

Appeal by the owners of the s.s. *San Onofre* from an order of DUKE, P., on a motion by the owners of the *Melanie* in objection to a report of the Admiralty registrar in a collision action in which the owners of the *San Onofre* were plaintiffs.

The *San Onofre* was damaged in collision with the defendants' steamer *Melanie* in the Bristol Channel on Dec. 27, 1916. After the collision the *San Onofre* endeavoured to beach the *Melanie*, which was in a sinking condition, and in doing so herself sustained damage by stranding. In the subsequent litigation the *Melanie* was found in the House of Lords alone to blame, and a second action in which the *Melanie* alleged that after the collision the *San Onofre* negligently put her ashore, for which she claimed damages, was dismissed. At the reference

A following the collision action the plaintiffs claimed to recover as an item of the collision damage the damage sustained by the *San Onofre* by stranding. The report of the registrar was as follows :

B "This reference arose out of a collision between the *Melanie* and the *San Onofre*, for which the *Melanie* was eventually held to be alone to blame. The collision occurred in the Bristol Channel on Dec. 27, 1916, at 9.45. The master and the crew of the *Melanie* came on board the *San Onofre*, as they believed their ship to be about to sink. The master of the *San Onofre* induced some of the crew to return, and, having made fast at 10.24 to the *Melanie*, decided to take her into safety. At 11.14 the vessels grounded; considerable bottom damage was done to the *San Onofre*. A salvage action has been commenced against the *Melanie* by the *San Onofre*, but has not yet been heard. In another action by the *Melanie* against the *San Onofre* for negligently stranding her, the court has held that the *San Onofre* did not act negligently in the operation already described. The basic question at the reference was whether the stranding damage to the *San Onofre* was a result of the collision so that the expenses resulting from it could be recovered as damages arising from the collision. In my opinion, they are part of such damages. That after a collision one vessel should be in danger of sinking is a natural result of it and an endeavour to save her by the other ship is equally a natural result, and, if damages are suffered during such action, they are proximately a consequence of the collision. The sequence of facts forms one group of occurrences. In these circumstances the [plaintiffs] are entitled to recover the claim in full, subject to any points as to the details of the several amounts, and unless the items are agreed . . ."

D By s. 422 of the Merchant Shipping Act, 1894 :

E "(1) In every case of collision between two vessels, it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel, crew and passengers (if any) (a) to render to the other vessel, her master, crew and passengers (if any), such assistance as may be practicable, and may be necessary to save them from any danger caused by the collision, and to stay by the other vessel until he has ascertained that she has no further need of assistance. . . (3) If the master or person in charge fails without reasonable cause to comply with this section, he shall be guilty of a misdemeanour . . ."

G SIR HENRY DUKE, P., held that the damages attributable to the stranding of the *San Onofre* must be excluded from the damages to be assessed against the owners of the *Melanie*, and the plaintiffs appealed.

Bateson, K.C., and *H. C. S. Dumas* for the plaintiffs.

Butler Aspinall, K.C., and *Stranger* for the defendants.

H *Cur. adv. vult.*

May 21. The following judgments were read.

I **BANKES, L.J.**—The proposition for which the plaintiffs are contending in the present appeal is that where two vessels have been in collision and the vessel which is wholly to blame is being assisted to a place of safety by the other vessel, if the latter, while so assisting, meets with an accident which is not due to any negligence, and is damaged, the vessel which is wholly to blame is liable not only for any damage caused to the other vessel by the collision, but also for any damage the result of the accident.

The accident in the present case occurred within two hours of the collision. If the proposition contended for is sound it would be immaterial whether the accident occurred two hours or two days or two weeks after the collision. The argument is based upon two grounds (i) that the damages resulting from the

accident were the natural and probable result of the collision and as such are recoverable, (ii) that in rendering assistance to the injured vessel the *San Onofre* was acting in pursuance of a statutory duty and that the damage she suffered while so acting was thus sufficiently connected with the collision as to render the damages claimed recoverable. Upon the first point I agree with the view taken by the President. I cannot distinguish the case from that of two pedestrians who collide in the street, and the one whose negligence caused the collision is injured and is assisted to hospital by the other, there being no one else available to render such assistance. If on the way to the hospital the one who is assisting the other accidentally slips and breaks his leg, he cannot, in my opinion, claim damages from that other on the ground that, but for the negligence in bringing about the collision, he would not have been where he was and would not have slipped and broken his leg. The collision, no doubt, caused a state of things which rendered it natural that the assistance should have been rendered. The motive which led to the rendering of the assistance seems to me to be quite immaterial. It may have been purely humanitarian, and, therefore, praiseworthy. It may have been purely mercenary, and, therefore, unworthy. It may have been a mixture of the two. Whichever it was, the result appears to me the same. The man, or the vessel, as the case may be, was a pure volunteer, and the negligence which caused the collision cannot be said, adopting LORD SUMNER's language in *Weld-Blundell v. Stephens* (1) ([1920] A.C. at pp. 983, 984), to be the direct cause of the subsequent accident.

A number of cases were cited by the plaintiffs' counsel in support of his argument. I do not think they are of any assistance in deciding this case, as each decision must depend upon the particular facts of the case. For instance, in *The Despatch* (2), where the decision turned upon the fact that as the collision broke one of the chains of the vessel claiming damages and so weakened her power to resist the force of the gale the collision might be regarded as the efficient cause of the subsequent accident, which, in that case, was the driving of the vessel on to the rocks. In *The City of Lincoln* (3), the court held that the grounding of the barque subsequent to the collision was the natural and reasonable consequence of the collision because the barque had lost her steering compass, logline and charts in the collision, which deprived the captain of the means of ascertaining his position and of properly navigating his ship.

I express no opinion whether the plaintiffs' position would have been any better if it could have been established that in rendering assistance to the *Melanie* the master of the *San Onofre* was acting under a statutory duty. The President held that he was not acting under any such duty. Here, again, I agree with the President. The duty of rendering all possible assistance to a vessel in distress cannot be too strongly insisted upon, and one does not sympathise with a defence such as is suggested here. In the case of a collision between two vessels the duty upon the master or person in charge of each vessel to stand by and to render such assistance as is possible is a statutory duty, and the failure without reasonable cause to fulfil that duty is a criminal offence. The provisions to that effect are contained in s. 422 (1) and (3) of the Merchant Shipping Act, 1894. The obligation is qualified by the limitation of the duty to cases where it can be exercised without danger to the master's own vessel, crew and passengers. In the present case the owners of the *Melanie* contend that the assistance rendered by the *San Onofre* was rendered under such dangerous conditions that it is not permissible for her owners to contend that the master was acting in performance of his statutory duty. The President has accepted this contention. Whether the conditions were such as to justify his conclusion is a question of fact. I am certainly not prepared to disagree with him, and if the proper test to apply is to consider whether, had the master not rendered the assistance, there could have been any reasonable prospect of securing a conviction against him for failing to perform

his statutory duty, I have no hesitation in saying that there could not. For these reasons I consider that the appeal fails on both grounds, and must be dismissed with costs.

SCRUTTON, L.J.—The question in this appeal is whether the President was right in holding that certain damage caused to the owners of the *San Onofre* by the stranding of the *San Onofre* while attempting to save the *Melanie* was recoverable by the *San Onofre* as damages occasioned by the negligence of the *Melanie* in colliding with the *San Onofre*. Shortly, the facts are that about 9.30 a.m. on a foggy morning in the Bristol Channel, the *Melanie* collided with the *San Onofre*, and has been found alone to blame for the collision. The *Melanie* was seriously damaged, so that her master and all crew came on board the *San Onofre*. The *San Onofre* was very slightly damaged, some rivets being started in the forepeak. The master of the *San Onofre*, to use his own words, "thought there was a chance of saving the *Melanie*, and also of getting her out of the traffic." He persuaded some of her crew to return to her, lashed himself to one side, and his escort, an armed trawler, the *Urania*, to the other side, and started towing her in the fog inshore into shallow water and out of the traffic, meaning to take her to Barry. Nearly two hours after the collision, and three-quarters of an hour after the towage began, the three vessels stranded in the fog on the Welsh shore and damage was done to the *San Onofre* and the *Melanie*. It has been found that the stranding was not due to any negligence on the part of the *San Onofre*.

The question is whether the damage to the *San Onofre* by stranding is the direct consequence of the original negligence of the *Melanie* in colliding with her. Where a ship alone to blame for a collision does damage to another ship, which, while in her damaged condition, is subsequently lost, the *prima facie* presumption in the Admiralty Court is that the subsequent loss is occasioned by the collision, the burden being on the ship in fault to displace that presumption by showing that the loss did not arise out of the collision, one example being where it is shown that the ultimate loss was caused by negligence on the part of the damaged ship: see per MR. LUSHINGTON in *The Pensher* (4) and *The Mellona* (5), and see also *The City of Lincoln* (3). In all these cases, however, the ship ultimately lost has sustained damage in the original collision which may have contributed to the ultimate loss. The position would probably be the same if, by breach of duty, a ship otherwise undamaged were left in a position of danger in which she would not have been had the duty been performed: see, however, the difficult questions raised in *Wilson v. Newport Dock Co.* (6). But in all these cases the ultimate damage must be a direct consequence of the collision, a wrongful act through the damage caused immediately by the collision.

In the present case, if a strange ship had come up and attempted to save the *Melanie* going ashore without negligence while doing so, it would, I think, be impossible to recover her damages by stranding as the direct consequence of the *Melanie*'s negligence in colliding. The *Urania* could not recover her stranding damages as damages by collision. The recompense for the stranding, if any, must be recovered in a salvage action in proportion to the value of the services rendered and as part of their cost. The *San Onofre* could only be in a better position than the strange salvor in two cases. First, if the direct collision damage was the cause of the ultimate stranding damage, as in *The City of Lincoln* (3), but in the present case the actual slight collision damage to the *San Onofre* had nothing to do with the subsequent stranding. Secondly, if the *Melanie*'s negligence, causing damage to herself, put the *San Onofre* under a legal duty to save her, and in carrying out that legal duty without negligence the *San Onofre* damaged herself, there might be a direct chain of causation between original negligence and ultimate damage. In support of this view s. 422 of the Merchant Shipping Act was relied on, which imposes on the master of a vessel in collision a duty enforceable by prosecution to render to the other vessel such assistance as may

be practicable. But this duty is only imposed if and so far as the master can do so without danger to his own vessel, crew and passengers. This restriction is obviously reasonable, for an owner whose ship is not to blame can hardly be required to endanger her as a matter of duty enforceable criminally to save a wrongdoer. In the present case there was obviously danger to the *San Onofre* in taking her in a fog towards shore, as is shown by the fact that she went ashore without negligence. In my view, it would have been impossible successfully to prosecute the master of the *San Onofre* if, when he had taken the *Melanie's* crew on board, he had sailed away. His answer of danger to his owner's vessel would have been conclusive. The attempt to connect the stranding damage with the collision negligence by means of a legal duty imposed on the *San Onofre*, therefore, fails.

I do not discuss the cases cited; they are numerous and bewildering, but the question whether damage is a sufficiently direct consequence of negligence to be recoverable or too remote is rather a question of first impression. I am clear that if a negligent driver on the road injures himself in a collision with another vehicle, whose driver and a stranger thereupon take the injured man to hospital and meet with an accident in so doing, neither of them can recover damages for the accident from the negligent driver in consequence of his original negligence. The present case seems to me exactly similar. In my view, the registrar came to an erroneous decision, and the President arrived at a correct result. The appeal should be dismissed with costs. Any remedy the *San Onofre* may have is in an action for salvage remuneration, on the prospects of success in which I express no opinion.

ATKIN, L.J.—I have felt considerable doubt in respect of both the points argued. I do not think it is possible to overrate the importance of maintaining the statutory duty, imposed by s. 422 of the Merchant Shipping Act, 1894, first enacted in the Merchant Shipping Act, 1862, s. 33, an Act that attached a statutory obligation to a duty that has been recognised from time immemorial by British shipmasters. From 1862 to 1911 this appears to have been the only section dealing with an obligation to save life, and, in my opinion, the qualification without danger must be read in reference to the subject-matter, i.e., the duty of saving life at sea. I should be very sorry to lay down that any degree of danger, however slight, in performing the contemplated duty would absolve the master from his statutory obligation. I should suppose that there must be an appreciable and real danger in excess of the peril to be anticipated under ordinary conditions of navigation attending a voyage at sea. It is true that in the Maritime Conventions Act, 1911, the duty expressed in s. 422 of the Merchant Shipping Act, 1894, is re-enacted in a much wider form so far as relates to saving life. It is not confined to a duty arising in case of collision, and the words used are "without serious danger." I doubt whether the degree of danger which will excuse the duty is substantially modified by this addition. Nor in a civil case do I think it necessary for the purpose of determining whether there is a breach of duty to consider whether if a criminal charge were made against the master a jury would convict. It is because I should be very sorry to pay lip-service only to the importance of the statutory duty that I have been anxious to see in this case that it has not been too lightly negated. I am moreover inclined to think that, if a master establishes that he *bonâ fide* considered that the duty had arisen, and if the other ship takes the benefit of the assistance rendered in pursuance of the supposed duty the court should scrutinise carefully any suggestion by the assisted ship that the assistance was too dangerous and should not have been given. I agree, however, that the final determination of the question must turn on a question of fact, and in view of the opinion of the President and the agreement of the other members of the court I am not prepared to say that I am satisfied that the decision on this point was wrong.

Apart from the statutory duty I think that there is a great deal to be said for the view taken by the learned registrar. The emergency caused by a collision may be such as to compel any normal person to take a particular course of action in the sense of affording such strong motives for that particular action that every reasonable person would be induced by them so to act. I see no reason why damage occasioned in the course of such action may not give rise to a claim in respect of damage by the collision if the damage can be directly associated with the original wrongful act. For instance, the case put of a collision between motor cars where the wrongdoer was in danger of losing his life unless hurried to medical care, if the other party using the only reasonable means hurried him to hospital in the injured car, and the car in consequence incurred further damage or the driver was in consequence injured, I think such injuries might well be the direct result of the original collision. And I should desire to reserve the case decided in the American courts of injuries sustained by a passer-by in reasonably attempting to snatch a child or other person from the course of a negligently driven vehicle. In the present case there appears to me evidence that the stranding in the course of the joint voyage to refuge was directly connected with the collision. The voyage was in shallow waters because of the collision damage. The *Melanie* first stranded and the *San Onofre* might have escaped if she had not been necessarily bound to the crippled *Melanie*. But the plaintiffs have to establish the claim, and I understand the President not to be satisfied that the expedition undertaken by the *San Onofre* was due to the impelling desire to assist the injured ship, but to be possibly due to a desire to earn salvage or some other motive. In this respect, as before, the question of direct cause is ultimately one of fact, and I am not prepared to dissent from the judgment below.

Solicitors: *Downing, Handcock, Middleton & Lewis; Thomas Cooper & Co.*

[Reported by W. C. SANDFORD, Esq., Barrister-at-Law.]

WARMAN *v.* TIBBATTS

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Sankey, JJ.), October 19, 1922]

[Reported 128 L.T. 477; 87 J.P. 53; 21 L.G.R. 134]

Nuisance—Statutory nuisance—Injury or danger of injury to health—Defect in kitchen range—Other cooking facilities available—Annoyance to tenant—Public Health (London) Act, 1891 (54 & 55, Vict., c. 76), s. 2 (1) (a).

The kitchen range of a house had a hole in one of the sides of the oven. In another room of the house, used as a bedroom, was a small range and on a landing was a gas stove, both of which could be used for cooking and were in good repair.

Held: the defect in the kitchen range, although an annoyance to the tenant of the house, was not "injurious or dangerous to health," within the meaning of the Public Health (London) Act, 1891, s. 2 (1) (a) [now s. 82 (1) (a) of the Public Health (London) Act, 1936] and so was not a statutory nuisance liable under the Act to be abated summarily.

Great Western Rail. Co. v. Bishop (1) (1872), L.R. 7 Q.B. 550, and *R. v. Parlbby* (2) (1889), 22 Q.B.D. 520, applied.

Notes. The Public Health (London) Act, 1891, has been repealed, but the words formerly contained in s. 2 (1) (a) of that Act are now contained in s. 82 (1) (a) of the Public Health (London) Act, 1936, and in s. 92 (1) (a) of the Public Health Act, 1936: the provision formerly made by s. 5 (1) (a) of the 1891 Act is now made by Sched. 5, para. 7 of the Public Health (London) Act, 1936.

Referred to: *Ager v. Gates*, [1934] All E.R. Rep. 566.

As to nuisances which may be abated summarily see 31 HALSBURY'S LAWS (3rd Edn.) 363 et seq.; and for cases see 36 DIGEST (Repl.) 273. For the Public Health (London) Act, 1936, see 15 HALSBURY'S STATUTES (2nd Edn.) p. 887, and for the Public Health Act, 1936, see, *ibid.* vol. 19, p. 302.

Cases referred to:

- (1) *Great Western Rail. Co. v. Bishop* (1872), L.R. 7 Q.B. 550; 41 L.J.M.C. 120; 26 L.T. 905; 37 J.P. 5; sub nom. *R. v. Glamorgan Justices, Great Western Rail. Co. v. Bishop*, 20 W.R. 969; 36 Digest (Repl.) 272, 241.
- (2) *R. v. Darlby* (1889), 22 Q.B.D. 520; 58 L.J.M.C. 49; 60 L.T. 422; 53 J.P. 327; 37 W.R. 335; 5 T.L.R. 257, D.C.; 36 Digest (Repl.) 273, 252.

Case Stated by a metropolitan police magistrate.

A complaint was preferred by Horace Albert Tibbatts, the respondent, under s. 5 (1) of the Public Health (London) Act, 1891, against Harry Warman, the appellant, for that the appellant, being the owner of a dwelling-house known as 19, Bloomsbury Street, in the metropolitan borough of Poplar, was allowing a nuisance to exist therein by reason of the kitchen grate and oven being in a defective condition. The complaint was heard on June 13, 1922, and an order was made by the magistrate for the abatement of the nuisance within fourteen days and for payment by the appellant of 48s. costs.

On the hearing of the case the following facts were either proved or admitted. The appellant was the owner of the dwelling-house in question within the meaning of the Public Health (London) Act, 1891, and had, on or about April 22, 1922, been served with a statutory notice requiring him to repair the kitchen range. The dwelling-house was let by the appellant to one Robert Elliott at a weekly rental of 18s. 2d. per week. The dwelling-house contained three rooms on the first floor, and three rooms, wash-house, and w.c., on the ground floor. The kitchen grate and oven, the subject of the complaint, on the ground-floor back room were defective in such a manner that their use occasioned a nuisance. In addition to such kitchen grate there was in the first-floor back room, used as a bedroom, a small range, half the size of the kitchen range, and, on the first-floor landing, a gas stove, which could both be used for cooking and were included in the tenancy and were in the occupation of Robert Elliott and were in good repair.

On the part of the respondent it was contended that the fact of the kitchen range in question being defective constituted per se an offence within the meaning of s. 5 (1) of the Public Health (London) Act, 1891; and that the fact of there being another range and a gas stove available for cooking purposes, on other parts of the premises, was no answer to the charge. On the part of the appellant it was contended that, there being another range and a gas stove in good repair available for use in addition to the kitchen range in respect of which complaint was made, there could be no nuisance within the meaning of the subsection, as there was ample provision in the dwelling-house for cooking purposes apart from the defective kitchen range; and that no nuisance could be said to exist, particularly as the dwelling-house was a small one, consisting only of six rooms and a scullery. The magistrate was of opinion that what he had to consider was the result of the use of the house in the way in which such a house would ordinarily be used, involving the use of the kitchen as a kitchen, and that he ought not to contemplate a state of things in which the tenant might be compelled to turn his bedroom or his staircase into a kitchen and his kitchen into a bedroom;

A accordingly, as the ordinary use of the house resulted in a nuisance, he made the order above referred to.

By the Public Health (London) Act, 1891, s. 5 (1) [now Sched. 5, para. 7 of the Act of 1936] :

B "If either—(a) the person on whom a notice to abate a nuisance has been served as aforesaid makes default in complying with any of the requisitions thereof within the time specified; or (b) the nuisance, although abated since the service of the notice, is, in the opinion of the sanitary authority, likely to recur on the same premises, the sanitary authority shall make a complaint, and the petty sessional court hearing the complaint may make on such a person a summary order (in this Act referred to as a nuisance order)."

C *Walter R. Warren* for the appellant.
R. P. Croom-Johnson for the respondent.

D **LORD HEWART, C.J.**—This is a Case Stated raising a question under s. 5 (1) of the Public Health (London) Act, 1891. A complaint was preferred by the respondent against the appellant, the owner of a dwelling-house, for allowing a nuisance to exist therein by reason of the kitchen grate and oven being in a defective condition. Section 2 (1) (a) of that statute [now s. 82 (1) (a) of the Public Health (London) Act, 1936] deals with the nuisances which may be abated summarily under the Act, and the scope of that provision has been judicially considered more than once. The language of the provision is very general:

E "For the purposes of this Act—(a) Any premises in such a state as to be a nuisance or injurious or dangerous to health . . . shall be nuisances liable to be dealt with summarily under this Act."

But in dealing with similar words in another Act in *Great Western Rail. Co. v. Bishop* (1), COCKBURN, C.J., said :

F "The Act speaks of nuisances or things injurious to health, and I think . . . that it was intended for the benefit of public health or health generally, to secure the means of abating things that were either matters of public or private nuisance, of public nuisance as coming within the word 'nuisance,' and private nuisance as coming within the words 'injurious to health,' but, whether you regard public or private nuisance, still it was intended that the powers of this Act should apply only when the thing complained of was injurious to health."

G In *R. v. Parlbay* (2), WILLS, J., said with regard to the same words :

H "It is clear that the expression 'premises in such a state as to be a nuisance' has not the wide application claimed for it by the respondents, who say that it is answered by any premises on which a nuisance exists. If that were so the enumeration of, at all events, the several kinds of nuisance specified under heads 2, 3, 4, and 6, would be unnecessary; we do not attempt to define every class of case to which the first head applies, but we think it is confined to cases in which the premises themselves are decayed, dilapidated, dirty, or out of order, as, for instance, where houses have been inhabited by tenants whose habits and ways of life have rendered them filthy or impregnated with disease, or where foul matter has been allowed to soak into walls or floors, or where they are so dilapidated as to be a source of danger to life and limb."

I Here what was complained of was a defect in the kitchen grate and oven, and we have been told that someone had made a hole in one of the sides of the oven. If that is so, it may be doubted whether that would be a nuisance within the section. For my part I should need persuasion to convince me that it would be. But the facts here are that in addition to the kitchen grate there was in the first-floor back room, used as a bedroom, a small range half the size of the kitchen

range, and, on the first-floor landing, a gas stove, and these could both be used for cooking and were included in the tenancy and were in good repair. A

Notwithstanding these facts it has been contended that the defect in the kitchen range constituted an offence. Section 4 shows that in order that the appellant, being the landlord, should be liable, one or other of two things must exist. First, the nuisance must arise from a structural defect, or, secondly, it must arise from the act, default, or sufferance of the landlord. Here there was, in my opinion, a three-fold failure on the part of the prosecution to prove their case. (i) It has not been shown that there was a nuisance. (ii) The defect was not a structural defect, but a defect in a fixture. (iii) The defect was not due to the act, default, or sufferance of the appellant. On all these grounds the case for the prosecution fails, first and foremost, on the ground of failure to show that the defect was a nuisance. The order of the magistrate was therefore wrong, and the appeal must be allowed. B
C

AYORY, J.—I am of the same opinion. It is said that the nuisance consisted in there being a hole in the side of the oven in the kitchen, but, in my opinion, such a defect is not to be held to be a nuisance within the Act in view of the decisions to which my Lord has referred. Apart from that, the proceedings must have been taken against the landlord under the mistaken notion that this was a structural defect, but no evidence was given as to the landlord's liability to repair. Further, the reasons given by the magistrate for holding the defect to be a nuisance are not sufficient. He overlooked the character of the grievance aimed at by the Act, and he held that merely because the defect was an inconvenience to the tenant it was a nuisance within the Act. In my opinion that is not sufficient. D
E

SANKEY, J.—I agree.

Appeal allowed and order set aside.

Solicitors: *Palmer & Robinson; C. V. Young & Son.*

[Reported by J. F. WALTER, ESQ., Barrister-at-Law.] F

GARRATT v. GARRATT AND GARRATT G

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), March 20, 27, May 8, 1922]

[Reported [1922] P. 230; 91 L.J.P. 207; 127 L.T. 559; 38 T.L.R. 620]

Variation of Settlement—Property with which court can deal—Property in which guilty respondent takes interest under will of testator who died after dissolution of marriage—Matrimonial Causes Act, 1859 (22 & 23 Vict., c. 61), s. 5. H

The Divorce Court has no power to deal by way of variation of a marriage settlement with property in which a guilty respondent has taken an interest under the will of a testator who died after the marriage had been dissolved, even if by the terms of the will the property is to follow the trusts of the settlement. I

Notes. The Matrimonial Causes Act, 1859, s. 5, has been replaced by the Matrimonial Causes Act, 1950, s. 25.

As to the power of the Divorce Court to revise an order for variation of settlements see 12 HALSBURY'S LAWS (3rd Edn.) 459; as to settlements which the Divorce Court cannot vary see, *ibid.*, 452. For cases see 27 DIGEST (Repl.) 646, and for the Matrimonial Causes Act, 1950, s. 25, see 29 HALSBURY'S STATUTES (2nd Edn.) 412.

A Cases referred to :

- (1) *Midwinter v. Midwinter*, [1892] P. 28; 61 L.J.P. 1; 65 L.T. 438; 40 W.R. 33; 86 Sol. Jo. 12, C.A.; subsequent proceedings, [1893] P. 93; 27 Digest (Repl.) 637, 5991.
- (2) *Loraine v. Loraine and Murphy*, [1912] P. 222; 82 L.J.P. 23; 107 L.T. 363; 28 T.L.R. 534; 56 Sol. Jo. 687, C.A.; 27 Digest (Repl.) 638, 6003.

B Also mentioned in argument :

Paul v. Paul and Farquhar (1870), L.R. 2 P. & D. 93; sub nom. *St. Paul v. St. Paul and Farquhar*, 39 L.J.P. & M. 50; 23 L.T. 196; 18 W.R. 1007; 27 Digest (Repl.) 657, 6191.

March v. March and Palumbo (1867), L.R. 1 P. & D. 440; 36 L.J.P. & M. 64; 16 L.T. 366; 15 W.R. 799; 27 Digest (Repl.) 641, 6032.

C

Worsley v. Worsley and Wignall (1869), L.R. 1 P. & D. 648; 38 L.J.P. & M. 43; 20 L.T. 546; 17 W.R. 743; 27 Digest (Repl.) 245, 1980.

Blood v. Blood, [1902] P. 190; 71 L.J.P. 97; 86 L.T. 641; 50 W.R. 547; 18 T.L.R. 588; 46 Sol. Jo. 499, C.A.; 27 Digest (Repl.) 649, 6111.

Motion for a declaration as to the effect of an order made by BARGRAVE DEANE, J., on Oct. 19, 1908, and for amendment of that order.

D

By a deed of settlement made on July 10, 1890, in contemplation of the marriage of the parties the husband's father covenanted that his executors and administrators should pay to the trustees of the settlement £5,000 within six months of his death, to be held on the trusts of the settlement, which provided for a life interest in the fund settled for the wife if she survived the husband. By his will, made July 17, 1903, the husband's father, after reciting this covenant,

E

bequeathed
 "to the trustees of the settlement the further sum of £5,000 to be held by them on the same trusts as are therein declared concerning the said sum of £5,000 so covenanted to be paid by me as aforesaid."

F

On July 30, 1907, the husband obtained a decree nisi for the dissolution of his marriage, and that decree was made absolute on Feb. 10, 1908. The husband's father died on July 11, 1908. Both sums of £5,000 were paid by his executors to the trustees of the settlement. On Feb. 28, 1908, the husband had presented a petition for variation of the settlement, praying an order that the settlement be varied by directing that the wife's interest in the husband's trust funds be extinguished as if she were dead. To this petition the wife did not appear. The registrar made his report on July 22, 1908, recommending that "all the rights and interests of the respondent in the husband's trust fund should be extinguished as if she were dead." On July 23, 1908, the husband's solicitors became aware of the provisions of the will of the husband's father and applied to the court, asking that the two sums of £5,000 should be dealt with as if the second as well as the first had been mentioned in the report. On Oct. 19, 1908, the judge assented, and confirmed the report, expressly stating that the wife's interest in the sums of money brought into settlement by the husband's father should be extinguished." A question having arisen in the Chancery Court whether the wife's interest had been extinguished in the second £5,000, the husband, by notice of motion asked the court to decree (i) that by order of Oct. 19, 1908, the wife's interest in the second £5,000 was extinguished, and (ii) that the order of Oct. 19, 1908, be amended by adding words which would have that effect.

I

Clifford Mortimer for the husband.

W. M. Hunt for the wife.

Cur. adv. vult.

May 15. **HILL, J.**, read the following judgment.—My difficulty has been to see whether, whatever my own view, I am not bound to carry out what seems to have been intended by BARGRAVE DEANE, J., express the order as he seems to

have intended, and leave the husband to go to the Court of Appeal. BARGRAVE DEANE, J.'s, mind seems not to have been directed either to the fact that neither wife nor trustees had appeared, and that the petition for variation was absolutely silent as to the second £5,000, or to the question whether the court had power to vary a settlement created by will, and the observations of FARWELL, L.J., on that question in *Midwinter v. Midwinter* (1). I have the advantage, which BARGRAVE DEANE, J., had not, of the decision of the Court of Appeal in *Loraine v. Loraine and Murphy* (2), which makes it quite clear that this court has no power to vary the trusts of a will. That case turned on s. 45 of the Act of 1857, but the judgments deal also with s. 5 of the Act of 1859, and in part proceed upon what the lords justices regarded as the clear effect of s. 5, namely, that it related to ante-nuptial or post-nuptial settlements only and to nothing else. In the present case the interest of the parties in the second £5,000 is created by the will and not by any marriage settlement; if anything further were needed it is created by the will of a testator who died after the marriage had been dissolved. I have no doubt that this court could not make the order which the husband says BARGRAVE DEANE, J., intended to make. The report as confirmed in terms deals only with the first £5,000. The husband must ask me to vary the order as drawn up. That seems to me to make the question one on which I can act, notwithstanding BARGRAVE DEANE, J.'s, contrary intention. I refuse to add anything to the order. It correctly confirms the report which dealt with the only matters which the court had jurisdiction to control. The motion must be dismissed.

Solicitor: A. T. Plant.

[Reported by J. A. C. SKINNER, ESQ., Barrister-at-Law.]

Re NORTH WALES PRODUCE AND SUPPLY SOCIETY, LTD.

[CHANCERY DIVISION (P. O. Lawrence, J.), March 21, 1922]

[Reported [1922] 2 Ch. 340; 91 L.J.Ch. 415; 127 L.T. 288; 38 T.L.R. 518; 66 Sol. Jo. 439; [1922] B. & C.R. 12]

Bill of Sale—Debenture—Floating charge given by registered industrial and provident society—Charge on personal chattels and other property—Charge not in form prescribed for bills of sale—Validity as regards personal chattels—Validity as regards other property—Bills of Sale Act, 1878 (Amendment) Act, 1882 (45 & 46 Vict., c. 43), s. 17.

Industrial and Provident Society—Debenture—Floating charge on personal chattels and other property—Charge not in form prescribed for bills of sale—Validity as regards personal chattels—Validity as regards other property—Bills of Sale Act, 1878 (Amendment) Act, 1882 (45 & 46 Vict., c. 43), s. 17.

A society incorporated and registered under the Industrial and Provident Societies Acts is not an "incorporated company" within the exception contained in s. 17 of the Bills of Sale Act (1878) Amendment Act, 1882, and so a security given by such a society charging its personal chattels must be registered as, and be in the form provided for, a bill of sale.

Great Northern Rail. Co. v. Coal Co-operative Society (1), [1896] 1 Ch. 187, applied.

A debenture giving a charge on personal chattels and other property which is void as regards the personal chattels because it does not comply with the

A requirements of the Bills of Sale Acts, 1878 and 1882, creates an effective charge on such of the other property as is severable from the personal chattels.

Re Burdett, Ex parte Byrne (2) (1888), 20 Q.B.D. 310, and *Re Isaacson, Ex parte Mason* (3), [1895] 1 Q.B. 333, applied.

B A registered industrial and provident society issued a debenture giving a floating charge on all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being. This debenture did not comply with the requirements of the Bills of Sale Acts, 1878 and 1882. At the date when the charge attached, the assets of the society consisted of book debts, cash, fixtures and personal chattels.

Held: the debenture was void as regards the personal chattels, but gave a valid charge on the other property.

C **Notes.** Since this case was decided Industrial and Provident Societies Acts have been passed (the current Acts are the Industrial and Provident Societies Acts, 1893-1954), but no subsequent provisions have affected the principles stated in the headnote.

D As to the validity of void bills of sale see 3 HALSBURY'S LAWS (3rd Edn.) 276 and 306 et seq., and as to the registrability as bills of sale of debentures and charges on personal chattels given by industrial and provident societies see, *ibid.*, 273 and, *ibid.*, vol. 21, pp. 24, 25, and for cases see 7 DIGEST 31, 126, 127, and 28 DIGEST (Repl.) 467. For the Bills of Sale Acts, 1878 and 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 557-583, and for the Industrial and Provident Societies Acts, 1893-1954 see *ibid.*, vol. 12, pp. 876-924, and vol. 34, p. 319.

E Cases referred to:

(1) *Great Northern Rail. Co. v. Coal Co-operative Society*, [1896] 1 Ch. 187; 65 L.J.Ch. 214; 73 L.T. 443; 44 W.R. 252; 12 T.L.R. 30; 40 Sol. Jo. 52; sub nom. *Re Coal Co-operative Society, Great Northern Rail. Co. v. Coal Co-operative Society*, 2 Mans. 621; 7 Digest 31, 158.

F (2) *Re Burdett, Ex parte Byrne* (1888), 20 Q.B.D. 310; 57 L.J.Q.B. 263; 58 L.T. 708; 36 W.R. 345; 4 T.L.R. 260; 5 Morr. 32, C.A.; 7 Digest 126, 719.

(3) *Re Isaacson, Ex parte Mason*, [1895] 1 Q.B. 333; 64 L.J.Q.B. 191; 71 L.T. 812; 43 W.R. 278; 11 T.L.R. 101; 39 Sol. Jo. 169; 2 Mans. 11; 14 R. 41, C.A.; 7 Digest 56, 302.

(4) *Clark v. Balm, Hill & Co.*, [1908] 1 K.B. 667; 77 L.J.K.B. 369; 15 Mans. 42; 7 Digest 30, 151.

G (5) *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627; 60 L.J.Ch. 292; 64 L.T. 487; 39 W.R. 369; 7 T.L.R. 282; 2 Meg. 418, C.A.; 7 Digest 29, 148.

(6) *Cochrane v. Entwistle* (1890), 25 Q.B.D. 116; 59 L.J.Q.B. 418; 62 L.T. 852; 38 W.R. 587; 6 T.L.R. 319, C.A.; 7 Digest 56, 299.

Also referred to in argument:

H *Mumford v. Collier* (1890), 25 Q.B.D. 279; 59 L.J.Q.B. 552; 38 W.R. 716, D.C.; 7 Digest 127, 720.

Companies (Winding-up) Adjudged Summons.

I The North Wales Produce and Supply Society, Ltd., was incorporated and registered under the Industrial and Provident Societies Act, 1893, on July 31, 1918. The main object of the society was to carry on the business of wholesale and retail dealers in agricultural requirements and dairy farm and garden produce. Under the rules of the society its business was to be conducted by a committee. By r. 12, it was provided that the committee might obtain loans (within certain limits not material to be here stated) on such security and on such terms of repayment as they might think fit. On Mar. 27, 1920, the committee obtained a loan of £500 from the respondent on the security of a debenture under the common seal of the society. The sum so borrowed, and the security so given, were admittedly within the borrowing powers conferred by r. 12. The debenture

is dated Mar. 27, 1920, and the society thereby covenanted within six months after notice or on such earlier day as the principal money thereby secured might become payable in accordance with the conditions endorsed thereon, to pay to the respondent the sum of £500, and also in the meantime to pay interest thereon at the rate of six per cent. per annum. The society, as beneficial owner, thereby charged with such payments, all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being. By the conditions endorsed on the debenture it was provided (inter alia) that the debenture should rank as a first charge on the property thereby charged as a floating security, and that the principal money thereby secured should immediately become payable if an effective resolution should be passed for winding-up of the society. On Mar. 26, 1921, the society passed an effective resolution for winding-up and for the appointment of the applicant as liquidator. At the date of the winding-up resolution the assets of the society consisted of (i) book debts owing to the society of the value of £662, (ii) cash and miscellaneous receipts amounting to £65, (iii) fixtures of the value of £26, and (iv) personal chattels (consisting of stock, furniture, vehicles, &c.) of the value of £279. The society was insolvent, and the liquidator contended that the debenture given to the respondent was altogether void by virtue of the provisions of the Bills of Sale Acts, 1878 and 1882.

W. F. Swords for the liquidator.

Wilfred M. Hunt for the respondent.

Cur. adv. vult.

Mar. 28. **P. O. LAWRENCE, J.**, read the following judgment.—This is an application by the liquidator of the North Wales Produce and Supply Society, Ltd. (hereinafter called "the society") to have it determined whether the respondent, Alfred Ernest Priddle, is entitled to rank as a secured creditor in the winding-up of the society. The society is insolvent, and the liquidator contends that the debenture given to the respondent is altogether void by virtue of the provisions of the Bills of Sale Acts, 1878 and 1882. In answer to this contention, counsel for the respondent, raises two points—viz., first, that the debenture is outside the purview of the Bills of Sale Act, 1878, and comes within s. 17 of the Bills of Sale Act, 1882, and secondly, in the alternative, that the debenture creates a valid charge on all the property of the society as it existed at the date of the winding-up other than "personal chattels" as defined by s. 4 of the Bills of Sale Act, 1878.

In my judgment, the first point is concluded against the respondent by *Great Northern Rail. Co. v. Coal Co-operative Society* (1) in which VAUGHAN WILLIAMS, J., decided that the defendant society which was registered under the Industrial and Provident Societies Act, 1893, was not a company within the meaning of s. 17 of the Bills of Sale Act, 1882. Although PHILLIMORE, J., in *Clark v. Balm Hill & Co.* (4), commented adversely on the interpretation placed by VAUGHAN WILLIAMS, J., upon the judgment of the Court of Appeal in *Re Standard Manufacturing Co.*, *Ex parte Lowe* (5), and decided that s. 17 of the Act of 1882, was not confined to debentures of companies in the case of which provisions had been made by the legislature for registration, yet that learned judge expressed no dissent from the decision of VAUGHAN WILLIAMS, J., that the expression "incorporated company" in s. 17 did not include a society incorporated under the Industrial and Provident Societies Act, 1893, but, on the contrary, expressly stated that this point was concluded by *Great Northern Rail. Co. v. Coal Co-operative Society* (1). In these circumstances it is my plain duty to follow that decision.

This brings me to the respondents' second point, whether the debenture is good as regards the property of the society other than "personal chattels." The question is in my opinion not free from doubt. Counsel for the liquidator admits that, if the debenture, instead of charging all the society's property in general terms, had enumerated the different classes of property which the society then possessed,

A and which it might thereafter possess, the case would have been covered by *Re Burdett, Ex parte Byrne* (2) and *Re Isaacson, Ex parte Mason* (3), and that the debenture would have been good as to all classes of property so enumerated which did not consist of or include "personal chattels." He submits, however, that, inasmuch as the debenture charges all the property of the society in general terms, the court cannot sever "personal chattels" from the rest of the property,

B and that therefore the whole debenture is void. In support of this contention, he relies mainly on the judgments of LOPES and RIGBY, L.JJ., in *Re Isaacson, Ex parte Mason* (3). Both in *Re Burdett, Ex parte Byrne* (2) and *Re Isaacson, Ex parte Mason* (3) the court held that an instrument purporting to charge both "personal chattels" and other property was valid as to the other property, although void as to the "personal chattels." The principle on which these cases were

C decided (as stated in *Re Burdett, Ex parte Byrne* (2), 20 Q.B.D. at p. 315) is that an instrument giving a security in several properties is a security for the whole amount on each of these properties and on every part of each of them, and that the excision of one property in law, by a statute, or, in fact, by an earthquake, effects a separation between the properties and withdraws that one of them from the operation of the instrument; but leaves the instrument intact and still operative as regards the rest. It is true that in *Re Burdett, Ex parte Byrne* (2) the properties charged were separately described; in my opinion, however, the court did not base the principle on the form of the instrument, but on its nature and effect. The court, in that case, while recognising the well-established rule that unless you can on the face of the deed sever the illegal from the legal part of a covenant the whole contract is void, held that this rule was inapplicable to the security there under consideration, regard being had to the object and purpose of the Bills of Sale Acts and to the special nature of an instrument of charge.

E

In my judgment, the principle of *Re Burdett, Ex parte Byrne* (2) is as much applicable to a case where a borrower, having three farms situate in different parts of the same county charges these three farms under the general description of all his farms in that county, as it is to a case where, under similar circumstances, the borrower charges his three farms under the description of farms A, B, and C. In either case the excision of farm A in law (as, e.g., by a statute preventing the borrower from charging farm A), or in fact (as, e.g., by farm A being engulfed by an earthquake) would leave the charge intact, and still operative as regards farm B and C. Moreover, one of the main grounds of the decision in *Re Burdett, Ex parte Byrne* (2) was that the Bills of Sale Acts were not concerned with the borrowing on any property other than "personal chattels" or with the forms of instruments by which such borrowing might be effected, and that, therefore, the court ought to lean towards construing the Act of 1882 as affecting securities on "personal chattels" only and not securities on other kinds of property. In the present case the object and purpose of the legislature would be fully attained by cutting out from the security created by the debenture all "personal chattels" existing at the date of the winding-up which is the date when the charge attached on the property of the society. The policy of the legislature in reference to securities on "personal chattels" does not require that the debenture should be altogether void so as to destroy the security not only as regards the "personal chattels" but also as regards the rest of the property. I know of no case in

I which a security on "personal chattels" and on other property has been held to be void as regards such other property, because it also comprised "personal chattels" though conversely, such a security has been held void as regards "personal chattels" because it also comprised (and, therefore, presumably created an effective charge on) other property: see *Cochrane v. Entwistle* (6). As pointed out by the Court of Appeal in *Re Burdett, Ex parte Byrne* (2), what is avoided by s. 9 of the Act of 1882 is the "bill of sale" and not every instrument, of however complicated or comprehensive a nature, of which a bill of sale is part. For the

reasons stated I am of opinion that the principles of *Re Burdett, Ex parte Byrne* (2) applies to the debenture in the present case and that the excision in law of the "personal chattels" from the charge created by the debenture has left it still operative as to the rest of the society's property as it existed at the date of the winding-up.

There remains to be considered, however, the question whether I am precluded by authority from deciding the present case according to the opinion I have expressed. In my judgment, I am not so precluded. There is admittedly no case which decides the exact point that has arisen here. There are, however, certain passages in the judgments in the cases cited which have been rightly pressed on me by counsel, and which require consideration. LOPES, L.J., in *Re Isaacson, Ex parte Mason* (3), referring no doubt to *Re Burdett, Ex parte Byrne* (2) states that it has been distinctly decided that a deed may be void as to part of it, while it remains good as to the rest of it "provided that the subject matter is so described as to be severable." I do not think, however, that the learned lord justice, when making this statement, had in his mind (or intended to express any opinion on) such a case as the present nor do I think that he intended in any way to detract from the former of the two main reasons given by the Court of Appeal for its decision in *Re Burdett, Ex parte Byrne* (2)—viz.: the object and purpose of the Bills of Sale Acts and the special nature of an instrument of charge. RIGBY, L.J., in the same case, states that "the piano could be struck out of the deed without affecting the hiring agreement." This statement had reference to the special circumstances of the case then before the court. The hiring agreement related exclusively to the piano, and the interest of the borrower under the hiring agreement was the only interest which the borrower had in the piano; it was, therefore, essential to determine whether the court would excise the piano from the deed and yet leave the deed operative as a charge on the interest of the borrower in the piano under the hiring agreement. This amply accounts for the language used by the learned lord justice, which language, therefore, in my opinion, affords no support to the argument that the learned lord justice considered the principle in *Re Burdett, Ex parte Byrne* (2) as applying only to a case where the "personal chattels" were on the face of the instrument severed from the rest of the property charged. As regards *Re Burdett, Ex parte Byrne* (2) itself, the Court of Appeal in stating the principle no doubt quotes as an illustration the case of a security given on "properties A, B and C"; but, as I have already endeavoured to explain, the principle laid down in that case does not, in my opinion, depend on the separate description of these properties in the security, and the Court of Appeal nowhere states that it does so depend. On the whole, I have come to the conclusion, for the reasons stated, that I am not precluded by authority from applying what I consider to be the true principle to the facts of this case. I, therefore, hold that the debenture created a valid charge which attached on all the property of the society as it existed at the date of the winding-up with the exception of such property as consisted of "personal chattels."

Solicitors: *Rhys, Roberts & Co.*, for *David Hughes*, Chester; *Jaques & Co.*, for *D. Howell Jones*, Llanrwst.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

Re MELLOR. ALVAREZ v. DODGSON

[CHANCERY DIVISION (Eve, J.), June 23, 1921]

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.J.J.), January 17, 1922]

[Reported [1922] 1 Ch. 312; 91 L.J.Ch. 393; 126 L.T. 562; 66 Sol. Jo. 249]

Will—Contingent interest—Contingent interest limited to life interest—Income accumulated prior to vesting of contingent interest—Capital or income.

Under a will, real and personal estate was devised and bequeathed in trust for conversion and investment of the net proceeds, and the trustees were directed to stand possessed of such proceeds and the investments representing the same, thereafter called "the residuary trust fund," on trust as to part thereof for a class of children who should attain twenty-five, or, being daughters, should marry under that age. The gift was followed by a proviso settling each vested share in "the residuary trust fund" on the usual trusts in favour of the beneficiaries for life with remainder to his or her children. A daughter who married when more than twenty-one, but under twenty-five, claimed to be entitled to a sum representing accumulations of unexpended income of her share.

Held: the daughter was only entitled to the income produced by the accumulations and not to the accumulated income because (i) (per the Court of Appeal, affirming EVE, J.) the effect of the proviso was to make the residuary trust fund settled by the will consist, not only of the original capital, but also of all accumulations of interest thereon since the death of the testatrix: *Green v. Ekins* (1) (1742), 2 Atk. 474, and *Bective v. Hodgson* (2) (1864), 10 H.L.C. 656, applied; (ii) (per EVE, J., the Court of Appeal expressing no opinion on this point) even if this construction of "the residuary trust fund" was incorrect, when the interest of a legatee whose interest was limited to a life interest vested, existing accumulations of income must, as regards the legatee, be treated as capital and not as belonging to the tenant for life: *Re Scott* (3), [1902] 1 Ch. 918, and *Re Bowlby* (4), [1904] 2 Ch. 685, explained and applied.

Court of Appeal—Respondent's notice—Notice by respondent to fellow respondent that he will ask for variation of order—Right to be heard in support of appeal—R.S.C. Ord. 58, r. 6 (1).

A respondent, who has not given notice of appeal, cannot be heard to argue in support of an appellant's case, even if he has given notice under R.S.C. Ord. 58, r. 6, to a fellow respondent that on the hearing of the appeal he will ask for the order to be varied in his favour.

Notes. The requirements of R.S.C. Ord. 58 as to a respondent's notice on appeal have been made more stringent by R.S.C. (Appeals), 1955, but the present R.S.C. Ord. 58, r. 6 (1), is sufficiently similar to the Ord. 58, r. 6, considered here, for this case to remain authority for the proposition stated in the second headnote.

Considered: *Re Oliver, Watkins v. Fitton*, [1947] 2 All E.R. 162.

As to rights under a gift by will to accumulations of income see 34 HALSBURY'S LAWS (2nd Edn.) 239, and for cases see 43 DIGEST 791. As to respondents' notice on appeal to the Court of Appeal, see 30 HALSBURY'S LAWS (3rd Edn.) 466, and for cases see DIGEST (Practice) 792.

Cases referred to:

- (1) *Green v. Ekins* (1742), 2 Atk. 473; 3 P. Wms. 306, n.; 26 E.R. 685, L.C.; 44 Digest 1102, 9515.

- (2) *Hodgson v. Earl of Bective* (1863), 1 Hem. & M. 376; 2 New Rep. 233; 32 L.J.Ch. 489; 9 L.T. 18; affirmed sub nom. *Bective v. Hodgson* (1864), 10 H.L. Cas. 656; 3 New Rep. 654; 33 L.J.Ch. 601; 10 L.T. 202; 10 Jur. N.S. 373; 12 W.R. 625; 11 E.R. 1181, H.L.; 44 Digest 741, 5982.
- (3) *Re Scott, Scott v. Scott*, [1902] 1 Ch. 918; 71 L.J.Ch. 475; 86 L.T. 348; 50 W.R. 454; 18 T.L.R. 470; 28 Digest (Repl.) 573, 872.
- (4) *Re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685; 73 L.J.Ch. 810; 91 L.T. 573; 53 W.R. 270; 48 Sol. Jo. 698, C.A.; 28 Digest (Repl.) 573, 873.

Originating Summons to determine a question arising on the will of Mrs. Judith Mellor, dated Jan. 4, 1905.

The testatrix by her will, having appointed G. S. Dodgson and G. A. Bromet to be the executors and trustees thereof, and after giving specific and pecuniary legacies, gave, devised, and appointed all her real and personal estate not thereby otherwise disposed of, unto her trustees upon trust to sell and convert the same and, after payment out of the proceeds of sale of funeral and testamentary expenses and legacies, to invest the residue and stand possessed of the same and the investments for the time being representing the same, thereafter called "the residuary trust fund," upon trust to pay certain annuities and subject thereto, as to two-thirds thereof for the children of her niece, Mary Matilda Ashworth, living at her death, who being male should attain the age of twenty-five years, or who, being female, should attain that age or marry under that age, in equal shares, and so that the share or shares as well original as accruing of any such children dying under the age of twenty-five or without having been married should accrue to the others of such children, and if there should be only one such child, the whole to be in trust for that child. Provided always and the testatrix thereby declared that the share or shares original and accruing to which each of such children acquiring a vested interest should be entitled in the residuary trust fund should be held by the trustees upon trust to pay the income thereof to the same child for his or her life, and after the death of the same child then as to the principal of his or her share in the residuary trust fund with the future income thereof, the same should be held in trust for all the children of the same child at twenty-one or marriage upon the usual settlement trusts, with an accruer of the shares of any children dying without leaving issue to attain a vested interest, to the other children of Mary Matilda Ashworth upon the same trusts as their original shares, and a final gift over to other persons on failure of all previous trusts. The testatrix made a codicil dated Feb. 17, 1906, to her said will substituting John Winne for G. A. Bromet as executor and trustee. She died on May 3, 1910, and her will and codicil were duly proved in the district probate registry at Wakefield on Aug. 22, 1910.

The testatrix's niece, M. A. Ashworth, had seven children, of whom only four were still living. The plaintiff, Grace Eileen Alvarez, had attained twenty-one but not twenty-five, and was married to Nathaniel Alvarez on Mar. 10, 1920. She had one child, the defendant, Joan Rachel Mary Alvarez. The testatrix left a large estate, and the trustees accumulated the bulk of the income of the two-thirds settled on the children of Mrs. Ashworth. By their accounts it appeared that the accumulations of income of the plaintiff's share as on May 3, 1920, amounted to £12,631 1s. 11d. In the case of the surviving son John Ashworth's share, they amounted to £7,333 10s. 9d., and in the case of the other two daughters £12,831 4s. 11d. each. The plaintiff then took out this originating summons for the determination of the question whether the said sum of £12,631 1s. 11d. accumulated income of the share of the plaintiff in the testatrix's residuary estate belonged to the plaintiff and ought to be paid to her, or whether it ought

A to be treated as an addition or accretion to the capital of her share, and that directions might be given to the trustees of the will accordingly.

Meyrick Beebee for the trustees.

Gover, K.C. and *P. F. S. Stokes* for the plaintiff, and daughter of the testatrix's niece.

B *Romer, K.C.* and *G. E. Timins* for a sister of the plaintiff.

Dighton Pollock for a brother of the plaintiff.

Hewitt, K.C. and *Roope Reeve* for the infant defendant, Joan Rachel Mary Alvarez, the only child of the plaintiff.

C **EVE, J.,** stated the facts and continued: A gift of residuary personal property, or a share of residuary personal property vesting on a future contingency carries with it the intermediate income, and so soon as the right to the share of residue is vested, there is vested also the right to the accumulated intermediate income. But the testatrix by her will goes on to make a settlement as regards the shares of children acquiring a vested interest, and she does this by means of a proviso in these words:

D "Provided always and I declare that the share or shares, original and accruing to which each of such children acquiring a vested interest shall be entitled in the residuary trust fund shall be held by my trustees upon the trusts following."

Putting it shortly, it is upon trust for the legatee for life with remainder to his or her children.

E The question I have to determine is this—does the provision relating to the settlement of the share alter the right of the legatee to take and receive for his or her own use and benefit the accumulations of intermediate income? It has been argued it does not on the construction of this will, because according to the true construction of that declaration by which the settlement was brought about, that which is the subject-matter of the settlement is the share of the child in
F the residuary trust moneys and the investments for the time being representing the same, and does not extend to income which was not part of the residuary trust funds and the investments for the time being representing the same, but represents something which these moneys have earned in the period which has elapsed between the realisation and investment of the residue, and the date of the vesting of the legatee's interest. I am not prepared to adopt that as the
G correct construction. I think that, when the residuary trust moneys and investments are spoken of and are compendiously called the residuary trust fund, it must be taken to include the investments which from time to time represent the residuary trust moneys, and if those residuary trust moneys have been added to by the investments and accumulations of income, those would be properly included, that is to say those additions would be properly included as part of the original
H share, and in the case of accruing shares, part of the accruing shares to which each child acquiring a vested interest would be held to be entitled in the residuary trust fund.

If that view as to the construction is right that disposes of the matter, but it may very well be that that is not the correct construction and that in substance this is a direction to settle the aliquot share of each child in that which represents
I the residuary trust moneys produced by the conversion directed by the testatrix in her will. Then the question arises whether, in that case, this accumulated income is to be treated, as between the persons entitled under the settlement for life and those entitled in remainder, as income or as capital. I think I am bound, on the authorities as they stand, to hold that even in that case those accumulations would have to be treated as capital. It is true that the exact point that I have to decide has not been the subject-matter of direct decision, because in the cases to which I have been referred there was introduced an element which is

wholly inapplicable in this case. In *Re Scott* (3) the construction of s. 43 (2), of the Conveyancing Act, 1881, was a material factor. In this case, by reason of the vesting being postponed until the legatees attain the age of twenty-five, that section has no application, and what I have to ask myself is this—whether, having regard to the judgments which were pronounced, more particularly in the Court of Appeal in *Re Bowlby* (4), it can really be asserted with confidence that all those cases decided was that, in circumstances where s. 43 applied, accumulations of intermediate income must be treated as accretions to capital. I do not think, reading those judgments fairly, that this is the true result. I think the view of the courts was that at the moment when the interest of the legatee vests, the accumulations of income must, as regards the legatee, if that legatee's interest be limited to a life interest, be treated as capital, and not be treated as belonging to the tenant for life. The matter is not altogether in a satisfactory position so far as the authorities go, but I should be disregarding a great deal of what is said in the judgment in *Re Bowlby* (4), which was not actually necessary for the determination of that case, were I to hold in a case like the present, where the Act of 1881 has no application, that the income should be treated differently, that is to say, the accumulated income should be treated differently from the way in which it was held to be properly treated in the cases in which the statute applies. I hold, therefore, that on the true construction of this will, and in the events that have happened, the accumulations of income in the intermediate period between the death of the testatrix and the vesting of the legacy must be added to the settled share, and that the plaintiff is only entitled to the income produced by the settled share and not to the accumulated income.

The plaintiff appealed.

Gover, K.C. and *P. F. S. Stokes* for the appellant plaintiff.

Romer, K.C. and *G. E. Timins* for a sister of the plaintiff.

Hewitt, K.C. and *Roope Reeve* for the defendant, the plaintiff's infant daughter, and *Dighton Pollock* for the plaintiff's brother were not called on to argue.

Beebee for the trustees.

LORD STERNDALÉ, M.R.—This is an appeal from a decision of *EVE, J.*, on the will of a lady of the name of Mellor. The appellant plaintiff contends that she is entitled to certain income mentioned in the will, and arising out of the investments of the residuary estate of the testatrix. Counsel appearing for a respondent, but a respondent whose interests might be prejudiced if this judgment stands, wished to be heard on behalf of that respondent by virtue of a notice which he had given purporting to be under Ord. 58, r. 6, saying that he would, upon the hearing of the appeal, ask for a variation of the order which really was an entire reversal of that order. We did not think that he was entitled to be heard, and we did not think—at least I did not—that Ord. 58, r. 6, was ever intended to apply to a case of this description. It deals with the question whether there need be notice of a cross-appeal, or whether merely a notice that the point would be argued is sufficient without formal notice by way of cross-appeal; and I do not think that this case comes within that rule at all. In fact, counsel's client's case was not before us at all, but as we think counsel was quite well founded in saying that this decision practically deprived his client of the right to be heard, and he would not be able to proceed without going to the House of Lords, we thought it well that he should be heard in some way; and the difficulty was got over by his being instructed to argue the case with counsel for the appellant on behalf of the appellant; and we have heard him on that footing. I only wish to say that we allowed that under the special circumstances of this case, and I do not wish it to be taken that, wherever a respondent desires to support the appellant's case, it will be enough during the hearing of the appeal for that respondent's counsel to say: "I cannot appear for my own client, but the appellant is quite satisfied that I should argue the case for him." This is not to be taken as a precedent to

A enable this course to be taken in an ordinary case, and I do not wish to do anything to disturb the practice of this court in refusing to hear a respondent in support of the appellant.

B Having heard both the plaintiff and, in fact, that respondent who agrees with the plaintiff, I am of opinion that the learned judge's decision is quite right. There were two points argued before him. The first, on the construction of the will, was whether the settlement thereby created, to which I shall refer, was a settlement of both corpus and accumulated interest, or was merely a settlement of the corpus, leaving the accumulated interest to be dealt with, not by any express provision in the will, but by ordinary law. The second point was, assuming that it was a settlement of the corpus, and the corpus alone, were the accumulations of the income to be paid to the plaintiff. If the decision on the first point C be right I quite agree with EVE, J., that the decision on the second point does not arise; and as I am of opinion that the decision on the first point was right, it is not my intention to say anything on the second.

D The clauses in the will under consideration are as follows: The testatrix gives, devises, and bequeaths and appoints all her real and personal estate not thereby otherwise disposed of to her trustees on trust to call in and convert and invest; and, taking it shortly,

E "the trustees shall stand possessed of the residuary trust moneys and the investments for the time being representing the same hereinafter called the residuary trust fund upon trust to pay the annuities above referred to and subject thereto in trust as to two-thirds for the children of my niece Matilda Mary Ashworth living at my death who being male attain the age of twenty-five years or being female attain that age or marry [the plaintiff is one who has now attained the age of twenty-one years and married, but, at the time of her marriage she had not attained, and has not yet attained, the age of twenty-five] in equal shares and so that the share as well original as accruing of any such children dying under the age of twenty-five years or F without having been married shall accrue to the others of such children, and if there should be only one of such child then the whole to be in trust for that one child."

G As the learned judge says, pausing there, if that were the end of the gift when the contingency of marriage or the attainment of the age of twenty-five occurred, the children, who were the objects of the gift, would take the accumulations of income made during the period between the death of the testatrix and the vesting of the contingent interest of each child, but it goes on:

H "Provided always and I declare that the share or shares original and accruing to which each of such children acquiring a vested interest shall be entitled in the residuary trust fund shall be held by my trustees upon the trusts following (that is to say) upon trust to pay the income thereof to the same child for his or her life. And after the death of the same child then as to the principal of his other share in the residuary trust fund with the future income thereof the same shall be held in trust for all the children of the same child who being male attain the age of twenty-one years or who being female attain that age or marry in equal shares."

I and if only one child then there are certain other provisions.

The first question depends on this. It is contended that the expression "the residuary trust fund" in the clause following the investment clause where it is mentioned as "hereinafter called the residuary trust fund" refers only to the corpus of the investment, and does not refer to the accumulation of interest; that these accumulations are no part of the residuary trust fund, and that that being so the expression "the residuary trust fund" in the subsequent clause means the same thing, and that it must be there read as meaning the corpus only, and

not including the accumulations of interest. The learned judge has held that that is wrong, and that in each position in the will the words "residuary trust fund" and the "residuary trust funds" must be held as including not only the corpus, but also the accumulations of interest. I agree with that, and I agree with it in substance for the reasons given by the learned judge and therefore I do not think it necessary to repeat them. I wish to say it seems to me to be in accordance with the principle of the decisions to which we have been referred, namely, *Green v. Ekins* (1), a decision of LORD HARDWICKE, and *Bective v. Hodgson* (2), both in the Court of Appeal and the House of Lords, and also the dicta, if they may be called dicta, or expressions of opinion of this court in *Re Bowlby* (4), and, therefore, I think the learned judge is right on the first point, and, that being so, the second point does not arise. The appeal, therefore, will be dismissed.

WARRINGTON, L.J.—I am of the same opinion. With regard to the capacity in which Mr. Romer has been heard, I have nothing to add to what has been said by the Master of the Rolls, I will only say that I agree with what he has said as to the difficulty of allowing counsel to be heard in such a case as the present under the provisions of Ord. 58, r. 6.

On the main question I am also of opinion that EVE, J.'s, decision is right. The question is really this—What was it that the testatrix directed should be held on trust to pay the income thereof to the niece for life, and then on trust for her children, and so forth? On acquiring by her marriage a vested interest in her share of the residuary estate the plaintiff also became entitled as part of that share to income which had accumulated since the death of the testatrix. Her share in the estate was to be settled. Did that direction to settle include the accumulated income or did it not? That question has been dealt with in many previous authorities, not directly under the circumstances which arise here, but various judges of great eminence have given their opinion as to why it is, in such a case as the present, that a person contingently entitled to a share of the residue of personal estate, or of a mixed fund, becomes entitled to the income which has accrued and been accumulated during the suspense of the contingency. We have it first in the case before LORD HARDWICKE, *Green v. Ekins* (1), and the reasons he gives are important because they seem to me to be the foundation of what has been said in other cases. He is talking about personal estate, and he says this:

"The residue of personal estate is nothing fixed, but a fluctuating interest, and if the personal estate is increased by any event after the death of the testator it [that is the income of course] is part of the residue and will pass as such; why then not the interest of the residue, for that interest is assets and part of the estate."

Then he goes on to give certain considerations to support that view. That means this, that when, as here, the testatrix directs her trustees to sell and convert into money and invest the residue of the moneys forming part of her personal estate, that direction includes any income which was accruing during the suspense of the absolute vesting, and, therefore, when she says they are to stand possessed of the residuary trust moneys, and calls those residuary trust moneys, "residuary trust funds" they are to stand possessed of what originally at her death formed part of her estate, and what has become part of her estate by being income derived from it subsequently to her death. Exactly the same view is expressed in different terms by LORD WESTBURY, L.C., in *Bective v. Hodgson* (2). He says (10 H.L. Cas. at p. 668):

"Consequently if by a will the whole of the personal estate or the residue of the personal estate be the subject of an executory bequest, the income of such personal estate follows the principal as an accessory and must during the period which the law allows for accumulation be accumulated and added to the principal."

A In the same case in the court below, reported sub nom. *Hodgson v. Bective* (2), Wood, V.-C., says (1 Hem. & M. at p. 100):

"If I give the whole of my personal estate to be invested on trusts—similar to the trusts of these two-thirds—all the interim income will have to be applied exactly in the same manner as the capital in the purchase of real estate."

B In that case it was to be applied in the purchase of real estate to be held upon certain trusts. So far it is quite true that, for simplicity, I have drawn no distinction between a direction to settle the whole of the residuary estate, and a direction to settle a share of it; but, in my opinion, there is no distinction between those two cases. The first is rather more simple to express, but there is no substantial difference. There again fortunately both in the court below before Wood, V.-C., and in the House of Lords, the point was dealt with by the learned judges who were sitting in that case. I need not refer to the judgment of Wood, V.-C. It is enough to refer to the speech in the House of Lords of LORD WESTBURY:

C "The rules which are applicable to the gift of the entirety of the residue will be applicable to the gift of the undivided part of the residue. There cannot be a possibility of any distinction being introduced which should prohibit the rule that clearly applies to the whole being applied to a portion, or part of the residue."

D It is said that in those several cases the question did not arise as between tenant for life and persons interested in the fund after the tenant for life's death but that point did arise in *Re Scott* (3), and BUCKLEY, J., there expressed an opinion not in accordance with that I have just expressed as being founded on the cases I have referred to. But in the subsequent case of *Re Bowlby* (4) that opinion of BUCKLEY, J., was considered in the Court of Appeal, and both ROMER, L.J., and COZENS-HARDY, L.J., said they did not agree with BUCKLEY, J.'s view, and they thought that his erroneous view on that point had led him to an erroneous decision which was not strictly on the point at all. In my opinion, in view of those authorities, what this will provides shall be settled is the share to which the plaintiff became entitled on her marriage, that is to say, when the suspense of vesting came to an end; and what she then became entitled to was what one may call her original share, and the increase of it by the accumulations of the intermediate income. The whole of that was directed to be settled.

F In my opinion the learned judge was right in the conclusion to which he arrived, and this appeal ought to be dismissed.

G YOUNGER, L.J.—I agree. I think that on the true construction of this will the fund to the income of which the plaintiff became entitled on her marriage as tenant for life was the entire fund to which she would have been entitled at that moment absolutely had there been in the will no subsequent direction for settlement.

Appeal dismissed.

Solicitors: *Ridsdale & Co.*; *Rawle, Johnstone & Co.*, for *H. Booth & Sons*, Oldham; *Hatchett, Jones & Co.*, for *Walter Dodgson*, Leeds.

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

WOODIFIELD v. BOND

[CHANCERY DIVISION (Sargant, J.), March 3, 7, 22, 1922]

[Reported [1922] 2 Ch. 40; 91 L.J.Ch. 561; 127 L.T. 205; 38 T.L.R. 494; 66 Sol. Jo. 406]

Mortgage—Remedies of mortgagee—Restriction—Calling in—Mortgagor keeping property in "proper state of repair"—Construction by reference to state at date of mortgage—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 7.

The "proper state of repair" in which a mortgagor has to keep his property in order to obtain the benefit of s. 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, must be measured by the general condition of the property at the date of the mortgage, and does not extend beyond the preservation of the property in that state so as to keep it not substantially deteriorated and as good a security for the mortgage money as it then was.

Statute—Construction—General, doubtful or ill-defined terms—Consideration of object of statute and mischief sought to be remedied thereby.

Any general, doubtful or ill-defined terms in a statute must be considered and interpreted in such a manner as will best accord with the main object of the statute and the mischief sought to be remedied thereby.

Hawkins v. Gathercole (1) (1885), 6 De G.M. & G. 1, applied.

Notes. As to the restrictions on a mortgagee enforcing his security if the Rent and Mortgage Interest Restrictions Acts, 1920–1939, apply, see 27 HALSBURY'S LAWS (3rd Edn.) 337–339; for cases see 35 DIGEST 697, 698. For the Increase of Rent and Mortgage Interest (Restrictions) Acts, 1920–1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 981 et seq. As to the interpretation of statutes by reference to their object, see 31 HALSBURY'S LAWS (2nd Edn.) 477–479, and for cases see 42 DIGEST 634–640.

Cases referred to :

- (1) *Hawkins v. Gathercole* (1855), 6 De G.M. & G. 1; 3 Eq. Rep. 348; 24 L.J.Ch. 332; 24 L.T.O.S. 281; 19 J.P. 115; 1 Jur. N.S. 481; 3 W.R. 194; 43 E.R. 1129, L.J.J.; 42 Digest 636, 394.
- (2) *Woodfield v. Bond* (No. 1) (1921), 127 L.T. 204; 66 Sol. Jo. (W.R.) 14; 31 Digest (Repl.) 640, 7476.
- (3) *Payne v. Haine* (1847), 16 M. & W. 541; 16 L.J.Ex. 130; 8 L.T.O.S. 414; 153 E.R. 1304; sub nom. *Paine v. Hayne*, 11 J.P. 462; 31 Digest (Repl.) 359, 4895.
- (4) *Proudfoot v. Hart* (1890), 25 Q.B.D. 42; 59 L.J.Q.B. 389; 63 L.T. 171; 55 J.P. 20; 38 W.R. 730; 6 T.L.R. 305, C.A.; 31 Digest (Repl.) 359, 4900.

Also referred to in argument :

- Walters v. White* (1917), 116 L.T. 377; 33 T.L.R. 154; 61 Sol. Jo. 253; 35 Digest 697, 4403.
- Crowe v. Crisford* (1853), 17 Beav. 507; 2 W.R. 45; 51 E.R. 1130; 40 Digest (Repl.) 702, 1976.
- Cooke v. Cholmondeley* (1858), 4 Drew. 326; 27 L.J.Ch. 826; 32 L.T.O.S. 59; 4 Jur. N.S. 827; 6 W.R. 802; 62 E.R. 126; 40 Digest (Repl.) 703, 1983.
- Jacob v. Down*, [1900] 2 Ch. 156; 69 L.J.Ch. 493; 83 L.T. 191; 64 J.P. 552; 48 W.R. 441; 44 Sol. Jo. 378; 31 Digest (Repl.) 89, 2406.
- Lincott v. Wakely and Wheeler*, [1911] 1 K.B. 905; 80 L.J.K.B. 713; 104 L.T. 290; 55 Sol. Jo. 290, C.A.; 31 Digest (Repl.) 363, 4953.
- Re Gaskell's Settled Estates*, [1894] 1 Ch. 485; 63 L.J.Ch. 243; 70 L.T. 554; 42 W.R. 219; 38 Sol. Jo. 200; 8 R. 67; 30 Digest (Repl.) 324, 142.

A **Action** for an injunction to restrain a sale on the ground that it was rendered unlawful by s. 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

B Section 7 provides that: "It shall not be lawful for any mortgagee under a mortgage to which this Act applies, so long as . . . (c) the mortgagor keeps the property in a proper state of repair . . . to call in his mortgage or to take any steps for exercising any right of foreclosure or sale, or for otherwise enforcing his security or for recovering the principal money thereby secured."

A. H. Woolf for the mortgagor.

H. B. Vaisey for the defendants, the mortgagee and his agents.

Cur. adv. vult.

C Mar. 22. **SARGANT, J.**, read the following judgment.—The plaintiff here is suing to prevent the defendant, Bond, who is a mortgagee, from exercising the power of sale in his mortgage contrary to the provisions of s. 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The defendants, Hawkinson & Son, are merely auctioneers who were employed by the defendant, Bond, for the purposes of the intended sale. They are merely formal defendants; and it is admitted that their costs (which are trifling since they have appeared by the same counsel as the defendant, Bond, and have taken no separate part in the evidence or discussion) must be provided for either by the plaintiff or the defendant, Bond, in accordance with the results as between these parties.

D So far as value and general character are concerned the property is admittedly within the protection of the Act; but two special defences have been raised. The first is that the property is in the actual possession and occupation of the plaintiff as mortgagor, and that the Act applies only to property that is let to a tenant. The second is, that the mortgagor has not kept the property in a proper state of repair. The point raised by the first defence was argued at length when the matter was before me on motion, and was for the purposes of that motion decided in favour of the plaintiff. This decision is reported sub nom. *Woodifield v. Bond* (No. 1) (2). There has been no re-argument of the point at the trial, but the defendant, Bond, has not abandoned it, and will be entitled to rely on it should the case go higher. The second defence is that to which all the evidence at the trial was directed, and with which alone I have now to deal. To do so it will be necessary to state the facts rather more fully.

E The property is a small residential one at Longham, Dorset, and consists of a small house containing five bedrooms and two sitting-rooms with some farm buildings, and something over 1½ acres of garden and orchard. The house was built between 150 and 200 years ago. It was in the ownership and occupation of the defendant, Bond (hereafter referred to as the defendant) for three or four years prior to the sale to the plaintiff, and was sold by him to her in September, 1917, for the sum of £650; but in consequence of some claim for a deficiency in the area of the land (for which an allowance was ultimately made) the conveyance to the plaintiff did not take place till Feb. 16, 1918. At the time of the sale to the plaintiff the house was described by the defendant's agents, Messrs. Walters & Co., as being perfectly dry and in a good state of repair, and it was stated that there was inside sanitation, and that the drainage was treated on the property and was quite satisfactory. The defendant's wife also wrote in reply to a letter from the plaintiff to the defendant as follows:

"In reply to yours of the 20th. Mr. Walters is writing to you about the property and conditions you named . . . about the house being damp, we have been here three years and have seen it no worse than when you saw it, and it is the most dry and cosy house I have ever lived in, the roof is in quite habitable repair."

I have no doubt that these statements were relied on by the plaintiff and were seriously inaccurate and misleading, and would certainly have entitled the plaintiff to resist specific performance of her contract had she learned the true facts prior to the completion of the contract; though whether they would have enabled her to obtain rescission and *restitutio in integrum* after the conveyance is more doubtful. In fact, however, she has not sought either of these remedies while they might have been available, but limited herself to complaints and to requests that the defendant, Bond, should make the representations good to some extent. And, this being so, I do not think that the plaintiff can now rely on these misrepresentations in aid of her present claim; and I mention the matter as possibly explaining to some extent the subsequent conduct of the parties.

The property was conveyed to the plaintiff in fee by an indenture of conveyance of Feb. 16, 1918, and by an indenture of mortgage dated Feb. 18, 1918, the plaintiff mortgaged the property to the defendant, Bond, to secure the sum of £470 and interest. The mortgage contained a clause under which the mortgagee was not to call the principal in before February, 1921. On Mar. 10, 1921, formal notice was given to the plaintiff that the defendant required her to pay the principal of the mortgage off within three calendar months, and that unless she did so he would apply to the court for leave to sell the property. Some correspondence ensued, and ultimately the defendant's solicitor wrote that he was advised that the mortgage, being a post-war one, was not protected by the Courts (Emergency Powers) Act, and that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, did not apply (an obvious error); and he therefore intended putting the property up for sale at an early date. The sale was in fact advertised to take place by auction on Oct. 13, 1921. But this action was commenced a day or two earlier, namely, on Oct. 11, 1921, and the sale was prevented by an interim order, which was subsequently extended on motion before me to the hearing of the action.

It is of some importance to observe that, throughout the whole period from the date of the mortgage to the commencement of the action, no complaint whatever was made to the plaintiff by the defendant or his solicitor as to the property being out of repair, or as to his security being in any way endangered. And in the particulars of sale prepared for the intended auction by the same firm of auctioneers who afterwards prepared a report to which I will refer later, the property is described as a "charming old-fashioned freehold property," while the residence itself is called "a picturesque red brick building of the Georgian period." I have come somewhat reluctantly to the conclusion, notwithstanding what the defendant said in the box, that the case as to disrepair was raised by way of afterthought and by way of defence to the plaintiff's action; and that the real reason for the defendant's attempt to enforce his mortgage was not any apprehension on this score, or as to the possible insufficiency of his security, but the natural desire to secure that higher rate of interest on his money which would result from its being available for investment at large. But while the result of this view is to cause me to discount considerably the evidence of the defendant and, to a less extent, of his sister-in-law, as to the comparative condition of the property generally at the present time and at the date of the sale to the plaintiff and the mortgage by her, it does not by any means follow that I must reject the defendant's contention. A defence may be justified though raised only by way of afterthought. That it is an afterthought is merely a reason for examining it with some extra care and precaution.

The particulars of the disrepair on which the mortgagee relies are those comprised in a report which was made to him quite recently, namely, on Jan. 19, 1922, by a firm of house agents at Bournemouth, and was prepared for them by an employee different from the employee who had prepared the particulars of sale. The latter employee's object, as he stated in the box, was to find the favourable features of the property; the former had to discern the defects. In doing

A so he by no means limited himself to pointing out those defects which consisted of want of repair to the structure of the property or were of a serious character. On the contrary he called attention to every defect, large or small, structural or decorative, which an exacting tenant might require to be made good as a condition of taking a fresh tenancy of the property. And, accordingly, I disregarded the elaborate details of the report and confine myself, as indeed counsel on both sides
B did, to its main statements and conclusions. These were accepted both by the plaintiff and by a builder, Mr. Hiscocks, who gave evidence on her behalf, and are as follows :

C "Generally speaking, the premises are in a very poor state of repair. The roofs are not watertight and the rafters are sagging and giving way, one of the principal beams is coming away from the wall itself, underneath the beam is being forced outward and appears to be held up by the w.c. wall which is acting as a buttress. It appears likely that an entirely new roof will be required. The cornice on the top of the wall of the front elevation is also giving way and the pointing on the exterior walls requires renewing especially on the chimney breasts and stacks. Damp is apparent on the interior walls
D in many places owing to the walls being solid, although 14 ins. in thickness. No damp course is apparent, and, if this course is missing, the damp is rising up the walls from the ground and also soaking through above ground. The roof of the upstairs w.c. consists of a large slate slab which has split in two and lets in the water, and as a result the floor appears to have rotted, as we were told that it was unsafe. The ceiling of bedroom No. 5 has cracked
E badly. The loft above was once used as an apple store and the weight may have sagged the joists which are of rather small gauge. The w.c. apparatus is not connected up, having been disconnected, we are informed, owing to the well from which the house is supplied with water being reported as being close to the cesspool. We consider the water supply should be obtained from the company's mains which run in the road in front of the house, and the
F w.c. could be connected up with the cesspool. The house is not supplied with either electric light or gas. Many of the ceilings are badly damaged and require plastering."

After an itemised list of repairs required, the report concluded :

G "The writer cannot speak definitely as to the condition of the premises at the time of the commencement of the mortgage, but the condition of the premises suggest that little or no attempt has been made to keep them in tenantable order. However, the main part of the repairs required is structural work due to structural decay or defects, and until this is done it is hardly worth while attempting the purely decorative work. From the appearance of the premises and the bad state of the rotten woodwork, we consider that very little has
H been done to the premises in the way of repairs for at least ten years, and quite possibly longer, excepting the dairy and the big cow shed."

It is now necessary to consider what was the state of the property at the time of the conveyance to the plaintiff and the mortgage by her in the year 1918. It appears that it had been brought by the defendant in 1914 and occupied by him till the sale to the plaintiff. And previously to that it had been occupied for some
I years by the builder John Hiscock, who was the principal witness for plaintiff, and whose evidence, speaking generally, I accept in preference to that of the defendant and of his sister-in-law, Mrs. Arnold. In my judgment the house was both structurally and decoratively no better then than it is now, at any rate if allowance is made for the natural operation of time on a building of this character. As regards two of the three main defects on which stress is laid in the report of last January, namely the defective sanitation and the dampness due to the absence of a damp course the position is necessarily unchanged. And as regards

the third main defect, the roof, it seems that the roof was too old to get on for repair prior to the plaintiff's purchase; and such deterioration as has taken place is in the nature of the gradual development of a fault in the original construction, namely, the pushing out by one of the principal beams of one of the walls of the house at one point. Further as regards minor items of repair the defendant was not able to show that during his occupancy he spent more than £15 on repairs, of which much greater part was spent at the beginning and on decoration; while on the other hand, the plaintiff during her time has spent over £40 on repairs, including the rebuilding of walls outside her house, the repair and planting of fences, repair to ceilings, and various decorative repairs which were, however, wholly or in great part spoiled by the damp. In my judgment, if regard is to be had to the age and condition of the property at the date of the mortgage, and if all question of improvement of the main structural features of the property is excluded, the plaintiff has acted quite reasonably with regard to the maintenance and repair of the property and the preservation of its capital value.

This view of the facts was not very seriously contested by counsel for the mortgagee. His argument rested mainly, if not exclusively, on the language of the Act, as interpreted by the meaning which has been placed by the courts on somewhat similar language in bargains between individuals. He argued that when buildings were out of repair, an obligation to keep them in repair involved an obligation to put them in repair; and that in this case the building could not be put or kept in proper repair without the addition of a damp course and the provision of a new roof, though he did not insist on a reconstruction of the drainage system, however necessary that might be to make the house really tenantable. He submitted that the expense of the suggested works, amounting to some £400 or £500, or the fact that they involved not mere repair but new construction was immaterial, having regard to the plain language of the Act. And he cited in support of his argument such well-known cases as *Payne v. Haine* (3) and *Proudfoot v. Hart* (4). I feel the force of much of this argument, and yet, on the whole, am unable to accept it. Even assuming that the construction contended for would prevail in the case of a private bargain between individuals in a particular case—and I may say that would be pushing the doctrine of the cases cited to its furthest limits and to an extent almost revolting to common sense—it by no means follows that the same interpretation should be placed on the language of a public general statute. In such cases, it is permissible, and may often be necessary, to consider the general scope of the statute in question and the mischief sought to be remedied, and to give to any general doubtful or ill-defined terms such a meaning as will best accord with the main object of the measure: see such cases as *Hawkins v. Gathercole* (1). And to no class of statutes is the principle more obviously applicable than to emergency legislation such as this, passed in exceptional circumstances for temporary purposes, and to protect large classes of individuals against the strict enforcement of contracts that might prove ruinous to them from no fault of their own. It would be lamentable if the protection obviously intended to be given generally to the mortgagors of small properties were to be cut down and stultified by an unduly strict construction of the provisos to the section.

The provisos to this section are obviously directed to securing this, and apparently no more than this, namely, that, during the suspension of his right to recover his principal, the mortgagee's right shall not be otherwise prejudiced, and the general position shall be kept in status quo. And the generality of the phrase "keep in a proper state of repair," especially when contrasted with the much more specific language of s. 2 (5), namely, "good and tenantable repair," would appear to have been used in view of the difference between the relations of landlord and tenant and those of mortgagee and mortgagor. In the former case ownership is involved, and any defect, however trifling, in the structure is a direct loss to the landlord; in the latter case the question is only one of loan, and there is no

A loss to the mortgagee, unless and until the margin of his security is appreciably affected—a result which, in the present case, has not even been suggested by the defendant's evidence; and accordingly the standard of repair to be reasonably required—or which is “proper”—for the protection of a mortgagee is obviously more elastic than that appropriate in the case of a landlord. Bearing this distinction in mind and having regard to the general scope of the provisos to s. 7, I have

B come to the conclusion that the “proper state of repair” in which a mortgagor has to keep his property, in order to obtain the benefit of the section, must be measured by the general condition of the property at the date of the mortgage, and is not to be extended beyond the preservation of the property in a state corresponding with that which existed at that date. The phrase cannot, in my judgment, be read as equivalent to keeping in “good” or in “tenantable” repair,

C nor in a sense to involve a rebuilding of the whole or of an integral part of the whole structure, such as is involved in the provision of a new roof or the virtual reconstruction of the walls by the introduction of a damp course throughout their length. In my judgment the language of the proviso as to repair is satisfied, if the property is repaired with reference to its general condition at the date of the contract between the mortgagor and the mortgagee, and in relation to the nature

D of the bargain between them, that is, so as to keep the property not substantially deteriorated and as good a security for the mortgage money as it was. I cannot think that in cases where “good repair” or “tenantable repair” in a private contract would involve complete reconstruction, “proper repair” in this section has an equally stringent meaning, or that the mortgagor fails to obtain any relief under the section, unless he proceeds far beyond preserving the status quo and launches out into providing an entirely new structure. And yet in many cases this would be the inevitable result of the argument for the defendant.

E

F

In the result I find that the plaintiff in this case has not fallen short of the standard of repair as between mortgagor and mortgagee which is set up by s. 7, and accordingly that the defendant has failed in his defence on this ground also. The plaintiff is therefore entitled to an injunction as asked, during the continuance of the Act of 1920 and so long as she continues to comply with the provisos of s. 7.

Solicitors: *Henry Anderson; Peacock & Goddard*, for *F. A. Johns*, Bournemouth.

[*Reported by L. MORGAN MAY, Esq., Barrister-at-Law.*]

FOWLER v. WILLIS

[CHANCERY DIVISION (Sargant, J.), May 25, 1922]

[Reported [1922] 2 Ch. 514; 91 L.J.Ch. 772; 128 L.T. 500; 66 Sol. Jo. 576]

Landlord and Tenant—Lease—Option to purchase—Subject-matter of option—Option to purchase “all the estate interest and title” vested in landlord at date of lease—Premises mortgaged prior to date of lease.

A lease provided that the tenants should at any time have the option of purchasing “all the estate interest and title” vested in the landlords at the date of the lease. The tenants exercised the option and subsequently discovered that the premises were subject to a mortgage created prior to the date of the lease. The tenants claimed that they were entitled to have the premises unencumbered by the mortgage.

Held: the tenants were only entitled to the equity of redemption of the premises as this was the estate, interest and title of the landlords at the date of the lease.

Notes. This case approves the statement in WILLIAMS ON VENDOR AND PURCHASER (2nd Edn.) 646 [see, now (3rd Edn.) 664.]

As to the effect of the exercise of an option to purchase the interest of the landlord in the demised premises see 23 HALSBURY'S LAWS (3rd Edn.) 472, and for cases see 30 DIGEST (Repl.) 496 et seq.

Case referred to:

- (1) *United London and Scottish Insurance Co. v. Omnium Insurance Corpn.* (1915), 84 L.J.Ch. 777, H.L.; 10 Digest (Repl.) 1151, 8012.

Also referred to in argument:

Goold v. Birmingham, Dudley and District Bank (1888), 58 L.T. 560; 4 T.L.R. 413; 40 Digest (Repl.) 85, 648.

Delmer v. McCabe (1863), 14 I.C.L.R. 377; 15 Ir. Jur. 236; 40 Digest (Repl.) 368, *1674.

May v. Platt, [1900] 1 Ch. 616; 69 L.J.Ch. 357; 83 L.T. 123; 48 N.R. 617; 40 Digest (Repl.) 308, 2551.

Bain v. Fothergill (1874), L.R. 7, H.L. 158; L.J.Ex. 243; 31 L.T. 387; 39 J.P. 228; 23 W.R. 261, H.L.; 31 Digest (Repl.) 432, 5587.

Witness Action in which the plaintiffs, as tenants, claimed a declaration that it was the duty of the defendants, the landlords, to redeem the encumbrance on the property which the tenants had contracted to buy, and consequential relief including specific performance.

On April 15, 1920, the landlords by deed demised to the tenants a cinema theatre called Raby Hall for three years from Nov. 24, 1919, at the yearly rent of £440. The lease provided that the tenants should at any time during the term

“have the option of purchasing all the estate interest and title which is at the date of these presents vested in the landlords in and to the freehold premises hereby demised and the fixtures and fittings at a price not exceeding £3,000.

On April 15, 1921, the tenants' solicitors by letter wrote exercising the option to purchase for £3,000, and enclosed a deposit of £300. When the abstract of title was delivered the tenants learned for the first time that the property was subject to a mortgage to a building society created by a deed dated Feb. 22, 1910, on which a sum of £500 remained due at the date of the lease, and was still due. They thereupon demanded of the landlords that they should perfect their title by redeeming the mortgage, but the landlords declined to do so, and contended that the contract created by the exercise of the option was to buy the equity of redemption, namely, the property, subject to the mortgage existing

A before it. They refused to redeem the mortgage, but were willing to release the tenants altogether from their contract.

Alexander Grant, K.C. and Jolly for the plaintiffs.

Galbraith, K.C. and G. D. Johnston for the defendants.

B **SARGANT, J.**—This case raises a neat point as to the effect of an option in a lease dated April 15, 1920, by virtue of which the landlords covenanted that the tenants should have the option of purchasing “all the estate interest and title which is at the date of these presents vested in the landlords.” [His LORDSHIP stated the facts and, after saying that in his view no useful object would be served by looking at the language of the earlier lease, continued:] The question is, what was the property contracted to be sold upon the exercise of the option by C the tenants? Was it the fee simple in the cinema theatre comprised in the lease or was it the estate and title of the landlords in the theatre? The matter was really decided by the answer to two questions I put in the course of the arguments. I asked, what estate, interest and title the mortgagees had in the property at the material date. The answer was the legal fee simple subject to the equity of redemption of the landlords. I then asked what was the estate, D interest and title vested in the landlords at the date of the lease, and the reply necessarily was that it was the equity of redemption in the property. These two answers seem to dispose of the matter. The option is not to purchase the premises comprised in the lease but “all the estate interest and title which is at the date of these presents vested in the landlords.”

E The tenants having given a notice to exercise the option in ignorance of the existence of the mortgage, the landlords might be in a position to force them to purchase the equity of redemption for £3,000. That, however, is not a matter I have to determine, for the landlords did not insist on this right and do not desire to force the tenants to complete on these terms. The only question I have to determine is whether the tenants are entitled to compel the landlords to sell F them the unencumbered fee simple of the property for £3,000. Dealing with the matter from a common sense point of view and apart from authority I come to the conclusion that the tenants are only entitled, on exercising the option, to what the lease itself says, the estate and interest and title held by the landlords at the date of the lease.

G A passage has been cited from WILLIAMS ON VENDOR AND PURCHASER (2nd Edn.) 646, [see, now, 3rd Edn., 664] in which the exact point is discussed, and I am glad to express my assent to the view taken by the learned author that

“If the vendor should have sold only such estate or interest as he has in some particular land, he is . . . entitled to require that he shall convey the same thing only and in the same words.”

H There are at least two cases within my own experience in which I have taken that view. The first was when the Marylebone Borough Council bought from the Metropolitan Electric Supply Co. their undertaking within the council's area. Certain of the properties of the Metropolitan Electric Supply Co. that was being sold were subject to existing mortgages and the council set up a contention that they were entitled to have these mortgages discharged. To this the Metropolitan Electric Supply Co. replied that they had only sold the undertaking which they I had. That question was taken by the council as far as the master in chambers and then abandoned. Another case was when one insurance company agreed to sell to another insurance company their undertaking including the sum of £20,000 deposited with the Paymaster-General under the Assurance Companies Act, 1909. That sum of £20,000 was subject to claims by existing policy holders and the purchasing company contended that they were entitled to a transfer of the sum of £20,000 free of all claims. I held, and my view was subsequently confirmed by the Court of Appeal and the House of Lords (*United London and*

Scottish Insurance Co. v. Omnium Insurance Corpn. (1)), that the purchasing company was only entitled to the assets of the selling company in the condition they were and must, therefore, take the sum of £20,000 subject to the liabilities affecting it. A

As the tenants are willing to complete even on the footing that they are only entitled to acquire the equity of redemption in the premises for £3,000, I will declare that there is a valid contract for the sale of the equity of redemption and make a decree for specific performance. B

Solicitors: *Milner & Bickford*, for *Thomas Gee & Co.*, Newcastle-upon-Tyne; *Worthington Evans, Dauneay & Co.*, for *Mather & Dickinson*, Newcastle-upon-Tyne.

[Reported by L. MORGAN MAY, Esq., Barrister-at-Law.] C

BLAY v. DADSWELL

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.J.J.), January 31, February 1, 1922] D

[Reported [1922] 1 K.B. 632; 91 L.J.K.B. 739; 127 L.T. 6; 66 Sol. Jo. 439; 20 L.G.R. 221; 86 J.P. Jo. 65] E

Agriculture—Agricultural holding—Notice to quit—Sale of part of holding to tenant after notice—Effect on notice—Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919 (9 & 10 Geo. 5, c. 63), s. 1—Agriculture Act, 1920 (10 & 11 Geo. 5, c. 76), s. 29, Sched. I. F

The Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919, was passed on Aug. 19, 1919, and provided by s. 1 that on the making thereafter of any contract for sale of a holding, or any part of a holding, held by a tenant from year to year, any then current and unexpired notice to determine the tenancy of the holding given to the tenant should be null and void, save in circumstances not here material. The Agriculture Act, 1920, which came into operation on Jan. 1, 1921, by s. 29, and Sched. I, amended s. 1 of the Act of 1919, by limiting its effect to cases where the contract of sale was made by the person by whom the notice to quit was given. A notice to quit was given to the tenant of a holding and before its expiration, but after the passing of the Act of 1919, a portion of the holding had been sold to the tenant. G

Held: (i) s. 1 of the Act of 1919 must be given its literal meaning and was not limited to a contract of sale to third parties, but applied also to a sale to the tenant; (ii) as the Act of 1920 was an amending Act and not merely declaratory of s. 1 of the Act of 1919, it was not retrospective so as to reinstate a notice which expired before the operative date of the Act of 1920, and was rendered void by the Act of 1919; and therefore, the notice to quit was null and void. H

Notes. The Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919, and the Agriculture Act, 1920, have been repealed. Section 1 of the Act of 1919 is represented with modifications by s. 30 of the Agricultural Holdings Act, 1948 (28 HALSBURY'S STATUTES (2nd Edn.) 55). I

Referred to: *Ridgley v. Waugh's Executors*, [1931] All E.R. Rep. 551.

A As to the operation of notice to quit an agricultural holding where there has been a contract for sale after notice, see 1 HALSBURY'S LAWS (3rd Edn.) 288, and for cases see 2 DIGEST (Repl.) 14 et seq.

Case referred to :

(1) *Robinson v. Nesbit* (1920), 64 Sol. Jo. 291; 2 Digest (Repl.) 14, 55.

B Also referred to in argument :

Heston and Isleworth U.D.C. v. Grout, [1897] 2 Ch. 306; 66 L.J.Ch. 647; 77 L.T. 118; 45 W.R. 697; 13 T.L.R. 504; 41 Sol. Jo. 639, C.A.; 42 Digest 776, 2046.

Re Lovell and Collard's Contract, [1907] 1 Ch. 249; 76 L.J.Ch. 246; 96 L.T. 382; 42 Digest 713, 1323.

C *A.-G. v. Theobald* (1890), 24 Q.B.D. 557; 62 L.T. 768; 38 W.R. 527; 42 Digest 706, 1237.

Appeal by the defendant from an order of ROWLATT, J.

In October, 1912, the owners of Hilders Court estate, Chiddingly, Sussex, let a portion of that estate, comprising two farms known as Chiswell and Honeywick and a field, No. 325 on the ordnance survey map, as one holding to the defendant as tenant from year to year from Sept. 29, 1912, subject to twelve months' notice on either side. On May 21, 1919, the owners entered into a contract to sell Hilders Court estate, including the defendant's holding, to the plaintiff for £14,000, and on May 31, 1919, they, at the request of the plaintiff, gave the defendant notice to quit his holding at Sept. 29, 1920. On Aug. 19, 1919, the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919, was passed. On Mar. 10, 1920, during the currency of the notice to quit and before its expiration, the defendant entered into a contract to purchase Chiswell Farm for £1,125, and on May 10, 1920, the conveyance was executed. At the expiration of the notice to quit on Sept. 19, 1920, the defendant refused to give up possession of the field No. 325, and also for mesne profits from Sept. 29, 1920, at the rate of £15 per annum. **F** At the trial at Lewes ROWLATT, J., held that s. 1 of the Act of 1919 applied only to contracts for the sale of holdings to third persons and ordered judgment to be entered for the plaintiff for possession of the field and mesne profits. The defendant appealed.

By the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919 (passed on Aug. 19, 1919), s. 1 :

G "On the making, after the passing of this Act, of any contract for sale of a holding, or any part of a holding held by a tenant from year to year, any then current and unexpired notice to determine the tenancy of the holding given to the tenant, either before or after the passing of this Act, shall be null and void, unless the tenant shall, after the passing of this Act and prior **H** to such contract of sale, by writing, agree that such notice shall be valid."

By s. 29, and Sched. I, to the Agriculture Act, 1920 (which became operative on Jan. 1, 1921), s. 1 of the Act of 1919, was amended by inserting after the word "shall" where it first occurred "if the contract for sale is made by the person by whom the notice to quit was given."

I *C. M. Pitman* for the defendant.

P. B. Morle (J. B. Matthews, K.C. with him) for the plaintiff.

BANKES, L.J.—This appeal raises a short point whether or not the learned judge put the correct construction upon the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919, which was passed to amend the law as to notice to quit given to tenants by owners of agricultural land prior to the sale of such land.

The defendant says that the effect of his entering into the contract to purchase part of the holding on Mar. 10, 1920, was to render the notice to quit null and

void with regard to the whole of the holding because the case is one which exactly falls within the language of s. 1 of the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919. [HIS LORDSHIP read the section and continued:] The defendant says that he was a tenant from year to year; there was a contract made between him and the plaintiff for the sale of part of a holding, "holding" under s. 2 of the Act of 1919 being defined as, A

"a parcel of agricultural land held by a tenant and which is not let to the tenant during his continuance in any office, appointment or employment held under the landlord"; B

and there was then a current and unexpired notice to determine the tenancy of that holding, and under those circumstances the Act provides that that notice to quit shall be null and void.

The attention of ROWLATT, J., was not called to *Robinson v. Nesbit* (1), a decision of RUSSELL, J., to which we have been referred; nor was his attention called to the Agriculture Act, 1920, which amended s. 1 of the Act of 1919, and although it is quite true that the decision of RUSSELL, J., does not directly cover this point, the arguments which were addressed to him and which he rejected were so similar to the arguments addressed to ROWLATT, J., that I venture to think that if that decision had been brought to the attention of ROWLATT, J., it might have made a very considerable difference in the view he took. I also think that if his attention had been directed to the amendment of s. 1 of the Act of 1919 which was made by the Agriculture Act, 1920, he might have been led to think it wrong to depart from the literal meaning of the words used in the Act of 1919 when the legislature had by a subsequent statute made a particular amendment but which did not include the amendment which in substance the learned judge thought might be made. C D E

This is a case in which there is no clear or sufficient indication of the mischief Parliament intended to remedy by the Act of 1919. There is no indication either in the preamble or in the language of the Act, to show that the language used should be interpreted in other than its natural meaning. It may be that this particular case never occurred to the draftsman and it is a *casus omissus*. On the other hand, it may be that the legislature thought that this particular case was a class of injustice and of grievance that ought to be remedied by statutory provision. I do not know. Under these circumstances I think that the clear rule which the court has to follow is to give the language its literal meaning, and it is not disputed that if the language is used in its literal meaning it does cover the particular case. Under these circumstances I think that the learned judge should not have departed from the literal interpretation of the Act, and should have decided in favour of the defendant. For these reasons I think that the appeal should be allowed. It has been argued that the Act of 1920 has a retrospective effect. No doubt to some extent it has, and it might and would apply to a notice to quit which was running at the time when the Act of 1920 was in force, but I cannot see that it is possible to give it a retrospective effect so as to cover this particular notice to quit which was given in May, 1919, and which had expired some considerable time before January 1, 1921, when the Act of 1920 came into operation. F G H

SCRUTTON, L.J.—Upon consideration I have come to the same conclusion, and I think that this appeal should be allowed. In 1919 Parliament passed an Act in very wide language using the word "any" without restriction. It is quite clear that when the particular mischief intended to be remedied can be ascertained from the Act itself, general words may be limited in their meaning, for words intended only to meet the particular mischief ought not to have a wider effect. For instance, an Act imposing a penalty on "any person" found drunk on licensed premises was held not to apply to the landlord when found drunk in bed because, although he was a person found drunk on licensed premises, that was not the I

A mischief which the Act was dealing with as appeared from the preamble and some parts of the Act. If I could find out from the Act of 1919 what mischief Parliament was intending to deal with it might be possible to cut down the word "any" by language which would restrict the remedy to the mischief. But I cannot find in the Act any indication whatever of the mischief which Parliament was intending to remedy, and not knowing the mischief it intended to remedy I do not feel able
B to cut down the language which Parliament has used. Counsel for the plaintiff suggests that I ought to read "any contract for sale of a holding" as meaning any contract for sale to a person other than the tenant. It appears to me that if I do that I shall be legislating and not interpreting the words which Parliament has used. Of course, I strongly suspect that Parliament did use words which went further than intended, because the following year the Act of 1920 provides
C by amendment, that avoidance of the notice to quit to the case where the sale is by the owners who gave the notice, but that does not affect the question of the application of the Act of 1919, to a sale to the tenant.

Looking, therefore, at the Act of 1919, by itself I can find no ground to lead me to limit the wide language that Parliament has used, and I think that the way in which RUSSELL, J., approached the case of *Robinson v. Nesbit* (1), which
D has been cited to us was accurate. The only remaining question is whether, when the Act of 1920 amended s. 1 of the Act of 1919, and provided that the Act was to be construed with the Act of 1919, it operated retrospectively so that notices which had expired or which had been already rendered invalid were in no way affected, but in my view there is not sufficiently strong language here to enable that to be done. For these reasons, therefore, I think the appeal must be allowed.

E **ATKIN, L.J.**—I agree. I see no reason at all for cutting down the plain meaning of the words in this case, and I am myself by no means satisfied that the legislature cannot have had this question of the sale to a tenant in its mind. But, however that may be, it appears to me that we are bound to give the words their ordinary and plain meaning, and in respect of the principles of construction of them I think
F that the judgment of RUSSELL, J., in *Robinson v. Nesbit* (1) was entirely correct. On the question as to the effect and meaning of s. 29 and Sched. I, of the Act of 1920, it appears to me that they are what they are said in the Act to be, namely, amending provisions and not provisions declaratory of the construction of the Act of 1919. It appears to me plain that the Act of 1920 has at any rate not the effect of reinstating and making good a notice to quit which had already expired
G before the passing of the Act and which by the Act of 1919 was declared to be null and void. I agree that the appeal should be allowed and that judgment should be entered for the defendant in the action with costs.

Appeal allowed.

Solicitors: *Trinder, Capron & Co.*, for *Blaker & Sons*, *Lewes*; *Champion & Co.*

[*Reported by* EDWARD J. M. CHAPLIN, Esq., *Barrister-at-Law.*]

FOX v. BURGESS

[KING'S BENCH DIVISION (Avory, Salter and Roche, JJ.), January 25, 1922]

[Reported [1922] 1 K.B. 623; 91 L.J.K.B. 465; 126 L.T. 525; 86 J.P. 66; 38 T.L.R. 289; 66 Sol. Jo. 335; 20 L.G.R. 277; 27 Cox, C.C. 162]

Education—School attendance—Duty of parent to secure attendance—Refusal by child to submit to medical examination under direction of father—Expulsion of child—Elementary Education Act, 1876 (39 & 40 Vict., c. 79), s. 11, s. 12—Children Act, 1908 (8 Edw. 7, c. 67), s. 122.

By the Children Act, 1908, s. 122 (1), a local education authority was empowered to direct their medical officer to examine in any public elementary school the person and clothing of any child attending the school, and if, on examination, the medical officer was of opinion that a child's person or clothing was verminous, he might give notice to the child's parents requiring him to cleanse the child's person and clothing within twenty-four hours. The appellant's daughter, aged twelve, attended a public elementary school. An attendance order had been made under the Elementary Education Act, 1876, s. 11, in respect of the child. On two occasions the child, acting under the direction of the appellant, refused to submit to a medical examination ordered by a local education authority under s. 122 of the Act of 1908. She was, therefore, excluded from the school for persistent insubordination, and the appellant was informed of this. He subsequently sent the child to school, but she was refused admittance. The appellant was convicted of having unlawfully and without reasonable excuse failed to comply with the attendance order.

Held: section 122 of the Act of 1908 imported an obligation on the part of the child to submit to the examination, and, if the child refused to submit on the instructions or guidance of her father, he became responsible for her refusal; therefore, the appellant had not caused the child to attend school within the meaning of the Act of 1876, and had been rightly convicted.

Notes. The Elementary Education Act, 1876, and the Children Act, 1908, s. 122, were repealed by the Education Act, 1921, which, in turn, has been repealed by the Education Act, 1944. For s. 11 and s. 12 of the 1876 Act and s. 122 of the 1908 Act, see, now, s. 37 (as amended), s. 39, s. 40 (as amended) and s. 54 of the Act of 1944 respectively.

Referred to: *Spiers v. Warrington Corpn.*, [1953] 2 All E.R. 1052.

As to school attendance and as to cleanliness and clothing, see 13 HALSBURY'S LAWS (2nd Edn.) 558 et seq., 645 et seq.; and for cases see 19 DIGEST 564 et seq., 579, 580. For the Education Act, 1944, ss. 37, 39, 40 and 54, see 8 HALSBURY'S STATUTES (2nd Edn.) 181, 183, 184, 196.

Case referred to:

(1) *Saunders v. Richardson* (1881), 7 Q.B.D. 388; 50 L.J.M.C. 137; 45 L.T. 319; 45 J.P. 782; 29 W.R. 800, D.C.; 19 Digest 566, 80.

Also referred to in argument:

Gateshead Union v. Durham County Council, [1918] 1 Ch. 146; 87 L.J.Ch. 113; 117 L.T. 796; 82 J.P. 53; 34 T.L.R. 65; 62 Sol. Jo. 86; 16 L.G.R. 33, C.A.; 19 Digest 553, 7.

Richardson v. Saunders (1881), 6 Q.B.D. 313; 50 L.J.M.C. 65; 44 L.T. 474; 29 W.R. 681, D.C.

Jones v. Rowland (1899), 80 L.T. 630; 63 J.P. 454; 19 Cox, C.C. 315, D.C.; 19 Digest 567, 82.

Walker v. Cummings (1912), 107 L.T. 304; 76 J.P. 375; 28 T.L.R. 442; 10 L.G.R. 728; 23 Cox, C.C. 157, D.C.; 19 Digest 567, 83.

Bunt v. Kent, [1914] 1 K.B. 207; 83 L.J.K.B. 343; 110 L.T. 72; 78 J.P. 39; 30 T.L.R. 77; 12 L.G.R. 34; 23 Cox, C.C. 751, D.C.; 19 Digest 567, 84.

A Case Stated by justices for the borough of Hove.

At a court of summary jurisdiction sitting at Hove, a complaint was preferred by the respondent, Richard William Burgess, on behalf of the education authority for the borough of Hove under the Elementary Education Act, 1876, against the appellant, George Charles Fox, that he was the parent of a certain child named Violet, who was above the age of five years, to wit, of the age of twelve years or thereabouts, and who, by an order dated April 18, 1921, made by the court of summary jurisdiction sitting at Hove under the provisions of the Elementary Education Act, 1876, was duly ordered to attend the Portland Road School in the borough, and that such order had unlawfully not been complied with, without any reasonable excuse. The complaint was heard on Oct. 24, 1921, when the court adjourned the case for one week for consideration. The following facts were proved or admitted. On June 13, 1921, the school medical officer, acting on the instructions of the education authority for the borough of Hove, visited the Portland Road School with the object of examining the clothing and person of the appellant's child Violet in accordance with the provisions of s. 122 of the Children Act, 1908. The child refused to submit to such examination, and, therefore, it was not carried out. On Sept. 5, 1921, the school medical officer again saw Violet Fox, in accordance with the instructions of the education authority, with a view to carrying out the examination. On this occasion also, the child refused to submit to the examination, and, on the medical officer placing his hand on her shoulder, moved away. This was accepted as an intimation that a physical refusal would ensue if the examination was persisted in, and the child was thereupon informed that she would be reported for persistent insubordination. On such report coming before the education committee at their meeting on Sept. 14, 1921, it was decided to exclude the child from the school on the ground of persistent insubordination, consisting of her refusal to submit to the examination. Notice of this decision was sent by the secretary of the education committee to the appellant by registered post, but was returned marked "refused." The appellant declined to allow his child to be examined in accordance with the provisions of s. 122 of the Children Act, 1908. The child had from time to time been sent to school since the resolution was passed, but had been refused admission.

On the part of the appellant it was contended that: (i) The exclusion of the child by the education authority was a reasonable cause for non-attendance; the education authority had wrongfully excluded the child on the ground of persistent insubordination; and such exclusion was a reasonable cause for non-attendance. (ii) The prosecution were indirectly seeking to enforce obedience to an Act of Parliament which itself created no offence or penalty for its disobedience. (iii) There was no obligation on a parent to submit his child to the examination contemplated by s. 122 of the Children Act, 1908. (iv) The child could not be refused admission to the school except on reasonable grounds. On the part of the respondent it was contended that: (i) The education authority were justified in insisting on the examination of the child under s. 122 of the Children Act, 1908, such examination being for the mutual benefit and protection of all children attending school, and the refusal of the child, to the extent of showing that she would physically resist the examination, was serious insubordination, justifying the making of the order of exclusion. (ii) There was an implied obligation on a parent to submit his child to examination contemplated by s. 122 of the Children Act, 1908. (iii) The exclusion was not a reasonable excuse for not complying with the attendance order.

On Oct. 31, 1921, the justices convicted the appellant and fined him 10s., or, in default, six days' imprisonment. They held, on the authority of *Saunders v. Richardson* (1), that "to attend" meant to attend under such circumstances that the child would receive the benefit of the instruction offered, and that the

attendance order had not been complied with. They further held that the appellant A
had no reasonable excuse for not complying with the order.

A. H. M. Wedderburn for the appellant.
du Parc for the respondent.

AYVORY, J.—The appellant was summoned under the Elementary Education Act, 1876, for that he, being the parent of a child aged twelve years or there- B
abouts, who, by an order made on April 18, 1921, had been duly ordered to attend the Portland Road School, and that such order had unlawfully not been complied with without any reasonable excuse. The parent of the child was, in effect, sum-
moned before the court for not causing the child to attend school. It has been held in numerous cases that a parent who sends his child to a particular school, C
when he knows that, in the circumstances, the child will be refused admittance to that school, is not causing that child to attend school, and has no reasonable excuse for the child's non-attendance.

The question in this case is whether the parent knew that, in the circumstances, the child would be refused admittance, and whether he had any reasonable excuse for the child's non-attendance. It is quite clear on the facts found that he knew that the child would be refused admittance because she had been reported for D
persistent insubordination and had been excluded from that school on that ground. Therefore, the appellant knew quite well that she would be refused admission on that ground.

The remaining question is whether the child had been properly excluded from the school on that ground. Of course, if it can be shown that the child had not been properly excluded, then it cannot be said that the parent was guilty of not causing the child to attend when he sent her there. The insubordination for E
which the child had been reported was her refusal to allow herself to be examined by the medical officer under s. 122 of the Children Act, 1908. It is found as a fact that the school medical officer, acting under the instruction of the education authority, visited this particular school on June 13, 1921, for the purpose of F
examining this child under the provisions of s. 122 of the Children Act, 1908. The child refused to submit to the examination. On Sept. 5, 1921, the medical officer again saw the child in accordance with his instructions with a view to examining her; the child again refused to submit and, on the medical officer's placing his hand on her shoulder for the purpose merely of exercising his authority, or as a mere indication that he was claiming authority to examine her, the child moved away, indicating the intention on her part not to allow herself to be G
examined. The Case finds that that was done under the guidance, if not by the actual instructions, of the appellant, and that the appellant declined to allow his child to be examined in accordance with the provisions of s. 122 of the Children Act, 1908.

It has been argued before us, and very ably argued, by counsel for the appellant that, although s. 122 authorises the local education authority to direct their H
medical officer to make an examination for the purpose of discovering whether the child is verminous or in a dirty condition, this does not import or involve any obligation on the part of the child to submit to such an examination. Nor does it import, counsel says, an obligation on the part of a parent to allow the child to be examined, or to submit the child for examination under that section. I
He suggests that the only remedy, if a child refuses to submit, or if its parents instruct it not to submit, is for the school authorities to exercise their disciplinary powers on the child so as to compel it to submit. In my opinion, that would put on the school authorities a responsibility which was never intended by this Act of Parliament. It would lead to scenes, possibly of violence and disorder in the school, and, most probably, to summonses in the police court, in every case where such disciplinary powers were attempted to be exercised, alleging that an assault had been committed on the child. Such summonses are all too frequent

A at present when ordinary corrective discipline is applied in these schools. In my opinion, s. 122, which empowers the local education authority to direct the medical officer to examine for this purpose, does import an obligation on the part of the child to submit to that examination. And if a child refuses to submit under the instructions or guidance of its father, the father becomes responsible for the refusal. The child becomes insubordinate, and for this insubordination the father is himself responsible. If the child is excluded from the school in consequence of that insubordination, and the father knows that it is so excluded for the insubordination for which he is responsible, then, I think, he fails to cause the child to attend the school within the meaning of the Elementary Education Act, 1876, if he takes no steps to put the child in a proper condition to be received into the school, and the only way in which he can put the child into a proper condition to be received into the school is by removing his objection, and the child's objection, to the examination; in other words, by allowing it to be examined by the medical officer. Until he does that, he is himself preventing the proper attendance of the child at the school; in other words, he is not causing it to attend within the meaning of the statute.

D I must add a word on the provisions of the Local Education Authorities (Medical Treatment) Act, 1909, which has been very properly relied on by counsel for the appellant in support of his argument. This is a statute passed after the Children Act, 1908, and it provides, by s. 1, that

E "Where any local education authority provides for the medical treatment of children attending any public elementary school under s. 13 of the Education (Administrative Provisions) Act, 1907, there shall be charged to the parent of every child in respect of any treatment provided for that child such an amount not exceeding the cost of treatment as may be determined by the local education authority, and in the event of payment not being made by the parent it shall be the duty of the authority, unless they are satisfied that the parent is unable by reason of circumstances other than his own default to pay the amount, to require the payment of that amount from that parent, and any such amount"

F may be recovered from him. Before I come to s. 3, which is relied on by counsel for the appellant, it is necessary to appreciate to what s. 1 of the Act of 1909 is intended to apply. It is not intended to apply to any such examination or treatment as the Children Act, 1908, is concerned with. It is intended to apply only to general medical treatment of children in the school for illness, disease or infirmities, as distinguished from a dirty or verminous condition. When one looks at the Education (Administrative Provisions) Act, 1907, it is clear that the powers and duties of local education authorities include the duty to provide for the medical inspection of children immediately before, or at the time of, or as soon as possible after, their admission to a public elementary school, and on such other occasions as the Board of Education direct, and the power to make such arrangements as may be sanctioned by the Board of Education for attending to the health and physical condition of the children educated in public elementary schools. That refers, as I have said, to the general medical treatment of children for illness or disease as distinct from this particular inspection provided for by the Children Act, 1908, which relates only to a verminous or dirty condition.

G

H

I Section 3 of the Act of 1909 provides :

"Nothing in this Act shall be construed as imposing any obligation on a parent to submit his child to medical inspection or treatment under s. 13 of the Education (Administrative Provisions) Act, 1907."

In one sense it might be said, applying the well-known doctrine, *expressio unius est exclusio alterius*, that the very fact of excluding the liability of the parent under s. 13 of the Act of 1907 impliedly includes a liability on his part under the Children Act, 1908. But, quite apart from that point, in my opinion, s. 3

is intended to be strictly limited to those cases only where the medical inspection takes place under the Act of 1907, and where such inspection is for the purpose of looking after the general health of the children, as distinct from any verminous or dirty condition, which is provided for in the Children Act, 1908. A

Therefore, I come to the conclusion that s. 3 of the Act of 1909 creates no obstacle to the argument on behalf of the respondent in this case. It might be sufficient to say that I concur in the judgment and their reasons, which were expressed very clearly by the justices and are recorded in the Special Case. I see nothing in it to dissent from, and, for the reasons that I have given, I agree that that judgment was right and the appeal ought to be dismissed. B

SALTER, J.—I am of the same opinion. I think that s. 122 of the Children Act, 1908, imposes by a necessary inference both on the children and on their parents a duty to submit to the sanitary examination which is there authorised—a duty on the part of the children to submit and a duty on the part of their parents to co-operate. This child had repeatedly and persistently refused to obey the lawful instructions of those in authority. It is quite unnecessary, I think, to consider whether the child's teacher or the medical officer or representative would have been authorised in law to overcome the child's resistance by force. Nor is it necessary now to consider whether the medical inspection and treatment, which are provided by education authorities in pursuance of the duty imposed on them by s. 13 of the Education (Administrative Provisions) Act, 1907, is obligatory either on the children or on their parents. The material facts seem to me to be that this child had persistently refused to obey a lawful order with the result that she was a possible danger to the other scholars. C

The other material facts appear to me to be that the child's conduct was with the knowledge and approval and support of the appellant, her father, and that, by proper exercise of his parental authority and control, he could have induced her to obey the order given to her. If so, the effect is that the appellant sends the child, it is true, to the school gates, but he sends the child instructed to disobey and to persist in disobedience to a lawful order. The question is whether in the, circumstances, the charge is made out that the order had unlawfully not been complied with without any reasonable excuse. In my opinion, it had. I do not propose to review the authorities which have been cited to us, but they appear to me to show that the law requires of parents of children who attend public elementary schools, what I will venture to call a reasonable co-operation. In *Saunders v. Richardson* (1), LORD COLERIDGE, C.J., said (7 Q.B.D. at p. 392), after dealing with the facts, that unless the father had taken certain steps he could not think that the father had made reasonable efforts to fulfil those duties which the Act required. To send a child to school without the fee where fees are payable; to send a child to the wrong school; to send a child to school who is known to be verminous; in all these cases this has been held not to be a complete and efficient performance of the duty of the parents. D

I think that this case falls within those classes and that the appellant was rightly convicted. E

ROCHE, J.—I agree. F

Appeal dismissed. G

Solicitors: *H. E. Trangmar*, Brighton; *Sharpe, Pritchard & Co.*, for *W. Jermyn Harrison*, Hove. H

[Reported by J. F. WALKER, ESQ., Barrister-at-Law.]

A HOARE & CO., LTD. v. SIR ROBERT McALPINE, SONS & CO.

[CHANCERY DIVISION (Astbury, J.), November 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 21, 1922]

[Reported [1923] 1 Ch. 167; 92 L.J.Ch. 81; 128 L.T. 526; 39 L.T.R. 97; 67 Sol. Jo. 146]

Nuisance—Vibration—Old building—Pile driving operation—Structural damage to building—Rule in Rylands v. Fletcher.

The plaintiffs were the owners of an old house, which, although infirm, was found to have been in a stable condition. The defendants were contractors for making the foundations of a large building to be erected opposite the plaintiffs' house, and in the course of these operations it was necessary to drive a great number of piles through the soil into the London clay which lay beneath. This pile-driving set up a heavy vibration which caused serious structural damage to the plaintiffs' house, in consequence of which the whole of the building above the ground floor had to be pulled down in compliance with a dangerous structure notice. In an action by the plaintiffs,

Held: the damage to the plaintiffs' house was caused by the vibration, the principle of *Rylands v. Fletcher* (1) (1868), L.R. 3 H.L. 330, applied, and, therefore the plaintiffs were entitled to succeed.

Notes. As to dangerous property, see 28 HALSBURY'S LAWS (2nd Edn.) 144 et seq.; and for cases see 36 DIGEST (Repl.) 282 et seq.

Cases referred to:

- (1) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, 334.
- (2) *Walter v. Selfe* (1851), 4 De G. Sm. 315; 20 L.J.Ch. 433; 17 L.T.O.S. 103; 15 Jur. 416; 64 E.R. 849; affirmed (1952), 19 L.T.O.S. 308, L.C.; 36 Digest (Repl.) 247, 1.
- (3) *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q.B. 836; 63 L.J.Q.B. 661; 71 L.T. 362; 42 W.R. 626; 10 T.L.R. 506; 9 R. 819, C.A.; 36 Digest (Repl.) 325, 693.
- (4) *Robinson v. Kilvert* (1889), 41 Ch.D. 88; 58 L.J.Ch. 392; 61 L.T. 60; 37 W.R. 545, C.A.; 36 Digest (Repl.) 294, 400.
- (5) *Eastern and South African Telegraph Co. v. Cape Town Tramway Cos.*, [1902] A.C. 381; 71 L.J.P.C. 122; 88 L.T. 457; 50 W.R. 657; 18 T.L.R. 523, P.C.; 36 Digest (Repl.) 284, 336.
- (6) *Kine v. Jolly*, [1905] 1 Ch. 480; 74 L.J.Ch. 174; 92 L.T. 209; 53 W.R. 462; 21 T.L.R. 128; 49 Sol. Jo. 164, C.A.; affirmed sub nom. *Jolly v. Kine*, [1907] A.C. 1, H.L.; 36 Digest (Repl.) 256, 75.
- (7) *National Telephone Co. v. Baker*, [1893] 2 Ch. 186; 62 L.J.Ch. 699; 68 L.T. 283; 57 J.P. 373; 9 T.L.R. 246; 3 R. 318; 36 Digest (Repl.) 296, 417.
- (8) *A.-G. v. Cory Bros. & Co., Kennard v. Cory Bros. & Co.*, [1921] 1 A.C. 521; 90 L.J.Ch. 221; 125 L.T. 98; 85 J.P. 129; 37 T.L.R. 343; 19 L.G.R. 145, H.L.; 36 Digest (Repl.) 285, 346.

Also referred to in argument:

Colwell v. St. Pancras Borough Council, [1904] 1 Ch. 707; 73 L.J.Ch. 275; 90 L.T. 153; 68 J.P. 286; 52 W.R. 523; 20 T.L.R. 236; 2 L.G.R. 518; 36 Digest (Repl.) 309, 560.

Sandus-Clark v. Grosvenor Mansions Co., Ltd. and D'Allessandri, [1900] 2 Ch. 373; 69 L.J.Ch. 579; 82 L.J. 758; 48 W.R. 570; 16 T.L.R. 428; 44 Sol. Jo. 502; 36 Digest (Repl.), 269, 219.

Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co., [1895] 1 Ch. 287; 64 L.J.Ch. 216; 72 L.T. 34; 43 W.R. 328; 11 T.L.R. 137; 39 Sol. Jo. 132; 12 R. 112, C.A.; 28 Digest (Repl.) 792, 418.

Smith v. Kenrick (1849), 7 C.B. 515; 18 L.J.C.P. 172; 12 L.T.O.S. 556; 13 Jur. 362; 137 E.R. 205; 36 Digest (Repl.) 248, 8.

Witness Action.

The plaintiffs, Hoare & Co., Ltd., were a brewery company, who, since 1896, had held the lease of certain premises in Lower Thames Street, in the City of London, which would not expire for some years, and the plaintiff, Jarvis, had been since August, 1917, the tenant in occupation of such premises. The premises were used as an hotel and luncheon rooms, and consisted of a basement, the ground floor, and four floors above, the upper floors being let as offices, and were known as the Steam Packet Hotel. They consisted originally of two houses which were erected a hundred years ago or more, and were built in accordance with the methods of building of that time in what was admitted to have been then a proper manner. At some time, which was not certain, the premises were altered for the purpose of being adapted as an hotel, and the wall between the two houses was removed on the ground floor, the upper floors being supported by a wooden bressummer or girder carried on three iron columns. It appeared that at some time, which ASTBURY, J., thought was proved to be about fifty years ago, there had been a settlement in the building, and two of the iron columns and a pier, which formed part of the original brickwork at the junction of the two houses, had a list of four or five inches; but the building then came to rest, and there was no trouble or difficulty until 1919. In that year, part of the cross wall, which had been left at the time of the above-mentioned alterations, perished, and required to be repaired. The district surveyor was called in and sanctioned the proposed repairs; he also examined the whole building with the state of which he was satisfied, and he gave evidence that the house was then in a stable condition, and that, except for the list of the pillars and pier above mentioned, the walls were not out of the vertical. The defendants were well-known contractors, and were employed to make the foundations for a very large new building which was to be erected on the south side of Lower Thames Street opposite the plaintiff's premises, and between the street and the river Thames. This building was to be of an exceptional nature, of a height of about 120 ft., and consisting of ten or eleven storeys. To support this building, foundations of an exceptional nature were required. The soil consisted of made ground to a depth of about 16 ft. above the London clay, and it was decided that, for the purpose of the foundations, piles must be driven into the London clay to support a raft of concrete by way of foundation for the building. For this purpose, deep trenches were dug in the made ground, and piles about 13 in. square were driven in the trenches into the London clay, the piles varying in length from 24 ft. to 38 ft. The method of driving was as follows: At the beginning a steam-hammer was used, which delivered about 140 blows per minute, and later a drop-hammer or "monkey" was used, which dropped a weight of 2½ tons from a height of 5 ft., four times a minute. Such was the consistency of the London clay that, towards the end of the operation, the pile was only driven in about one-fifth of an inch by each blow. The pile-driving began on Nov. 3, 1920, and continued until July 28, 1921, in which time 670 piles had been driven, of which forty-seven piles were on the north side of the site immediately facing the plaintiffs' premises, from which the nearest pile was 40 ft. distant. The plaintiffs alleged that, shortly after the pile-driving commenced, the vibration arising therefrom so shook their premises that the walls shifted out of the perpendicular and cracks appeared in the external and internal walls and in the ceilings. In July, 1921, the Corporation of the City of London served on the plaintiffs a dangerous structure notice under the London Building Act, 1894, requiring them to shore up the buildings,

A which was done in July. On Nov. 23, 1921, the plaintiffs issued the writ in this action, claiming a declaration that the works carried out by the defendants had caused serious damage to the plaintiffs' building, and asking for an injunction and damages. On Jan. 16, 1922, after the issue of the writ, the corporation served a notice requiring the demolition of the building as a dangerous structure, and on Jan. 28 served a summons for that purpose, on which summons an order
B for the demolition was made on Jan. 31. In pursuance of that order, the whole of the building above the ground floor was pulled down, the plaintiff Jarvis being allowed to retain the ground floor for his business of caterer. It was stated that the adjoining premises in London Thames Street had already been set back when re-built, and that the premises, if re-built, would be a "new building," and must be set back to conform with the building line, so that only a depth of
C about eight or nine feet would be available for building.

The plaintiffs' witnesses stated that the building, although old, was, until the pile-driving began, reasonably stable; and this was confirmed by the district surveyor, who had inspected it in 1919. They stated that, soon after the pile-driving started, cracks and subsidence began to appear in the building, resulting in the damage which caused the demolition order. Evidence was given as to
D strong vibration being felt both in the building and in adjoining houses and in the neighbouring church of St. Magnus in Lower Thames Street, and even at a considerable distance; and that, after the issue of the writ, when a test pile was driven at a considerable distance from the plaintiffs' building, the vibration was so great as to affect water in a tumbler, and was recorded on a seismograph which had been erected for the purposes of the test, while the shaking caused
E by the demolition of the premises and by the heavy traffic in the street caused much less disturbance of the seismograph. The defendants, contended that the weakness of the building and its settlement existed before the pile-driving began, and that the real cause of the trouble was the age and unstable condition of the building. They also called three experts, who stated that structural damage could not be caused by such vibration as would result from pile-driving, and
F that the damage to this building must have resulted from other causes.

Tomlin, K.C. and *J. Fulton Carr* for the plaintiffs.

Upjohn, K.C., Farwell, and Theobald Matthew, for the defendants.

Cur. adv. vult.

Nov. 21. **ASTBURY, J.** read the following judgment, in which he stated the facts and reviewed the evidence, holding that the plaintiffs' house was, in
G November, 1920, although old, in a stable condition, and that the pile-driving had produced vibration which was felt in the plaintiffs' house and in adjoining and more remote premises, and continued: I am clearly, and without any hesitation, of opinion on the evidence that the vibration produced by the defendants' operations caused serious structural damage and injury to the plaintiffs' building, and resulted in the order to pull down, and I so hold.

H I now turn to the question of law which has been argued by the defendants. It is contended that the defendants' operations were lawful and not wrongful, and that they cannot be held liable for acts that they were entitled in the ordinary common course to do, by reason of the unstable character of the plaintiffs' building and its low resistance to external pressure. It is said that the law as to nuisance to human beings, as stated by **KNIGHT BRUCE, V.-C.**, in *Walter v. Selfe* (2) (4 De G. & Sm. at p. 322), is really applicable to buildings, and that one must not be too fastidious in trying to limit the actions of one's neighbours. Four
I authorities, or rather suggested authorities, were referred to for this proposition: First, *Grosvenor Hotel Co. v. Hamilton* (3). This was a case of landlord and tenant, and the following dicta were referred to. **LINDLAY, L.J.**, said ([1894] 2 Q.B. at p. 839):

"The first question is whether the tenant has any right of action. It has been contended that the tenant's house was weak and insecure, and that the

tenant is seeking to impose on his landlord a duty more extensive than that of an ordinary neighbour; for that to make vibration caused by a neighbour actionable it must be such as would damage a house of reasonable strength. If the case were not between lessor and lessee, that might be so."

LOPES, L.J., said (*ibid.* at p. 841): "It is unnecessary to decide how the case would stand between strangers." The point in question was not argued or decided, and the principle enunciated in *Rylands v. Fletcher* (1) (L.R. 3 H.L. at pp. 338-340) was not referred to, or regarded as relevant.

The second case relied on is *Robinson v. Kilvert* (4). The passages cited are, first, where COTTON, L.J., said (41 Ch.D. at p. 94):

"But no case has been cited where the doing something not in itself noxious has been held a nuisance, unless it interferes with the ordinary enjoyment of life, or the ordinary use of property for the purposes of residence or business. It would, in my opinion, be wrong to say that the doing something not in itself noxious is a nuisance because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life. Here it is shown that ordinary paper would not be damaged by what the defendants are doing, but only a particular kind of paper, and it is not shown that there is heat such as to incommode the workpeople on the plaintiff's premises."

LOPES, L.J., said (*ibid.*, at p. 97):

"A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbour doing something lawful on his property, if it is something which would not injure anything but an exceptionally delicate trade."

This was strictly a nuisance. The thing complained of was not in itself dangerous, and did not interfere with the ordinary amenities of life, and was done in the ordinary use and enjoyment of property; and, again, *Rylands v. Fletcher* (1) was not cited as having anything to do with the case.

The third authority referred to is *Eastern and South African Telegraph Co. v. Cape Town Tramways Cos.* (5). The passage referred to is in LORD ROBERTSON'S judgment, where he said ([1902] A.C. at p. 393):

"A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business of pleasure."

But, in an earlier passage in his judgment, the learned judge said this (*ibid.*, at p. 391):

"Now, if regard be had solely to the action of the respondents in storing electricity on their lands, it must be allowed that the analogy is very close to the illustrations given in *Rylands v. Fletcher* (1) of the kind of things which a proprietor can only do at his own peril. Electricity (in the quantity which we are now dealing with) is capable when uncontrolled of producing injury to life and limb and to property; and in the present instance it was artificially generated in such quantity, and it escaped from the respondents' premises and control. So far as the respondents are concerned, it appears to their Lordships that, giving resulting injury such as is postulated in *Rylands v. Fletcher* (1), the principle would apply. But this is only one-half of the question, and it remains to be seen if the injury postulated is present. Was there such resulting injury as to found a claim on the principle of *Rylands v. Fletcher* (1)? Now in the present case neither person nor property was injured (unless the ingenious suggestion of Mr. Bousfield could be entertained, that physical injury was done to the paper which was smudged by the eccentric action of the recording apparatus). Certainly there is here no injury of the same genus or species with the tangible and

A sensible injuries which have hitherto founded liability on the principle in question, and which have always constituted some interference with the ordinary use of property."

Here it is admitted that *Rylands v. Fletcher* (1) applies to all physical and tangible damage to person or property, although not necessarily to some extraordinary and delicate user of property to which the insurer's liability in *Rylands v. Fletcher* (1) may not extend.

The fourth and last case relied on for this proposition is *Kine v. Jolly* (6), the passage referred to being in VAUGHAN WILLIAMS, L.J.'s judgment, which is as follows ([1905] 1 Ch. at p. 489):

"I think we must bear in mind that in these cases, which are conveniently grouped together as cases in which the proper form of action is an action of nuisance, citizens are not to be allowed to enforce rights which limit the user by others of property, unless the facts relied upon as constituting a nuisance are such as interfere with the ordinary rights which according to the ordinary notions of mankind they are entitled to exercise in relation to one another, and in relation to their property."

This is not contested; the passage is referring to nuisance properly so called, and the principle of *Rylands v. Fletcher* (1) was not within the discussion.

The following proposition is sought to be established from these passages: "A man cannot limit the operations of his neighbour on his own land, or increase his neighbour's liability, by putting his property for his own purposes into a structural condition in which it is more than ordinarily liable to be affected by that neighbour's legitimate operations." In some circumstances, this may be accurate: as applied to the present case, it is, in my judgment, inappropriate, and the analogy of contributory negligence does not apply.

The plaintiffs' answers to these contentions are as follows: they say that a legal nuisance is something that a reasonable man ought not to be asked to put up with, and that there is an action on the case in the nature of trespass applicable here, as instanced in *Rylands v. Fletcher* (1) when a man releases some force brought by him on to his own property which gets beyond his control and injures his neighbour, in which case he is in the position of an insurer and liable for the damage he may cause; and that, in this case, the condition of the property damaged is not a relevant consideration. As establishing those propositions, *Rylands v. Fletcher* (1) was relied on, especially passages in LORD CAIRNS' judgment (L.R. 3 H.L. at pp. 338-340). *National Telephone Co. v. Baker* (7) was also relied on for the passage in KEHEWICH, J.'s judgment ([1893] 2 Ch. at p. 199), and *A.-G. v. Cory Bros. & Co.* was cited for VISCOUNT FINLAY'S remarks as to insurance ([1921] 1 A.C. at p. 539). I do not think that it is necessary at this stage to read these passages. In my judgment, *Rylands v. Fletcher* (1) applies to this case, although I do not wish to be understood as indicating that the law as to legal nuisance may not also be applicable. I do not think that the plaintiffs' house was, in November 1920, the delicate and fastidious erection which has been suggested by the defendants. It is true that it was old, and, as compared with younger buildings, whose constitution had been strengthened, reinforced, or originally produced with the experience of modern building science, more or less infirm; but it was built in accordance with principles prevailing at the date of its original construction, and it was altered many years ago in accordance, presumably, with the Metropolitan Building Regulations then in operation, and as late as 1920 it had been made to comply with the then requirements of the appropriate district authority, and I see no justification for its being physically shaken in its declining years to a premature and untimely end by an adventurous and powerful neighbour, even if the alleged analogy of *Walter v. Selfe* (2) were held to apply.

If the defendants' contentions of law were really apposite, I find it difficult to answer the query, "When does an old building lose its ordinary right to protection against destruction?" And the prospect of all old buildings in London and elsewhere having, if they are to be rendered immune and to be permitted to continue their existence, to be put into a condition capable of resisting, not only all ordinary forces, but all extraordinary forces that may be let loose to operate against them, seems to me to be alarming.

For these reasons, the plaintiffs, in my judgment, are entitled to succeed; and there will be a declaration that they have respectively suffered damage by reason of the defendants' operations complained of, for which the latter are liable in law, and in respect of which they are liable in damages, and an enquiry will be directed to ascertain the amount of such damages. The defendants must pay the costs of the action down to and including this order.

Solicitors: *Sandilands & Co.; Herbert Reeves & Co.*

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

SCRANTON'S TRUSTEE v. PEARSE

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), May 8, 9, 1922]

[Reported [1922] 2 Ch. 87; 91 L.J.Ch. 579; 127 L.T. 698; 38 T.L.R. 629; 66 Sol. Jo. 503; [1922] B. & C.R. 52]

Bankruptcy—Gaming—Bets paid by cheque—Right of trustee in bankruptcy to recover—Officer of the court—Stay of proceedings by Court—Gambling Act, 1835 (5 & 6 Will. 4, c. 41) ss. 1, 2—Bankruptcy Act, 1914 (4 & 5, Geo. 5, c. 59).

A trustee in bankruptcy sought under the provisions of the Gaming Act, 1835, to recover from a bookmaker certain sums which the bankrupt had paid by cheque to the bookmaker in respect of betting losses.

Held: since the trustee was seeking to enforce a claim in respect of a debt which was a chose in action and, by the Bankruptcy Act, 1914, s. 18, was made part of the assets of the bankrupt which vested in the trustee, and since there was nothing in the doctrine laid down in *Ex parte James* (1) (1874), 9 Ch. App. 609, which entitled the court to say that, in such a case as this, it was dishonourable or improper or unconscionable for the trustee, as an officer of the court, to enforce it, the trustee's position not being the same as that of the bankrupt if he had remained solvent and had brought the action himself, the trustee was entitled to succeed.

Decision of ASBTURY, J., [1922] 2 Ch. 87, reversed.

Notes. The Gaming Act, 1835, s. 2, was repealed by the Gaming Act, 1922, s. 1, which Act was passed as a result of the decision of the House of Lords in *Sutters v. Briggs* (2).

Referred to: *Re Wilson, Ex parte Salaman*, [1926] Ch. 21.

As to the powers and duties of a trustee in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 382 et seq.; and for cases see 4 DIGEST (Repl.) 236 et seq. For the Gaming Act, 1835, s. 1, and the Gaming Act, 1922, s. 1, see 10 HALSBURY'S STATUTES (2nd Edn.) 744, 781. For the Bankruptcy Act 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

A Cases referred to:

- (1) *Re Condon, Ex parte James* (1874), 9 Ch. App. 609; 43 L.J. Bey. 107, 30 L.T. 773; 22 W.R. 937, L.J.J.; 4 Digest (Repl.) 226, 2031.
- (2) *Sutters v. Briggs*, [1922] 1 A.C. 1; 91 L.J.K.B. 1; 125 L.T. 737; 38 T.L.R. 30; 66 Sol. Jo. (W.R.) 9, H.L.; 25 Digest 418, 213.
- (3) *Re Thellusson, Ex parte Abdy*, [1919] 2 K.B. 735; 88 L.J.K.B. 1210; 35 T.L.R. 732; 63 Sol. Jo. 788; 122 L.T. 35; [1918-19] B. & C.R. 249, C.A.; 4 Digest (Repl.) 227, 2035.
- (4) *Dey v. Mayo*, [1920] 2 K.B. 346; 89 L.J.K.B. 241; 122 L.T. 742; 36 T.L.R. 217; 64 Sol. Jo. 240, C.A.; 25 Digest 417, 212.
- (5) *Re Wigzell, Ex parte Hart*, [1921] 2 K.B. 835; sub nom. *Re Wigzell, Ex parte Trustee*, 90 L.J.K.B. 897, [1921] B. & C.R. 42; sub nom. *Re Wigzell, Ex parte Trustee v. Barclays Bank, Ltd.*, 125 L.T. 361; sub nom. *Re Wigzell, Hart v. Barclays Bank*, 37 T.L.R. 526; 65 Sol. Jo. 493, C.A.; 4 Digest (Repl.) 227, 2036.

C

Also referred to in argument:

D

Re Craig & Sons, Ex parte Hinchcliffe, [1916] 2 K.B. 497; 85 L.J.K.B. 1537; 115 L.T. 157; [1916] H.B.R. 125; 5 Digest (Repl.) 888, 7391.

Cohen v. Mitchell (1890), 25 Q.B.D. 262; 51 L.J.Q.B. 409; 63 L.T. 206; 38 W.R. 551; 6 T.L.R. 326; 7 Morr. 207, C.A.; 5 Digest (Repl.) 790, 6699.

E

Herbert v. Sayer (1844), 5 Q.B. 965; 2 Dow. & L. 48; 1 Dav. & Mer. 723; 13 L.J.Q.B. 209; 8 Jur. 812; 114 E.R. 1512, Ex.Ch.; 5 Digest (Repl.) 796, 6736.

Hand v. Blow, [1901] 2 Ch. 721; 70 L.J.Ch. 687; 85 L.T. 156; 50 W.R. 5; 17 T.L.R. 635; 45 Sol. Jo. 639; 9 Mans. 156, C.A.; 39 Digest 53, 657.

Jameson & Co. v. Brick and Stone Co., Ltd. (1878), 4 Q.B.D. 208; 48 L.J.Q.B. 249; 39 L.T. 594; 27 W.R. 672; 5 Digest (Repl.) 1070, 8623.

F

Ramsden v. Dyson (1866), L.R. 1 H.L. 129; 12 Jur. N.S. 506; 14 W.R. 926, H.L.; 31 Digest (Repl.) 92, 2419.

Ward v. Fry (1901), 85 L.T. 394; 50 W.R. 72; 18 T.L.R. 2; 46 Sol. Jo. 11, C.A.; 5 Digest (Repl.) 980, 7905.

Tapster v. Ward (1909), 101 L.T. 503; 53 Sol. Jo. 503, C.A.; 5 Digest (Repl.) 727, 6289.

G

Re Tyler, Ex parte Official Receiver, [1907] 1 K.B. 865; 76 L.J.K.B. 541; 97 L.T. 30; 23 T.L.R. 328; 51 Sol. Jo. 291; 14 Mans. 73, C.A.; 4 Digest (Repl.) 228, 2041.

Re Hall, Ex parte Official Receiver, [1907] 1 K.B. 875; 76 L.J.K.B. 546; 97 L.T. 33; 23 T.L.R. 327; 51 Sol. Jo. 292; 14 Mans. 82, C.A.; 4 Digest (Repl.) 413, 3692.

H

Re Phillips, [1914] 2 K.B. 689; 83 L.J.K.B. 1364; 110 L.T. 939; 21 Mans. 144; 4 Digest (Repl.) 229, 2042.

Re Stokes, Ex parte Mellish, [1919] 2 K.B. 256; 88 L.J.K.B. 794; 121 L.T. 391; 35 T.L.R. 345; [1918-19] B. & C.R. 208; 5 Digest (Repl.) 790, 6703.

I

Re Middlesbrough, Redcar, Saltburn-by-the-Sea, and Cleveland District Permanent Benefit Building Society, Ex parte Wythes (1885), 53 L.T. 492; 7 Digest 484, 183.

Re Carnac, Ex parte Simmonds (1885), 16 Q.B.D. 308; 54 L.T. 439; 34 W.R. 421; sub nom. *Re Rivett-Carnac, Ex parte Simmonds*, 55 L.J.Q.B. 74; 2 T.L.R. 18, C.A.; 4 Digest (Repl.) 227, 2032.

Re Rogers, Ex parte Villars (1874). 9 Ch. App. 432; 43 L.J. Bey. 76; 30 L.T. 348; 38 J.P. 533; 22 W.R. 603, L.C. & L.J.J.; 5 Digest (Repl.) 887, 7384.

Appeal from a decision of ASTBURY, J.

This action was brought by the trustee of A. F. Scranton, a bankrupt, to recover moneys paid to the defendant on the bankrupt's cheques, given in satisfaction of betting debts.

ASTBURY, J., held that the action failed, since, applying the doctrine laid down in *Ex parte James* (1), there were no special circumstances in the case and it was not honest for the trustee as an officer of the court, to bring such an action.

The plaintiff trustee appealed.

Clayton, K.C., *Barrington Ward, K.C.*, and *H. S. Simmons*, for the plaintiff.
Luxmore, K.C. and *P. B. Morle*, for the defendant.

LORD STERNDALÉ, M.R.—I think this appeal must be allowed. I have very grave doubts whether in any case the order as it now is could possibly stand, because there has been a misunderstanding. I think probably by misapprehension of the facts on the part of the learned judge, so far as I can see, with regard to the question of jurisdiction.

This matter arises in the bankruptcy of a gentleman of the name of Scranton, which bankruptcy is proceeding in the Manchester County Court. This action and four others (I think there were five altogether—not all of them bankruptcy but all arising on the same description of claim) were brought by the respective trustees and were assigned under the provisions of the Bankruptcy Act, 1914, and rules to ASTBURY, J., for trial as being one of the bankruptcy judges. In trying those assigned actions in that way, he would have the jurisdiction, and only the jurisdiction, of an ordinary judge trying an ordinary action; that is to say, he would have the right to give judgment for the plaintiff or for the defendant, and, of course, on certain grounds no doubt he would have a right to stay the action, but he would not as a judge simply trying the action, in my opinion, have the jurisdiction to consider this doctrine which we have to deal with in this case; and I think the learned judge himself felt that difficulty, because he, I think, suggested that a motion should be entered in the bankruptcy which he could deal with as the judge administering the affairs in bankruptcy—I forget the exact form—either to stay the action or to restrain the trustees from proceeding with it. It does not much matter which was the form; it was a motion for that purpose in the bankruptcy—that is the point—to restrain the action. The action, I may say, had been brought by the authority and with the consent of the committee of inspection, and the trustee was anxious to proceed with it. That motion having been entered in the wrong place, because it ought to have been entered, if anywhere, in the Manchester County Court, seeing that it was a matter in the administration of bankruptcy with which the learned judge had nothing to do—it having been entered in the High Court, the learned judge then heard it, and the action together and then made an order which is entitled “In Bankruptcy”; it is, however, further entitled “In the action” and I think contains at the head of it the index number of the action which shows when it was issued, so making the order a sort of combination of bankruptcy and the action. Then the order goes on:

“Whereas the above-mentioned action came on for hearing on the 2nd day of March, 1922, and on the further hearing on the 24th day of March, 1922, leave, was obtained by the consent of the parties from this court to serve notice of motion in the above action [the notice of motion, it seems to me, would not be in the action, but apart from the action in the bankruptcy administration; certainly I do not see how the notice of motion could have been served in the action] to stay the said action which had been transferred, from the King's Bench Division of the High Court of Justice to this Division by order of the Lord Chancellor, dated the 16th day of November, 1921. Now upon hearing counsel . . . It is ordered that all further proceedings in the above-mentioned action be and the same are hereby stayed with costs.”

A Then there is a further provision as to the costs of the action. It seems to me that this is done under a misapprehension, which probably was that the learned judge did not know that, in fact, the bankruptcy was proceeding in the Manchester County Court, and, so far as I can gather, none of the learned counsel knew either. There were five actions, some of them in the county court and some in the High Court, and nobody knew that this action was not in the High Court, and that is what led to the mistake. I doubt very much if that order could have stood for that reason in any case, but I do not propose to decide the matter on that ground, for this reason, that the point on the merits, if I may call it so, is a point of great and far-reaching importance, and I think that, as it has been before the learned judge and before us, we ought to give our opinion on it. Moreover, if we were to determine it on the technical ground that I have mentioned, it would only lead to further proceedings and further expense, and the same result of coming to this court again, because it would mean, I suppose, that a notice of motion would at once be entered in the Manchester County Court and the judge there would consider himself bound by ASTBURY, J.'s opinion; it would then go to the Divisional Court, and so would arrive here again. Therefore, to determine it on that narrow point would mean merely extra expense and trouble and inconvenience to everybody.

Having said that about the preliminary point I now proceed to the important and substantial point that we have to decide, and it is this. The action is brought by the trustee, founded on the Gaming Act, 1835, in order to recover monies which have been paid to the defendant, by the bankrupt, by means of cheques in discharge of betting debts, and after the decision of the House of Lords in *E Sutters v. Briggs* (2), that action is an undefended action. It was so admitted to be at the trial before ASTBURY, J., but it was said, and this was the effect of the learned judge's judgment, that, although it was an undefended action and although the debt due from the defendant was a chose in action which vested in the trustee in bankruptcy as part of the assets and the property of the bankrupt, still the trustee ought not to be allowed to proceed with that action because it fell within the doctrine of *Ex parte James* (1), and other cases which have proceeded on the principle laid down in that case. Putting it shortly, that doctrine is that the trustee being an officer of the court, ought not to be allowed to do anything which it is dishonourable or unconscionable for a person to do, and that the court will restrain him and prevent him from doing it; and it was said that for the bankrupt, if he had remained solvent, to have brought such an action against the defendant would have been a thing which any right-minded man would have considered reprehensible. It is said (and I am using expressions which have been used in the cases although they are not technical terms of law) that it "would have been shabby," "would have been a dirty trick," "would have been a thing that anybody ought to be ashamed of"; and that being so, the court would consider it a shabby thing, or a dirty trick, or a thing to be ashamed of on the part of the trustee if he were to proceed with the action, I can only say that I am by no means convinced myself that one solves the matter by saying that, had the bankrupt remained solvent, to bring such an action as this would have been a disreputable thing or any of the other words which have been used, and, therefore, it follows necessarily that it must be the same on the part of the trustee to do so. It has been said in some of the cases that the trustee, being an officer of the court, is bound at least to take as high a standard of morality (and it may be a higher) in the matter than the bankrupt himself if he had remained solvent, but I think it has also to be considered that the trustee stands in a different position from the bankrupt if he had remained solvent. If he had remained solvent, he would have been recovering money which he had paid as a debt of honour, to put it back into his own pocket. The trustee, on the other hand, is bound as a trustee, to administer the bankrupt's estate for the benefit of the bankrupt's creditors in general, and I am by no means sure that the same

standard is to be applied to him in this way and that, if it be said it would be a dishonourable thing on the part of the bankrupt if he had remained solvent to bring the action, therefore it must be a dishonourable thing on the part of the trustee. I am by no means sure that that follows, but that is the argument before us. I think there is a great difference between this case and any of the other cases that have been decided. As I pointed out there was an unquestioned right to get this money from the defendant at the time the adjudication was made and at the time the receiving order was made. That right was a chose in action which was part of the property of the bankrupt. By the express provisions of the Bankruptcy Act, 1914, that chose in action is vested in the trustee, and, therefore, what he is doing is realising an asset which comes to him as a statutory debt and is vested in him expressly by statute as such; and it comes to him as a statutory debt under the provisions of an Act which provides, by s. 2, that, in the circumstances of the payment in this case,

“such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid [that refers to the previous section of the Act by which cheques such as this are declared to have been given for an illegal consideration] and shall be deemed and taken to be a debt due and owing from such last, named person to the person who shall have so paid such money and shall accordingly be recoverable by an action of law.”

Looking at *Ex parte James* (1), which is the case which established this doctrine, it will be seen that the circumstances were very different indeed. In that case, the trustee had received payment of money of which he ought not to have received payment, and money which by no right could be called his money or the money of the bankrupt, but which, if he had been a private individual, although it could not have been contended that it was his money, there would have been a technical difficulty in the individual recovering because it had been voluntarily paid under a mistake of law. The difference there is that the trustee had got in his hands and was seeking to enlarge the assets of the bankruptcy by money that even he himself would have had to admit was not his money and never vested in him at all, but was simply money which could not be recovered in consequence of some technical rule of judge-made law. It is not the difference between a statutory debt and any other debt; it is the difference between money which was never rightly the trustee's at all and which would not have been rightfully the property of an individual under the same circumstances, and money which could not have been recovered from an individual because of this technical rule as to voluntary payment. In that case, the court said that the trustee should not be allowed to set up such a technical objection to doing right as that; he had got somebody else's money and he must give it back again. That was the same thing with regard to the next case that followed. There is another class of case, and that is this: where there was an asset which vested in the trustee and was an asset in the bankruptcy, namely, a policy, but an asset which would have come to an end and ceased to have any value at all or to be an asset but for the fact that it was kept alive by payments of premiums made by a person to the knowledge of the trustee under the impression that that person who was paying the premiums would get the benefit of the policy. There, again, the trustee was seeking to increase the assets of the bankruptcy by something that would have had no value at all if another person had not been allowed by the trustee to keep it alive under a wrong impression. That, again, is a totally different case. There were two cases of that kind; I am not going through them in any detail because they have been discussed quite fully; and in other cases in which the same thing had happened—that the payments had been made without the knowledge of the trustee—the trustee was held to be entitled to take the benefit of the policy which had been kept alive without repaying the

A payments which had been made. If the doctrine were to be extended to the width which is contended for in this case, I can hardly suppose that in those cases the trustee would have been held entitled to retain the policy money, but he was.

The next and last case which I think it necessary to mention is *Re Thellusson* (3). It is difficult to bring it under either of the classes I have mentioned, and I think it was an extension of the doctrine, but it was an extension which stopped very far short of the extent to which the defendant contends the doctrine should be extended in this case. That was a case where the bankrupt had obtained a loan which, or a portion of which, had been paid into his bank under circumstances which certainly would have made it extraordinarily dishonourable for him to attempt to retain the money, and the trustee was held not to be entitled to retain the money, because it was said he ought not to take advantage of the dishonourable conduct of the bankrupt. That may possibly be explicable on the ground that counsel for the plaintiff has put before us, namely, that it was a case of the trustee having to elect whether he should take advantage of the act of the bankrupt acting as his agent. If it can be explained in that way, I do not think it goes any further than any of the other cases, because then it would simply amount to this: here is something done by the bankrupt, something of which the trustee can take advantage, but something of which he need not take advantage, and then the court, if the act is a dishonourable act, will say: "You as officer of the court ought not to take advantage of it and so to increase the assets of the bankruptcy." I think possibly it is explicable on that ground, but I do not think that the learned judges who gave judgment intended to base it on so narrow a ground as that. I think they did intend to extend the doctrine of *Ex parte James* (1) further than it had gone before, at any rate to facts to which it had not been applied, and that it does go further than the other cases, but it stops, as I say, very far short of this. In my opinion, if what ASTBURY, J., did here was right, it amounts to repealing the statute in cases of trustees in bankruptcy, and to saying that it shall be deemed to be taken to be a debt due and owing from such last-named person to the person who shall have paid such money, and shall be recoverable by action at law in any of His Majesty's courts of record unless the person who sues for it happens to be a trustee in bankruptcy or other officer of the court; and that would be, to my mind, to legislate so as to repeal the Act, or, if not to repeal the Act, to put into it a clause which is not there.

G It was argued perfectly rightly before us that we must look at the object of this Act and how it came to be passed. When I say, perfectly rightly, I do not mean to say I agree with the conclusion—I mean, quite properly. We must look how it came to be passed and we must look at this provision from the point of view that it was left in the Act by accident, and that nobody awoke for nearly a hundred years to the fact that it had the construction which is now attached to it. The learned judge seems to have assented to that argument, because he said he must look at the statute and see whether it forms part of the public policy of the realm, and if it did not, then he might apply the doctrine of *Ex parte James* (1) to an action founded on it, but if it did form part of the public policy of the realm then he could not apply the doctrine. I am bound to say I think that it is an extraordinarily dangerous and mischievous doctrine, if a court, in considering whether it is to give effect to an Act of Parliament or not, is to look and see whether the court considers that it is the sort of legislation which is consistent with the general policy of the realm. It does not strike one, perhaps, as very startling in this case, but, if it is to be adopted at all, it strikes me as being a doctrine which might lead to the most extraordinary results. It seems to me this court can do nothing but say "Is that what is enacted by the statute? and, if it is, we must give effect to it"; and I think on that point what LORD SUMNER said in *Sutters v. Briggs* (2) is of some importance. I cannot find out

what exactly was the argument to which he was alluding, but he says this ([1922]1 A.A.C. at p. 25):

"The general policy of the Act of 1835 is finally appealed to [I think that must be some such argument as that which I have been mentioning] I think if this point is distinguishable from the argument upon the words of the preamble, it really involves an enquiry whether this was a sensible piece of legislation or not, which is hardly a judicial question."

I entirely agree with that. I think all this court can do is to look at the Act of Parliament and see to the best of its ability what it said, and, having found that out, to obey it and give effect to it, and it ought not to consider whether, in the opinion of the court, the legislation is consistent with the general trend of opinion in the country. I can conceive some very remarkable results that might follow if the court were to lend itself to such a method of dealing with the statute.

For these reasons, I think that the doctrine in *Ex parte James* (1) does not apply to this case. We are bound by the decisions. We are not bound by all the dicta of all the judges who have given judgment in these cases which have followed *Ex parte James* (1), and certainly we are not bound by the dicta apart from the particular facts of the case in which the dicta were uttered. It is always a most dangerous thing to take a somewhat wide expression of a learned judge and separate it altogether from its context and the facts of the case and say, "Now that is something which has to be followed in every other case." The learned judge, in ninety-nine cases out of a hundred, never meant anything of the sort and it is a very dangerous thing to do. I see nothing in any of these cases to oblige us to say that, where there is an undoubted right of action given by a statute which says that a certain sum of money may be recovered as being paid for an illegal consideration, and, therefore a debt recoverable, and that, when that chose in action so constituted is, by the express terms of the Bankruptcy Act, made part of the assets which vest in the trustee, there is anything "dishonourable," or "improper," or "unconscionable," or "shabby," or "dirty," or any of the other expressions that the learned judges have used, in the trustee enforcing the debt, in order to collect the asset and distribute it amongst the creditors who are his cestuis que trust. As I have said, I do not think that his position is in all respects, when one comes to consider whether his act is honourable or not, the same as that of the bankrupt if he had remained solvent and had brought the action himself for his own benefit.

For these reasons, I think the appeal must be allowed, and I think the result will be that there must be judgment given in the action, with costs, for the sum claimed by the plaintiff, because it was admitted that there was no defence to the action, if the trustee had the right to go on with it, and the trustee has, apparently, such a right.

WARRINGTON, L.J.—I am of the same opinion. With all respect to the learned judge, I think his judgment is incapable of being supported. The action in which the judgment was pronounced was an action brought by the trustee of a bankrupt to recover money's paid to the defendant on a bankrupt's cheques given in satisfaction of betting debts. By the Gaming Act, 1835, moneys so paid are to be deemed and taken to have been paid on an illegal consideration, and are deemed and taken to be debts due and owing from the person who received them to the person who shall have so paid such money and shall accordingly, be recoverable by action at law in any of His Majesty's courts of record. The trustee in bankruptcy brought this action to recover a sum of money which is by statute declared to have been paid on an illegal consideration and to be a debt due and owing from him to the defendant. Such a debt is a chose in action and part of the property of the bankrupt, and, by s. 18 of the Bankruptcy Act, 1914, this item of property, with all other items of property of the bankrupt, became vested in the trustee and divisible among his creditors. It was the trustee's duty

A to realise the property divisible among his creditors, and, in exercise of that duty and in the interests of the creditors, he brings the action which the statute gives him the right to bring. The learned judge before whom the action was tried has made an order staying all proceedings in the action. That is preventing the trustee from recovering this item of property vested in him. It is admitted that, as the judge trying the action, he had no jurisdiction whatever to stay the
B proceedings in an action founded on a legal cause of action to which there was no defence; but it was said, that the court, acting in bankruptcy, where it is administering the assets of a bankrupt through its officer, the trustee, has, in certain cases, ordered the trustee to do something which, by law, he was not compellable to do, or to abstain from doing something, which, by law, he ought to do, on the ground that the court, acting by its officers, should do, and would
C only do, that which an honest man acting with the desire to do real justice would do or abstain from doing. But the jurisdiction to give any such instructions to a trustee in bankruptcy is a jurisdiction which can only be exercised in bankruptcy, and, therefore, the learned judge, desiring to exercise that jurisdiction in the present case, gave leave to the defendant in the action to give a notice of motion before himself sitting as a judge in bankruptcy to deal with the matter
D on the lines of the principles to which I have referred: but unfortunately the judge was not the judge in bankruptcy and had no jurisdiction in bankruptcy over this case. The bankruptcy was being conducted in the county court of Manchester, and nobody seems to have realised that, in this particular case, which was one of several raising the same point, the bankruptcy was not a London bankruptcy and therefore was not within the jurisdiction of the learned
E judge. It was for that reason that the mistake was made, but it was a mistake and, as the judge had no jurisdiction to put into force the principle which was invoked in justification of his judgment, the mistake would of itself render the order he made of no effect. But, like my Lord, I do not propose to dispose of the case on that ground.

The case has been made a test case, and I think it is desirable that we should
F say something about the merits on which the judgment was founded. With regard to that, what is relied on is the fact that, in certain cases, as I have said, the court has, acting in administration through its officer, required that officer to pursue a course of conduct the reverse of which the court would consider "dishonourable" or a shabby trick," to use some of the many expressions which have been used, although the course in question was not one which the trustee
G could by law be compelled to take. In my opinion, the learned judge has adopted that principle or rather done the same thing in a case, the facts of which are entirely different from the facts of those cases in which that has been previously done. When the cases are examined this will be found. The first one was *Ex parte James* (1), before JAMES and MELLISH, L.J.J. That was a case in which the trustee had in his hands money which did not belong to him by law and which
H he had no right to, and the court said: "Pay that money to the man to whom it really belongs and to whom it by law belongs," and the only answer which the trustee could give was "Oh, but I am entitled to keep it, although it does not belong to me. I am entitled by law to keep it because it came to me, it is true by mistake, but the mistake was one of law, and not of fact." "True," the court replied, "an individual who is not under the control of the court, may stick to
I moneys which do not belong to him because he has a legal technical right so to do, but it is not an honest or an honourable thing to do and we will not let you, as our officer, take that course." That is all that case was. There were one or two other cases of the same sort depending on that statement of law. Then came a case of a different kind. That was a case in which a bankrupt was possessed of a policy of insurance on his life. It was worth nothing, and, of course, vested in the trustee with the rest of his property. The debtor's wife during a considerable number of years which elapsed between the bankruptcy and the death of

the assured, the bankrupt, had paid the premiums on the policy and the interest due to the bankers who were the mortgagees of the policy. The wife, therefore, had by her payments made that item of property, which was of no value at the date of the bankruptcy, of great value, because when the assured, the bankrupt died, that money became payable, by law, to the trustee. Now those premiums and the interest on the mortgage, had been paid by the wife, with the knowledge of the trustee in bankruptcy for the time being, and what the court in that case said was: "It would not be honest for anybody, although you may have a legal right to do so, to insist on keeping the proceeds of the policy without making good, to the person who has paid the premiums and interest the money without payments of which the policy would have been worthless." That was the whole of that case. Then there was a third case. That was *Re Thellusson* (3), and I am inclined to think that there we get a step further, but a step immeasurably short of that which the learned judge has taken in the present case. In that case, what happened was, that, the receiving order having been made on Jan. 2, after the commencement of the bankruptcy, a friend of the bankrupt had paid into his bank by way of loan a sum of about £900, and he had done so really as the result of the bankrupt's fraud. The bankrupt knew that there was an act of bankruptcy against him. He knew that the day before the money was paid the petition was to come on for hearing; he did not actually know as a fact that the receiving order was made, but, if he had thought for a moment, inasmuch as he did not appear on the petition, that the receiving order would be made, there was no answer to it. The lender knew none of these facts and thought that what he was doing was lending his friend a sum of money which would enable him to pay a single pressing creditor. The debtor became bankrupt. The trustee, as he was legally entitled to do, got the money from the bank, but the court directed him to repay it. The ground on which that was based I think was this, that it was not right or honest that that trustee should take advantage of the wrongdoing of the bankrupt as a consequence of which he, the trustee, had become possessed of this money, and the decision may, I think be, justified on the doctrine now well established, that, in the case of property acquired after the commencement of the bankruptcy, as this was, the bankrupt in reference to that may be treated as the agent of the trustee. I agree it was not put on that ground. As I have said I think that is a case which went a little further than the other cases but not nearly so far as this.

Now what is this case? Here the trustee is possessed of a statutory debt. He has to collect that debt—not for the bankrupt himself who paid the money, but for the bankrupt's creditors, and it seems to me that, even if there would be something dishonourable on the part of the bankrupt in seeking to recover money which he had voluntarily paid in discharge of a cheque given for a betting transaction, it by no means follows that it would be dishonourable or dishonest for the trustee to take similar proceedings in order to create a fund for payment we will say of the butcher or the baker, or other people who had supplied goods to the bankrupt. It seems to me there might well be a difference between the two cases. But, putting that aside, the law of this land vests in the trustee the right to recover that debt, and provides that that debt, with other items of property, shall be divisible among the creditors, and, in my judgment, there is no right for the court, on the footing that the trustee is its officer, to say that that particular item of property shall not be got in. By statute it belongs to the trustee, and the trustee is entitled to recover it. But it is said: "Oh, but that statute is eighty years old, and nobody quite knows why that provision was left in and other parts of the statute were repealed. For many years it was not acted on, and it was not until some ingenious person dug it out and got first the Court of Appeal, in *Dey v. Mayo* (4), and then the House of Lords, in *Sutters v. Briggs* (2) to decide that there was this cause of action, that anybody thought anything at all about it." All I can say is, if we are to decide cases depending

A on statute on any such footing as that, we are, as judges, not administering the law but administering that which has been vaguely referred to as the general policy of this country. That is not what we are here for. We are here to administer the law as it stands. It is the legislature which has to do with the policy of the country, and not the judges, who administer the law. Therefore, in this case where, as I have said, the trustee is only exercising a right which is vested in him by statute, a right which he is entitled to exercise, and which I think I may go further and say he is bound to exercise, for the benefit of the creditors amongst whom the property is divisible, it would be wrong to interfere with that right by prohibiting the trustee from bringing the action which he is entitled to bring.

C In my opinion, the order of the learned judge should be discharged, and there must be judgment in the action for the trustee for the agreed amount, with costs.

YOUNGER, L.J.—I am of the same opinion. Nothing that has been urged in the arguments which we have heard on this appeal has affected the view I have always taken, that the principle laid down in *Ex parte James* (1) is one which is extremely valuable when properly applied in the administration by the court of its bankruptcy jurisdiction, and I think, as I have stated in another case, the legislature has shown its appreciation of the value of that principle by the fact that, although the claim on the part of the court to apply it has been notorious since the decision in *Ex parte James* (1) no subsequent Bankruptcy Act contains any provision which restricts the exercise by the court of that jurisdiction. On the other hand, the arguments which have been presented to us in this case, as well as the judgment of the learned judge, have served, I think, to demonstrate this, that, if the principle in *Ex parte James* (1) be not applied with very great caution and only in the clearest cases, there is danger that the whole of that valuable principle will ultimately suffer shipwreck, and that, I think, would be a great misfortune.

I have arrived at the conclusion that this is not a case in which it is open to the court to apply this principle at all. I am free to agree that the Act of Parliament, of which the trustee in the present case proposes, if he be allowed, to take advantage, is, in relation to the rest of the statute law on this vexed subject of gambling, anomalous and partial in its operation. There are, to my mind, no obvious reasons why bets which have been paid by a cheque should be recoverable as debts paid on an illegal consideration while bets which have been paid in cash should not be recoverable at all. I do not doubt that the statute, as it stands, is a survival, very probably, perhaps even certainly, an accidental survival, but, although the anomalous character of the statute has been recognised by judicial decision for at least three years and its true effect has been laid down by the House of Lords itself in the course of last year, the statute still remains on the statute book, and it appears to me that, so far as this and every other court is concerned, it embodies the law of the land just as clearly and with just as binding a force as any other statutory enactment. As the Lord Chancellor (VISCOUNT BIRKENHEAD) said in *Sutters v. Briggs* (2) ([1922] 1 A.C. at p. 8):

“Where, as here [and he is speaking of this statute] the legal issues are not open to serious doubt, our duty is to express a decision and leave the remedy (if one be resolved upon) to others.”

I am free also to admit that, in the case of an individual, notwithstanding this statute, it would probably be regarded universally as dishonourable that he should seek to recover a debt which he had paid, whether he had paid it in cash or whether he had paid it by a cheque, just as I think it would be regarded universally as being dishonourable on his part not to pay a debt of honour if he had any means of paying it, but in relation to such a subject as this and when one is dealing only with the case of an individual, it is not, I think, possible

dogmatically to lay down, even in relation to such a matter as that, any clearly universally applicable standard of honour. If one finds that, in the case of the individual, there are complications which are not at all unusual, and inasmuch as the complications to which, by way of example, I am going to refer, are those which are necessarily characteristic of the position of a trustee in bankruptcy, it is not irrelevant on my part shortly to give two instances which have occurred to me. I take an individual who has indulged in betting, and I ask myself the question, whether it is quite certain in the case of such an individual that it would necessarily be dishonourable for him, if he were confronted with actions by others with whom he had made bets, to recover the moneys which he had won and which had been paid to him by cheque, to seek to avoid ruin—it may be for himself and for his dependents—by taking advantage of this statute for the purpose of recovering, from those to whom he had paid bets by cheque, the moneys which he had so paid. I agree there may be room for doubt in such a case as that, and I express no opinion one way or the other on it. I will take another case which may be even more difficult. If a man is heavily indebted to persons likely to be ruined if he does not meet his obligations towards them, and if he has, according to the Gaming Act, 1835, owing to him, as money due on an illegal consideration, large sums in respect of bets which he has paid by cheque, it is dishonourable on his part to seek to recover these debts from the persons who, by statute, owe them to him, in order that thereby and with the proceeds he may discharge these legal obligations to others, which, if not discharged, will involve them in ruin? May it not be that it would be a higher honour for him to risk dishonour in suing for these debts, in order that he might save these other persons, to whom he has incurred obligations, from ruin? I do not know, but it seems to me that at once one gets into the region of those cases which were referred to by *SALTER, J.*, in his judgment in *Re Wigzell* (5) in which he said ([1921] 2 K.B. at p. 845) that questions of ethical propriety have always been and will always be, the subject of honest differences amongst honest men.

These two illustrations I have chosen because they have special application to the position of a trustee in bankruptcy in relation to a matter of this kind as contrasted with the position of an individual. What is the position of a trustee in bankruptcy? He is not seeking to recover these debts for his own advantage: he is seeking to recover these debts for the advantage of the creditors in the bankruptcy. He is powerless to prevent the assets of those creditors from being depleted by claims which may be made on them by persons who have made payment of bets to the bankrupt by cheque. Is it to be said to be dishonourable that he should seek to recoup, if he can, the assets so depleted by, in turn, seeking to recover from those who owe these debts as debts contracted by the bankrupt for an illegal consideration the sums which may have been paid away by the bankrupt also by cheque? Again, I am quite unable to say whether it would be a dirty trick on the part of the trustee in such a case to do such a thing. I am not prepared to say that, acting in the interest of the creditors of the bankruptcy, it would even be dishonourable. It is extremely doubtful, as it seems to me, one way or the other, whether either epithet could be applied to the action of the trustee in such a case.

Accordingly, in this case, we start with this preliminary difficulty, that, as it appears to me, this is not one of those perfectly plain and clear cases in which alone, as it seems to me, the authorities show that this principle is open to application by the court, but I do not know that it is necessary, for the purpose of disposing of this appeal, to rest my judgment even on such considerations as these. We have here a right in the trustee which has been declared existent by Act of Parliament, partial and anomalous though that Act may be. We find that the trustee in bankruptcy and the committee of inspection are desirous that that legal right of the trustee shall be enforced—the right given to him by Act

A of Parliament. We find that there is not open to the defendant in the claim which is made against him any kind of equity, or any circumstance of aggravation which makes his position, in reference to this claim, one in respect to which any favour should be conceded to him. The question for this court, then, is whether that is a case in which there is any room for the application of the doctrine which has been invoked? If, in such a case as that, this doctrine was, without more, to be extended as I think the learned judge has extended it, because he has found no special circumstances which would debar him from doing so, it appears to me that the court would be led into serious danger of finding itself in conflict with the legislature itself, and the result of that conflict would inevitably be that the whole valuable principle—extremely valuable, in my view, when properly applied—should run the risk of being swept away altogether. I am not prepared speaking for myself, to be a party to putting that principle in such a position of danger. I think it would be placed in that position if it were strained to the point to which the learned judge has carried it in this case.

In my opinion, therefore, agreeing with my lord and the lord justice, I think this appeal should be allowed.

Appeal allowed.

D Solicitors: *Woolfe & Woolfe; J. J. Hands.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

E

R. v. CROCKER

F [COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Darling and Salter, J.J.), November 27, 1922]

[Reported 92 L.J.K.B. 428; 128 L.T. 33; 87 J.P. 44; 39 T.L.R. 105; 67 Sol. Jo. 248; 27 Cox C.C. 325; 17 Cr. App. Rep. 46]

Criminal Law—Evidence—Corroboration—Complaint of sexual offence—Jury directed not to convict in absence of corroboration—Conviction of prisoner—Quashing of conviction by Court of Criminal Appeal.

G

Where the prisoner is charged with an offence against a girl under the age of sixteen years, and the jury convict him of that offence on her uncorroborated testimony despite warnings by the trial judge that they ought not to convict in such a case, the Court of Criminal Appeal will not usurp the functions of the jury and quash the conviction.

H

Notes. Referred to: *R. v. Rudge* (1923), 17 Cr. App. Rep. 113.

As to corroboration, see 10 HALSBURY'S LAWS (3rd Edn.) 458 et seq.; and for cases see 14 DIGEST (Repl.) 524-527, 542 et seq., 15 DIGEST (Repl.) 1014.

Case referred to:

I

(1) *R. v. Baskerville*, [1916] 2 K.B. 658; 86 L.J.K.B. 28; 115 L.T. 453; 80 J.P. 446; 60 Sol. Jo. 696; 25 Cox C.C. 524; 12 Cr. App. Rep. 81, C.C.A.; 14 Digest (Repl.) 539, 5232.

Also referred to in argument:

R. v. Graham (1910), 74 J.P. 246; 4 Cr. App. Rep. 218, C.C.A.; 15 Digest (Repl.) 1018, 10,015.

Appeal against conviction (by leave of the court).

The appellant, William Crocker, was convicted before HORRIDGE, J., at the Dorset Assizes of carnal knowledge of a girl under the age of sixteen and sentenced

to eighteen months' imprisonment with hard labour. At the trial the only evidence that the appellant was the guilty person was that of the girl herself. A

F. J. Tucker for the appellant.

W. E. Coleridge for the Crown was not called on to argue.

The judgment of the court was delivered by

LORD HEWART, C.J. (after reciting the facts). The learned judge who presided at the trial put clearly to the jury that there was no corroboration. He did so at the beginning and at the end of his summing-up and at other places, and said that the jury ought not to convict. Notwithstanding the clear warning of the learned judge, the jury did convict, and it has been argued that the verdict should be set aside as unsatisfactory. B

The law regarding the evidence of accomplices has been referred to. In *R. v. Baskerville* (1) **LORD READING, C.J.**, pointed out ([1916] 2 K.B. at p. 663) that: C

"It has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence." D

That is the law regarding the evidence of accomplices and the court cannot accept the contention that the evidence of the girl, the victim of the offence, is on the same plane as that of the evidence of an accomplice. The objection in such a case as this is not on the ground of complicity, but because it is merely an oath against an oath. If, therefore, it is within the province of a jury to convict on the uncorroborated evidence of an accomplice, how much more so is it within their province to convict here. The jury had the opportunity of seeing and hearing the witnesses and there are persons—especially young persons—who somehow are able to convey the fact that the story they tell is true, and here, in spite of the learned judge's warnings, the jury came to the conclusion the girl's story was true. The court considers it would be a new departure if it allowed this appeal as it cannot usurp the functions of the jury. E

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.* F

[Reported by J. N. FLETCHER, ESQ., Barrister-at-Law.]

A

MANN v. MANN

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), May 29, 1922]

[Reported 127 L.T. 692; 38 T.L.R. 698]

Restitution of Conjugal Rights—Periodical payments—No time limit for petition—Discretion of court to disallow stale claim.

B

There is no time limit within which a petition for periodical payments, after a decree of restitution of conjugal rights has been granted, must be presented, but if the claim is hopelessly stale the court has a discretion to disallow it.

C

A wife who petitioned for periodical payments six years after being granted a decree of restitution of conjugal rights was able to satisfy the court that in the circumstances the delay was not unreasonable, and that, since she had not by any act waived her right to sue, her prayer ought to be granted. The court, therefore, ordered the husband to make periodical payments to her from the date of his failure to comply with the decree.

D

Notes. Alimony and periodical payments in case of restitution of conjugal rights is now governed by the Matrimonial Causes Act, 1950, s. 22 (29 HALSBURY'S STATUTES (2nd Edn.) 409, and the Matrimonial Causes Rules, r. 46 (10 HALSBURY'S STATUTORY INSTRUMENTS).

As to periodical payments in case of restitution of conjugal rights, see 12 HALSBURY'S LAWS (3rd Edn.) 440; and for cases, see 27 DIGEST (Repl.) 635-637.

E

Motion to confirm a registrar's report recommending an order for periodical payments, part of them to be secured, after failure to comply with a decree of restitution.

F

The parties were married on Nov. 20, 1910 at the register office, Newton Abbot, Devon, and the marriage was, by mutual arrangement, kept secret at the time. The wife was about to go out with her parents to Trinidad, and the understanding between the parties was that at the end of a year the husband would send for her and acknowledge her as his wife. The marriage had never been consummated. The wife stated in her affidavit in support of the present petition that after she reached Trinidad she repeatedly wrote to the respondent asking him to have her to live with him, and pointing out that they were drifting apart, and could not go on as they were, but he said it was impossible she should come to him. The marriage was still unknown to her parents and friends, and in December, 1913 she received a proposal of marriage in Trinidad. She told the respondent of this, and that she was in love with the man, and asked respondent to set her free; and on Nov. 9, 1914 she presented a petition for nullity of marriage on the ground of the respondent's failure to consummate the marriage. In the course of those proceedings the wife's solicitors wrote to the respondent's solicitors that their client did not wish to claim costs or alimony. On June 25, 1915, her petition for nullity was dismissed, and on July 6, 1915 she petitioned for restitution of conjugal rights. On Sept. 7, 1915, her solicitors wrote to the respondent's solicitors:

H

"Our client desires us to inform you that in view of the fact that your client has joined the army, she does not desire to embarrass him in any way by putting forward any claim to alimony or costs."

I

The respondent did not defend, and on Nov. 8, 1915, a decree for restitution of conjugal rights within fourteen days of service thereof, was pronounced, and this decree was served on the respondent on Nov. 15 and never complied with. On June 8, 1916, the wife's solicitors called the attention of the respondent's solicitors to his failure to comply with the decree, and asked if they were prepared to make any proposal. On June 13, 1916, the respondent's solicitors replied that he was in France on active service, and they would endeavour to communicate with him, and report the result, and nothing more seems to have been done until the

present petition was filed on Aug. 17, 1921. The respondent filed an answer to the petition in which he contended that he was neither morally nor legally liable to support the petitioner. On May 18, 1922, the registrar made his report, in which he found that the respondent's income was £255 per annum, and continued:

"It is submitted that the petitioner is entitled to be supported by her husband, and that he be ordered to secure to the petitioner the sum of £25 per annum, during their joint lives, as from the failure of the respondent to comply with the decree, and further to pay to her during their joint lives as from the 1st day of October, 1921, the sum of £58 per annum by equal monthly payments. The respondent should pay the costs of the inquiry before me, including the costs of the cross-examination."

Clifford Mortimer for the petitioner, moved to confirm the registrar's report. *T. Bucknill*, for the respondent, opposed the confirmation of the report.

HILL, J.—There is no limit of time, either under the Matrimonial Causes Act, 1884 or the Matrimonial Causes Rules, 1865, within which a petition for periodical payments, after a decree for restitution of conjugal rights has been granted, must be presented. Notwithstanding that fact I cannot doubt that the court has power to disallow a hopelessly stale claim, in cases, for instance, where a wife who has refrained from presenting a petition for many years afterwards begins proceedings for periodical payments for some collateral purpose. I do not think that this case is one of that kind. The order for restitution was pronounced in November, 1915, and according to the wife's evidence both before and since the decree she did everything in her power to induce her husband to return to her. He never did. During the pendency of the restitution suit the wife's solicitors wrote a letter to the husband's solicitors on the subject of alimony and costs. That letter does not constitute an agreement not to sue, and it is clear from the correspondence in June, 1916, that it was not so regarded. After that the wife held her hand—her husband being on active service, until the end of the war, and for some time afterwards. In those circumstances it is impossible to say that there has been such delay that it would be an injustice to accede to the wife's petition. The husband might have taken his wife back. He might have contributed to her support voluntarily. He did neither. The registrar's report is right in principle. As to quantum, it is said to be unjust to order part of the payments to date from non-compliance with the decree. If the letter of Sept. 7, 1915, had been in terms an agreement not to sue, then, even though such agreement were not binding on the wife, it might be unjust to allow her, years afterwards, to change her mind, and claim from the husband, who had been relying on the agreement, payment in respect of past years. But the husband had notice as early as June, 1916, that the wife was not waiving her rights. I therefore confirm the registrar's report; the wife to have her costs of the motion.

Solicitors: *Syrett & Sons; Ford, Lloyd, Bartlett & Co.*

[Reported by J. A. C. SKINNER, ESQ., Barrister-at-Law.]

A

IN THE GOODS OF GREWE

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), February 27, March 6, 1922]

[Reported 127 L.T. 371; 38 T.L.R. 440]

B

Administration of Estates—Testator domiciled abroad—Discretion of court—Executor without interest in estate—Grant of administration with will annexed—Court of Probate Act, 1873 (20 & 21 Vict., c. 77), s. 73.

In dealing with the will of a person domiciled abroad the court has a discretion whether or not it will grant probate to the executor according to the tenor of the will, and in exercising that discretion will take into consideration the circumstances of the case.

C

Where the applicant for probate was a stranger and had no interest in the deceased's estate the court refused a grant to him as executor according to the tenor, but exercised its discretion under s. 73 of the Court of Probate Act, 1857, and granted the applicant administration with the will annexed, requiring him to give security.

D

Notes. The Court of Probate Act, 1857, s. 73 was repealed by the Administration of Estates Act, 1925, as to deaths occurring after Jan. 1, 1926, after which date the court has a discretion as to the persons to whom administration shall be granted under s. 162 of the Supreme Court of Judicature (Consolidation) Act, 1925 [9 HALSBURY'S STATUTES (2nd Edn.) 777].

E

As to wills of persons dying domiciled abroad, see 16 HALSBURY'S LAWS (3rd Edn.) 179, 180, and as to discretionary power of court to grant administration, see *ibid.* pp. 224 et seq.; and for cases see 27 DIGEST (Repl.) 166 et seq. For the Court of Probate Act, 1857, s. 73, see 9 HALSBURY'S STATUTES (2nd Edn.) 692.

Cases referred to:

F

(1) *In the Goods of Von Linden*, [1896] P. 148; 65 L.J.P. 87; 44 W.R. 448; 23 Digest (Repl.) 92, 922.

Also referred to in argument:

In the Goods of Fernie (1849), 6 Notes of Cases, 657; 12 L.T.O.S. 559; 13 Jur. 216; 23 Digest (Repl.) 18, 4.

In the Goods of Manley (1862), 3 Sw. & Tr. 56; 31 L.J.P.M. & A. 198; 7 L.T. 220; 27 J.P. 9; 8 Jur. N.S. 493; 164 E.R. 1193; 23 Digest (Repl.) 27, 94.

G

In the Goods of Earl (1867), L.R. 1 P. & D. 450; 36 L.J.P. & M. 127; 16 L.T. 799; 23 Digest (Repl.) 145, *456.

Motion by which the court was asked (i) to give leave to presume the death of a master mariner employed on a Russian ship, which had left a port in the French West Indies on Nov. 12, 1917, and had not since been heard of; (ii) to admit to probate as a valid will according to the law of the deceased's domicile, a letter dated Oct. 30, 1917, and written by him to his employers; and (iii) to appoint the applicant, a member of the firm to which the letter was addressed, executor according to the tenor. The material portion of the letter was as follows:

H

"As the navigation nowadays is very dangerous, and many seamen are lost without news, I suppose it will be wise to prepare for the worst, I beg you, sirs, in case of my death or loss, you will find my mother, Matilde Grewe, and my sister, Mrs. Lili Jakninfelt; the address (before the Germans invaded Finland) Cerpen, Klimpe, via Salismunde, Finland. Please help her to get all my money. Half amount I allow to my mother, and other half to my sister and her children proportionately. For doing so I allow your commission 5 per cent. on all my deposits remitted on safe address to the above-mentioned persons. Trusting you will do this for me, with kind regards.—Yours truly, R. M. GREWE, master of the ship *Betty*."

I

It appeared that the deceased was domiciled in Livland (Livonia), then a province of Russia, and now the independent Republic of Latvia, and the evidence first tendered in proof of the validity of the alleged will was that of a member of the Latvian legislature, but the court not being satisfied that this evidence could be accepted as that of an expert, the motion was adjourned to Mar. 6, when an affidavit was put in by a member of the Petrograd Bar, stating that the letter in question was a valid holograph will under the laws and constitutions of the Russian Empire, applicable to the province of Livonia in the year 1917. He also stated that the law of Russia required no special form of words for the appointment of executors, provided that the intention of the testator was clear, and that by the law of Russia the applicant's firm were executors of the will in question.

Clifford Mortimer for the applicant.

HILL, J.—One of the questions arising upon this motion is whether the applicant shall be granted probate as executor according to the tenor, or whether the grant should be of administration with the will annexed under s. 73 of the Court of Probate Act, 1857. I have been referred to *In the Goods of Von Linden* (1) where the widow of a German subject, who died domiciled in Germany was given by the will during her lifetime “the unrestricted right of administration and of usufruct” of the whole of the testator's estate, and probate was granted to the widow as executrix according to the tenor. I do not doubt that the court has power to make such a grant; but in my view in dealing with a foreign will, the court will not grant probate to the executor according to the tenor of the will as of right, but will deal with the application according to the circumstances of the case. In *In the Goods of Von Linden* (1) the applicant was the widow, and was entitled to a life interest in the estate. In the present case the applicant is a stranger and has no interest in the estate, and in the circumstances I shall be infringing no rule of law if I make the grant to him under s. 73 of the Court of Probate Act, 1857, which will merely entail that the usual security shall be given. There will be a grant to the applicant of administration with the will annexed under that section, with leave to swear that the presumed deceased died on or since Nov. 12, 1917.

Solicitors: *Godfrey, Warr & Co.*, for *Batesons & Co.*, Liverpool.

[Reported by J. A. C. SKINNER, ESQ., Barrister-at-Law.]

A

R. v. WOODS

[COURT OF APPEAL (Lord Hewart, C.J., Shearman and Salter, JJ.), May 21, 22, 1922]

[Reported 91 L.J.K.B. 728; 127 L.T. 160; 86 J.P. 132; 38 T.L.R. 493; 66 Sol. Jo. 524; 27 Cox C.C. 223; 16 Cr. App. Rep. 129]

B

Criminal Law—Possession of paper intended to pass as bank note paper—No evidence given that paper of character alleged—No genuine bank note produced for comparison—Indictment—Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), s. 9 (a), (e).

C

The appellant was indicted under s. 9 (a) (i) of the Forgery Act, 1913, of knowingly and without lawful authority or excuse having in his custody or possession paper intended to resemble and pass as special paper such as is provided and used for making bank notes. There were found in his possession "Bank of Engraving" notes which were of the same size and shape as bank notes, the paper was crisp and with a water mark, and each note had a number and signature at the end, and, generally, it bore a resemblance to Bank of England notes. The appellant, who was convicted, appealed on the ground that at his trial, although the notes found in his possession were handed to the jury, no genuine bank note was exhibited to them for comparison, and also that, as the paper had been printed on, the charge should have been framed under s. 9 (e) of the Act.

D

E

Held: (i) in dealing with a matter so familiar as a bank note it was not necessary to call evidence of resemblance or to produce a genuine bank note to the jury for comparison; (ii) while the indictment could have been framed under s. 9 (e), it was properly framed under s. 9 (a).

Notes. As to being in possession of paper intended to pass as bank notes, see 10 HALSBURY'S LAWS (3rd Edn.) 842, 843; and for cases, see 15 DIGEST (Repl.) 1258-9. For the Forgery Act, 1913, see 5 HALSBURY'S STATUTES (2nd Edn.) 980.

F

Cases referred to in argument:

London General Omnibus Co., Ltd. v. Lavell, [1901] 1 Ch. 135; 70 L.J.Ch. 17; 83 L.T. 453; 17 T.L.R. 61; 18 R.P.C. 74, C.A.; 22 Digest (Repl.) 181, 1641.

G

Bourne v. Swan and Edgar, Ltd., Re Bourne's Trade-Marks, [1903] 1 Ch. 211; 72 L.J.Ch. 168; 51 W.R. 213; 19 T.L.R. 59; 47 Sol. Jo. 92; 20 R.P.C. 105; 22 Digest (Repl.) 181, 1642.

Appeal on a point of law against a conviction at the Maidstone Assizes under s. 9 (a) of the Forgery Act, 1913, for knowingly, without lawful authority or excuse, having in his custody or possession certain paper intended to resemble and pass as special paper such as is provided and used for making bank notes. Section 9 of the Forgery Act, 1913, provides that:

H

"Every person shall be guilty of a felony and on conviction thereof shall be liable to penal servitude for any term not exceeding seven years, who, without lawful authority or excuse, the proof whereof shall lie on the accused: (a) makes, uses, or knowingly has in his custody or possession any paper intended to resemble and pass as (i) special paper such as is provided and used for making any bank note, Treasury bill, or London county bill; (ii) revenue paper."

I

Sub-sections (b), (c), (d) of s. 9 dealt with the making of instruments for making such paper, engraving upon plates, &c., of any words, figures, letters, marks, lines or devices peculiar to and used in or on any bank note and other documents,

and being in possession of plates, &c., upon which such words, &c. have been engraved. Sub-section (e) provides:

"Uses or knowingly has in his custody or possession any paper upon which any such words, figures, letters, marks, lines, or devices have been printed or in any way made as aforesaid."

The appellant, Walter Woods, came from France, and, on his luggage being searched, a number of "Bank of Engraving" notes were found. Others were found on his person. He was tried at Maidstone Assizes under s. 9 (a) (i) of the Forgery Act, 1913, and convicted. At the trial the "Bank of Engraving" notes were handed to the jury, but no evidence was given that the paper was of the character alleged nor was a genuine bank note exhibited to the jury. The notes, the subject of the indictment, were of the same size and shape as bank notes, the paper was crisp and with a watermark, and each had a number and a signature at the end, and they bore a general resemblance to Bank of England notes.

G. F. Hohler, K.C., and *St. John Hutchinson* for the appellant.

A. L. B. Thesiger for the Crown was not called on to argue.

Mar. 21. The judgment of the court was delivered by

LORD HEWART, C.J. (after reciting the facts)—In dealing with a matter so familiar as a bank note it was not necessary to call evidence of resemblance or to produce a genuine bank note to the jury for comparison, though it might be otherwise if the document were less familiar. With regard to the second point, it might be that the indictment could have been framed under sub-s. (e) of s. 9, but it was also properly framed under sub-s. (a). The paper in the condition in which it was as to size, shape, watermark, crispness, and printing was such that nobody could compare it with so familiar a thing as a bank note without thinking that it was intended to resemble a bank note.

Appeal dismissed.

Solicitors: *Appleton & Co.; Director of Public Prosecutions.*

[*Reported by J. N. FLETCHER, ESQ., Barrister-at-Law.*]

A

FARRANT v. OLIVER

[CHANCERY DIVISION (Sargant, J.), January 24, 1922]

[Reported 91 L.J.Ch. 758; 127 L.T. 145; 66 Sol. Jo. 283]

Sale of Land—Contract—Breach—Action for specific performance or rescission—Right of plaintiff to choose relief.

B

By an agreement dated Jan. 31, 1920, the plaintiff agreed to sell and the defendant to buy the plaintiff's house and shop. The defendant failed to complete, and in February, 1921, the plaintiff began an action claiming specific performance of the agreement or, alternatively, rescission and the forfeiture of the deposit. The defendant filed a defence, but withdrew it.

C

Held: the plaintiff was entitled to choose which of the alternative reliefs he would take, and was not bound to take an order for specific performance.

Notes. Applied: *Glover v. Broome*, [1926] W.N. 46.

As to forfeiture and recovery of deposit, see 29 HALSBURY'S LAWS (2nd Edn.) 375 et seq.; and for cases, see 40 DIGEST (Repl.) 241 et seq.

Cases referred to:

D

- (1) *Stone v. Smith* (1887), 35 Ch.D. 188; 56 L.J.Ch. 871; 56 L.T. 333; 35 W.R. 545; 40 Digest (Repl.) 240, 2011.
- (2) *Kingdon v. Kirk* (1887), 37 Ch.D. 141; 57 L.J.Ch. 328; 58 L.T. 383; 36 W.R. 430; 40 Digest (Repl.) 141, 1083.
- (3) *Hall v. Burnell*, [1911] 2 Ch. 551; 81 L.J.Ch. 46; 105 L.T. 409; 55 Sol. Jo. 737; 40 Digest (Repl.) 245, 2057.

E

Also referred to in argument:

Holford v. Trim, [1921] W.N. 243; 65 Sol. Jo. 768; 40 Digest (Repl.) 245, 2061.

Action for specific performance of a contract of sale, rescission and forfeiture of the deposit. The defence had been withdrawn.

F

The facts were as follows. By an agreement in writing dated Jan. 31, 1920, the plaintiff agreed to sell and the defendant agreed to buy for £1,050 a leasehold house and shop at Exmouth for the residue of a long term; £100 was paid to house agents as a deposit and in part payment of the purchase money. The plaintiff duly delivered his abstract of title, and the defendant accepted the title, but took no steps to complete, and ultimately, in February, 1921, the plaintiff started this

G

action claiming specific performance or alternatively rescission of the agreement and forfeiture of the deposit. By his statement of claim the plaintiff alleged that he was and had at all material times been ready and willing to complete the sale and execute the proper assurance of the premises to the defendant, but the defendant had refused and neglected to complete, and had failed to perform his obligations under the agreement, and it was also alleged that by notice in writing given on Dec. 17, 1920, the plaintiff required the defendant to complete the said purchase within twenty-eight days. The notice stated that unless the matter was completed within twenty-eight days from the date thereof, a summons under the Vendor and Purchaser Act, 1874, would be issued to forfeit the deposit. The defendant put in a defence, but withdrew it before the action came on for hearing.

I

F. K. Archer for the plaintiff.

J. E. Hannan for the defendant.

SARGANT, J. (after stating the facts): In my judgment it is not the case that if the plaintiff desires rescission, he must now take an order for specific performance, and on non-performance of the order by the defendant apply for rescission. If the only relief asked for in the statement of claim had been specific performance, as in *Stone v. Smith* (1), it would not be right to grant a different form of relief. That is the full effect of *Stone v. Smith*, as was shown in

the judgment in *Kingdon v. Kirk* (2). It is true that in the latter case there was a special clause in the contract but that only affected the nature of the alternative relief granted. The judgment of EVE, J., in *Hall v. Burnell* (3) shows that a vendor has a right to forfeit a deposit if the purchaser deliberately declines or neglects to perform his contract. Here the contract ought to have been performed on Mar. 25, 1920. It was not until nearly a year later that notice was given requiring the defendant to complete within twenty-eight days, and it is alleged by the statement of claim that the defendant refused and neglected to complete. The ordinary rule is that a plaintiff claiming alternative reliefs can choose at the hearing which he will ask for. If the plaintiff had asked for rescission and forfeiture of the deposit alone he would clearly have been entitled to that form of relief. It can make no difference that he has asked alternatively for specific performance. It would be rather shocking if the plaintiff had first to take a decree for specific performance which he did not desire, and then come later for rescission and forfeiture of the deposit. It is not necessary that time should be made of the essence of the contract when the defendant has so persistently and for so long refused to perform the contract. There must be an order rescinding the agreement and declaring that the deposit is forfeited, and that as between the plaintiff and the defendant the plaintiff is entitled to give a good receipt for the deposit to the stakeholders and the plaintiff is entitled to the costs of the action.

Order accordingly.

Solicitors: *Kenneth Brown, Baker, Baker*, for *W. Linford Brown & Sons*, Exmouth; *Sharpe, Pritchard & Co.*, for *Petherick & Sons*, Exmouth.

[Reported by L. MORGAN MAY, ESQ., Barrister-at-Law.]

LECK v. EPSOM RURAL DISTRICT COUNCIL

[KING'S BENCH DIVISION (Lord Trevethin, C.J., Avory and McCardie, JJ.), January 11, 1922]

[Reported [1922] 1 K.B. 383; 91 L.J.K.B. 321; 126 L.T. 528; 86 J.P. 56; 38 T.L.R. 275; 66 Sol. Jo. 439; 20 L.G.R. 173]

Public Health—Drainage—Cesspool—Cleaning—Undertaking by local authority to cleanse every three months—Refusal to cleanse more frequently except on payment—Reasonable excuse—Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 43.

A dwelling-house, owned and occupied since 1914 by the appellant, was drained by a cesspool. Until 1920 the local authority emptied the cesspool whenever required, although they complained from time to time of the unreasonable frequency of the appellant's requests in that regard. In 1920 the local authority rescinded any resolution imposing on them an obligation to cleanse cesspools, and their surveyor wrote to the appellant that owing to the expense they could only empty cesspools once in three months, and that the cost of more frequent emptying must be paid by the occupier. On Oct. 15, 1920, the local authority cleansed the appellant's cesspool. On Nov. 25, 1920, it was again full, and the appellant on that day wrote to the local authority asking them to have it emptied "one day next week." The local authority declined, unless the appellant paid the cost £2 12s. The appellant paid under protest and on Dec. 8, 1920, the local authority, having by that time been in default for three days after the expiry of the notice,

A cleansed the cesspool. The provision of a soakaway for bath water only, at a cost of about £20, would have put an end to the necessity for such frequent cleansing. The appellant made a complaint against the local authority under the Public Health Act, 1875, s. 43, for that they, having undertaken the cleansing of cesspools, failed without reasonable excuse to cause his cesspool to be cleansed as required by that section. The justices
B found that the undertaking of the local authority was to cleanse once in every three months, that this undertaking was sufficient, and that, therefore, the local authority had a reasonable excuse for not complying with the notice, and they dismissed the complaint.

C **Held:** there was evidence on which the justices could find that the local authority had a reasonable excuse within s. 43 of the Act of 1875 for not complying with the appellant's request and their decision must be affirmed.

Notes. The Public Health Act, 1875, s. 42, s. 43 and s. 44, were repealed by the Public Health Act, 1936, s. 346 and Sched. 3, and were in effect reproduced by s. 72 of that Act.

Considered: *Whitbread v. Staines R.D.C.*, [1924] All E.R. Rep. 657.

D As to cleansing of conveniences by local authorities, see 26 HALSBURY'S LAWS (2nd Edn.) 425 et seq.; and for cases, see 38 DIGEST 236 et seq.

Case referred to:

(1) *Pegg and Jones, Ltd. v. Derby Corporation*, [1909] 2 K.B. 511; 78 L.J.K.B. 909; 101 L.T. 237; 73 J.P. 413; 7 L.G.R. 922; 38 Digest 237, 666.

E Also referred to in argument:

Stainland Industrial Corn and Provision Society v. Stainland U.C., [1906] 1 K.B. 233; 75 L.J.K.B. 190; 94 L.T. 214; 70 J.P. 150; 54 W.R. 282; 50 Sol. Jo. 207; 4 L.G.R. 295; 38 Digest 237, 664.

Case Stated by justices for the petty sessional division of Epsom in the county of Surrey.

F 1. A complaint was made on Jan. 27, 1921, by D. C. Leck, of Ravenshoe, Burgh Heath, in the county of Surrey, hereinafter referred to as the appellant, against Epsom Rural District Council, hereinafter referred to as the respondents, for that the respondents, being the local authority having jurisdiction in the district in which the appellant's house aforesaid was situate, and having undertaken the cleansing of the cesspools there, did, without reasonable excuse and
G after notice in writing dated Nov. 25, 1920, from the appellant, the occupier of the said premises, requiring them to cleanse the cesspool belongings to the said house, fail to cause the same to be cleansed as required by sect. 43 of the Public Health Act, 1875.

2. At the hearing of the said complaint the following facts were proved or admitted: (a) That the appellant had owned and occupied since the year 1914
H the said house and premises, comprising an area of one and a quarter acres, and being within the district of the respondents. (b) That the rateable value of the said house was £100, and that the appellant was in the year 1920 assessed for special expenses, including sewerage rate, and he paid in respect of that rate for the said year the sum of £8 19s. 2d. (c) That the said house was drained by a water-tight cesspool, 16 ft. deep, 8 ft. in diameter, and holding 4,200 gallon.
I (d) That the said house and the said cesspool were built and constructed in the year 1911, after the plans therefor had been submitted to and approved by the respondents. In that year the respondents had no control over the size of cesspools. (e) That on April 1, 1919, the respondents, by one Wooldridge, their surveyor and inspector of nuisances, wrote to the appellant stating that the cesspool would be emptied in compliance with his application of Mar. 31, 1919, and complaining that his cesspool accommodation was insufficient, and that it was hardly reasonable for the respondents to bear the expenditure involved in emptying so frequently the appellant's cesspool. (f) That the provision of a

soakaway for bath water only would relieve the cesspool and put an end to the trouble at a cost of about £20. (g) Bye-laws of Sept. 12, 1900, one of which was as follows:—"9. The occupier of any premises in the district shall once at least in every three months cleanse every cesspool belonging to such premises" were put in together with Model Bye-laws published by the Local Government Board in 1912, one of which provided for cleansing of cesspools as follows:—"When necessary and at least once in every six months." (h) That during the whole of the period of the appellant's occupancy of the said house up to and including Oct. 15, 1920, the respondents, when requested from time to time by the appellant, had cleansed the said cesspool, although from time to time, and in particular by the said letter of April 1, 1919, and by another letter of May 7, 1920, the respondents complained to the appellant of the unreasonable frequency with which he made such requests. (i) That for a considerable time prior to May 26, 1920, the respondents had in fact cleansed cesspools of occupiers of houses in their said district when requested so to do by such occupiers. (j) That by a resolution, dated April 28, 1920, of the sanitary committee of the respondents, subsequently confirmed by a resolution dated May 26, 1920, of the respondents, it was resolved that any resolution or resolutions adopting s. 42 of the Public Health Act, 1875, so far as related to the cleansing of cesspools in the parish of Banstead, be and are hereby rescinded, and that any resolution or resolutions imposing any obligations or duty on the council in respect of the cleansing of cesspools in such parish be also rescinded. (k) That no notice was given by the respondents at any material time of the passing of the said resolution of May 26, 1920, to the occupiers of houses within the said district or to the appellant, except that on Aug. 4, 1920, the respondents' said surveyor and inspector of nuisances wrote to the appellant saying that the council owing to the heavy expense incurred in emptying cesspools in their district had decided that they could only empty cesspools once in three months and that if they were emptied oftener the cost of so doing must be paid by the occupier. (l) That the last occasion on which the respondents, before the matters hereinafter set forth, cleansed the appellant's said cesspool was on Oct. 15, 1920. (m) That on Nov. 20, 1920, the appellant's said cesspool was full and required to be emptied, whereupon the appellant, by letter dated Thursday, Nov. 25, 1920, addressed to the respondents, requested the respondents to empty the said cesspool belonging to the said house, "one day next week." (n) That in reply to the appellant's said letter the respondents, by letter dated Nov. 29, 1920, addressed to the appellant, stated that the appellant's cesspool had been emptied on Oct. 15, 1920, and that they were unable to empty the same within three months of that date unless the appellant was prepared to pay £2 12s., the cost of so doing. (o) That the appellant, by letter dated Dec. 6, 1920, addressed to the respondents (the respondents in the meantime not having emptied or cleansed the said cesspool pursuant to the appellant's said notice of Nov. 25, 1920, sent to the respondents a cheque for £2 12s. in order that the work of cleansing the said cesspool might be carried out without delay, stating therein at the same time that such payment was made under compulsion, and protesting against the said action of the respondents and their right to the said payment. (p) that on Dec. 8, 1920, the respondents cleansed or caused to be cleansed the appellant's said cesspool and the next day sent the appellant a stamped receipt for the said sum of £2 12s., acknowledging that the same had been paid and received by them for emptying the appellant's cesspool aforesaid. (q) That from and after the expiry of the appellant's said notice, contained in his said letter of Nov. 25, 1920, the respondents continued in default in complying therewith at least three days. (r) That the appellant's said cesspool was cleansed by the respondent seven times in the year 1920 before the said Nov. 25, 1920, at a cost of £37 18s. for labour alone.

3. The respondents contended: (a) That the appellant's letter of Nov. 25, 1920, was not a good notice within s. 43 of the Public Health Act, 1875, since it

A required the respondents to cleanse "one day next week," and not within seven days. (b) That by virtue of the resolution of May 26, 1920, the respondents had rescinded any resolution or resolutions which had at any time imposed any obligation or duty on them in respect of the cleansing of cesspools. (c) That the Public Health Act, 1875, did not require a local authority to cleanse a cesspool at unreasonably frequent intervals, and that the respondents were entitled to
B limit the cleansing of cesspools to a reasonable interval of once in three months, and were therefore not bound to cleanse the appellant's cesspool before the lapse of three months from Oct. 15, 1920. (d) Alternatively if the respondents were not entitled so to limit their undertaking, that the resolution of May 26, 1920, in so far as it purported to undertake cleansing every three months, was ultra vires, and the respondents were under no obligation to cleanse any cesspools at the public expense. (e) That the respondents had a reasonable excuse for refusing to cleanse the appellant's said cesspool, since they had already cleansed it seven times in the year 1920, and for a payment of about £20 the appellant could render such frequent cleansing unnecessary in the future.

4. The appellant contended: (a) That his letter of Nov. 25, 1920, was a good and sufficient notice within s. 43 of the Public Health Act, 1875. (b) That
D by cleansing the cesspools of the occupiers of houses in the said district whenever they were required to do so by the said occupiers for a considerable period prior to the said May 26, 1920, and by cleansing his cesspool whenever required during the period of his occupation of his said house down to Oct. 15, 1920, the respondents had in law and in fact undertaken the cleansing of all the cesspools within their said district within the meaning of s. 42 of the Public Health Act,
E 1875. (c) That the respondents were bound to cleanse the appellant's cesspool, whenever the same was full and therefore required to be cleansed, and having undertaken as aforesaid could not limit their obligation to cleanse the said cesspool whenever required. (d) That the said obligation of the respondents was unaffected by the fact that the appellant's cesspool might and did require to be cleansed more than four times a year, or by the cost of so doing. (e) That the
F respondents had failed to show any reasonable excuse for not complying with the appellant's notice in his letter of Nov. 25, 1920.

5. The justices found that the said letter was a good notice within the meaning of s. 43 of the Public Health Act, 1875, but that the undertaking of the respondents was to cleanse once in three months and that such undertaking was sufficient, and that the respondents therefore had a reasonable excuse for not
G complying with the said notice, and the justices dismissed the summons.

The Public Health Act, 1875, provides:

Section 42. "Every local authority may, and when required by order of the Local Government Board shall, themselves undertake or contract for the removal of house refuse from premises. The cleansing of closets,
H privies, ashpits, and cesspools; either for the whole or any part of their district . . .

Section 43. "If a local authority who have themselves undertaken or contracted for the removal of house refuse from premises, or the cleansing of earthclosets, privies, ashpits, and cesspools fail, without reasonable excuse, after notice in writing from the occupier of any house within their district requiring them to remove any house refuse or to cleanse any earth-closet, privy, ashpit, or cesspool belonging to such house or used by the occupiers thereof, to cause the same to be removed or cleansed, as the case may be, within seven days, the local authority shall be liable to pay to the occupier of such house a penalty not exceeding 5s. for every day during which such default continues after the expiration of the said period.

Section 44. "Where the local authority do not themselves undertake or contract for the cleansing of footways and pavements adjoining any premises, the removal of house refuse from any premises, the cleansing of

earthclosets, privies, ashpits, and cesspools belonging to any premises, they may make by-laws imposing the duty of such cleansing or removal at such intervals as they think fit, on the occupier of any such premises. An urban authority may also make by-laws for the prevention of nuisances arising from snow, filth, dust, ashes, and rubbish, and for the prevention of the keeping of animals on any premises so as to be injurious to health."

Macmorran, K.C. (*N. L. C. Macaskie* with him) for the appellant.

Wooten, K.C. (*Randolph Glen* with him) for the local authority.

LORD TREVETHIN, C.J.—It is said for the appellant that the respondents have undertaken the duty, under s. 42 of the Public Health Act, 1875, of cleansing the cesspools in the district, and there is no doubt that they did in fact, for a considerable time, cleanse them, although there were in force bye-laws casting this duty on the occupiers. Those bye-laws were not enforced. The respondents, having regard to what they considered the excessive use of the appellant's bathrooms, with the consequent frequent filling of the cesspool, communicated on Aug. 4, 1920, with the appellant, stating that owing to the heavy expense incurred in emptying the cesspools in the district, they had decided that in future they would only empty them at the public expense once in three months, and that if they were required to empty them oftener they would only do so at the expense of the occupier. The justices found that the respondents' limited undertaking to cleanse the cesspools once in three months was reasonable and sufficient, and that the respondents had a reasonable excuse for not complying with the appellant's notice.

Counsel for the appellant contended that this limitation of the respondents' undertaking was *ultra vires*. I do not agree. The justices found that the respondents had a reasonable excuse and the justices had evidence before them on which they could so find. The respondents had already emptied nearly thirty thousand gallons from this cesspool during the year and were willing to do it whenever requested, provided that the appellant would pay them the cost incurred. It was, in my opinion, a reasonable excuse for them to say that they would not do the work oftener than every three months except on payment. Whether the undertaking to empty the cesspool at reasonable intervals was reasonable must be judged by reference to the community as a whole, and not to the case of a particular individual who wanted an excessive amount of user of his cesspool. I think that if the justices thought that an undertaking by the respondents to empty the cesspools in the district every three months was reasonable, they were entitled to come to the conclusion at which they arrived. The appeal must therefore be dismissed.

AVORY, J.—I agree that the appeal fails. The appellant's complaint was made under s. 43, and to establish it it was necessary for the appellant to show that the respondents had undertaken the cleansing of cesspools. In the circumstances of the case it is open to argument whether the respondents were in the position of a local authority who had undertaken the cleansing of cesspools. It is clear that after the passing of the resolution of May 26, 1920, they were not such a local authority, because they had then resolved not to undertake the duty, and the result was that after that time it became the duty of every occupier to cleanse his cesspool. Then on Aug. 4, 1920, the respondents' surveyor, with, it must be assumed, the respondents' authority, sent out a notice that in future they would empty cesspools once every three months, and that if they were requested to do so oftener the cost must be paid by the occupier. I appreciate the argument that a local authority which undertakes that duty must undertake the whole duty; they have no right to undertake the duty with limitations on it. I am not satisfied that on Aug. 4, 1920, the respondents were undertaking the duty of cleansing the cesspools within the meaning of the statute. But it is not necessary to decide whether the respondents were in the position of a local

A authority which had undertaken the cleansing of cesspools, because under s. 43 it was for the justices to determine whether in the circumstances of this particular case the respondents had a reasonable excuse for non-compliance with the appellant's request. I read the justices' finding as meaning that having considered all the circumstances they found that the respondents had a reasonable excuse for not complying. If there was any evidence on which they could come
B to ~~that~~ conclusion the Divisional Court cannot interfere. At first I was disposed to think that "reasonable excuse" only included some inability on the part of the local authority to carry out the work. That is one possible view of the section. But on further consideration I think it was open to the justices to find that in the circumstances, and having regard to the notice of Aug. 4, 1920, to the fact that for a small payment the appellant might get the work done without waiting
C three months, and to the further fact that the necessity for a frequent cleansing of the cesspool might have been obviated by making a soakaway, the respondents had a reasonable excuse for not complying with the appellant's request.

I do not give any decision on the point raised by counsel for the respondents as to the notice of Nov. 25, 1920, but as at present advised I am not prepared to assent to the view that the notice was bad, or that the seven days contemplated
D by s. 43, ran from Dec. 4. It is not necessary to decide that point, having regard to the fact that there was evidence justifying the justices' finding that the respondents had a reasonable excuse.

McCARDIE, J.—I agree that the appeal should be dismissed. I assume that the respondents "undertook" within s. 42 of the Act—I understand by
E the word "undertook" that they expressly resolved to do the thing mentioned in the section, or in practice so acted as to show that they had resolved to do it. That view is supported by the observations of the court in *Pegg v. Derby Corporation* (1). If the present respondents undertook to do the work, in my view they undertook it in toto. The scheme of the legislation is that the responsibility for the removal of rubbish and the like should fall on certain definite persons
F—the local authority, or the contractor, or, in the case mentioned in s. 44, the person mentioned in the bye-laws—but wherever the duty falls, it falls in its entirety. In my opinion the local authority was not entitled to demand any payment whatsoever for the fulfilment of its statutory duty; but the obligation as to cleansing and the like is a question of degree; it is always a matter of the reasonable interpretation of the statutory duty. So far as the reasonable
G fulfilment of the section requires the removal of rubbish and the like, it must be done by the local authority without payment; but when once the measure of statutory duty has been reached, there is nothing to prevent the local authority from saying to an occupier that if he desires further privileges he may obtain them by payment. The latter question involves no question of ultra vires and is not inconsistent with the section. Here the justices in substance meant that
H a reasonable fulfilment of the statutory duty by the respondents only required the cleansing of cesspools once in three months, and, that being so, the limit of the statutory duty was reached by them. The justices meant to find that there was a reasonable excuse within s. 43 because, having regard to the limit of reasonable interpretation and the totality of the circumstances, it could not be said that the respondents wrongfully failed to carry out their duty. The matter
I must be one of degree, and must be in substance a question of fact. Nothing that has been said should lead to any opinion that the complete fulfilment of their duties under the Act can be disregarded by local authorities. Subject to those observations, I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Spencer, Gibson & Son; Gard, Lyell & Co.*

[*Reported by J. F. WALKER, ESQ., Barrister-at-Law.*]

NICHOL v. FEARBY. NICHOL v. ROBINSON

[KING'S BENCH DIVISION (McCardie, J.), May 24, 25 and 29, 1922]

[Reported 127 L.T. 522; 86 J.P. 204; 38 T.L.R. 735; 20 L.G.R. 705]

Elections—Local government—Expenses—Failure to make return—Attendance and voting at meetings of the council and committees—Liability for penalties—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 224—Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 21 (3), (4), (7), (8).

The defendants were elected to a municipal council. They each failed to send to the town clerk return of expenses incurred by them in respect of the election as required by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, s. 21 (3), and each attended and voted at meetings of the full borough council and at meetings of committees of the council. The plaintiff, as a common informer, claimed to recover the penalties prescribed by s. 21 (4) of the Act of 1884. It appeared that the town clerk had instigated the bringing of the actions from motives of revenge.

Held: the defendants were not entitled to rely on the Municipal Corporations Act, 1882, s. 224, since that section had no application to s. 21 (4) of the Act of 1884, but s. 21 (4) did not provide a penalty for sitting on and voting at a meeting of a committee, as distinct from the full council; and, although the defendants were prima facie liable to penalties under s. 21 (4) in respect of their attendance and voting at meetings of the council, they ought to have the opportunity of applying for relief under s. 21 (7) and (8) of the Act of 1884.

Dicta of LORD ESHER, M.R., and LINDLEY, L.J., in *Tuck v. Priester*, (1887) 19 Q.B. at p. 638 and p. 645 respectively, applied.

Notes. The Municipal Elections (Corrupt and Illegal Practices) Act, 1884, s. 21, was repealed by the Representation of the People Act, 1949, s. 175, and Sched. 9, and replaced by s. 78, s. 167 of and Sched. 6 to that Act.

As to the disqualification of a candidate from sitting and voting, see 14 HALSBURY'S LAWS (3rd Edn.) 197 et seq.; and for cases, see 20 DIGEST 145 et seq.

Cases referred to:

- (1) *R. v. Loxdale* (1758), 1 Burr. 445; 42 Digest 663, 731.
- (2) *A.-G. v. Moore* (1878), 3 Ex. D. 276; 47 L.J.N.C. 103; 38 L.T. 251; 42 J.P. 372; 26 W.R. 366; 33 Digest 460, 1724.
- (3) *Re Elections of County Councillors* (1880), 5 T.L.R. 220; 20 Digest 146, 1200.
- (4) *Forbes v. Samuel*, [1913] 3 K.B. 706; 82 L.J.K.B. 1135; 109 L.T. 599; 29 T.L.R. 544; 42 Digest 755, 1804.
- (5) *Todd v. Robinson* (1884), 12 Q.B.D. 530; 53 L.J.Q.B. 251; 50 L.T. 298; 48 J.P. 692; 32 W.R. 858; 33 Digest 17, 60.
- (6) *Reynell v. Lewis* (1846), 15 M. & W. 517; 4 Ry. & Can. Cas. 351; 16 L.J.Ex. 25; 8 L.T.O.S. 167; 10 J.P. 775; 10 Jur. 1097; 1 Digest 358, 665.
- (7) *R. v. Sunderland Corporation*, [1911] 2 K.B. 458; 80 L.J.K.B. 1337; 105 L.T. 27; 75 J.P. 365; 27 T.L.R. 385; 9 L.G.R. 928; 33 Digest 61, 373.
- (8) *Tuck & Sons v. Priester* (1887), 19 Q.B.D. 629; 56 L.J.Q.B. 553; 52 J.P. 213; 36 W.R. 93; 3 T.L.R. 826, C.A.; 42 Digest 729, 1516.
- (9) *Andrews v. Ryde Corporation* (1874), L.R. 9 Exch. 302; 43 L.J.Ex. 174; 23 W.R. 58; 33 Digest 43, 242.

Further Consideration of two actions tried together by McCARDIE, J., at Newcastle Assizes.

The plaintiff, as a common informer, sued the defendants for penalties under s. 21 (4) of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884.

A The defendants were candidates at the municipal elections at Morpeth in November, 1930, and were both duly elected. It was alleged that they failed within the time limited by the section to make the return and declaration required by the section, and the actions were brought for penalties in respect of meetings at which they sat and voted, such meetings being meetings of the borough council of Morpeth as such; meetings of the borough council of Morpeth, sitting to exercise the functions of an urban district council under the Public Health Acts; meetings of committees of the borough council either as such or in the exercise of the functions of an urban district council under the Public Health Acts.

The facts of the case and the arguments sufficiently appear in the judgment of McCARDIE, J.

C *C. Paley Scott* for the plaintiff.
R. F. Burnand for the defendants.

Cur. adv. vult.

May 29.—McCARDIE, J., read the following judgment.—These actions were together tried before me at the Newcastle Assizes and then adjourned to London for argument on the novel and important points at law which arise.

D The questions at issue in each action are in substance the same, and I therefore give one decision on both cases. The defendant Fearby is a clerk in the office of a railway company. The defendant Robinson is an official in the service of the Society for the Prevention of Cruelty to Animals. The plaintiff is a common informer. He claims under s. 21 (4) of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884. As against the defendant Fearby he claims £550. E As against the defendant Robinson he claims £800.

F The facts can be stated with comparative brevity. On Nov. 1, 1920, each of the defendants stood as a candidate for election to the council of the borough of Morpeth. Each was elected on that day and was declared by the mayor. Thereunder the duty fell on the defendants of observing the requirements of s. 21 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884. Sub-section (3) of that section provides:

G “Within twenty-eight days after the day of election of a councillor every candidate at such election shall send to the town clerk a return of all expenses incurred by such candidate or his agents on account of or in respect of the conduct or management of such election, vouched (except in the case of sums under 20s.) by bills stating the particulars and receipts and accompanied by a declaration by the candidate made before a justice in the form set forth in Sched. 4 to this Act to the like effect.”

I need not set out the form of declaration indicated by Sched. 4. Section 21 (4) provides:

H “After the expiration of the time for making such return and declaration, the candidate, if elected, shall not until he has made the return and declaration (in this Act referred to as the return and declaration respecting election expenses), or until the date of the allowance of such authorised excuse as is mentioned in this Act, sit or vote in the council and if he does so shall forfeit £50 for every day in which he so sits or votes to any person who sues for the same.”

I I may mention here that sub-s. (7) and sub-s. (8) of s. 21 give power to the High Court or an election court (if proof be given of certain circumstances) to grant relief in the manner and on the terms indicated in such sub-sections. The circumstances mentioned in those sub-sections may be described as “authorised excuses.” Such, as above stated, was the duty of the defendants. They did not fulfil it. I am satisfied that each was wholly ignorant of the requirements of s. 21. No one reminded them of their statutory obligation. The time for making their return and declaration expired on or about Nov. 29, 1920. Thereafter the defendants sat or voted at various meetings of the whole borough council. Thus the

defendant Fearby sat or voted on Dec. 14, 1920, Feb. 8, 1921, and March 8, 1921. So, too, the defendant Robinson sat or voted on Dec. 14, 1920, Jan. 8, 1921, Feb. 8, 1921, and March 8, 1921. They also sat or voted at divers committees of the borough council and also on certain other occasions which will call for consideration hereafter.

On or about March 8, 1921, the defendants opposed a certain housing scheme which was for the consideration of the council. Their opposition aroused the irritation of the town clerk (a Mr. Jardine), who thereupon announced for the first time that both the defendants were liable to heavy penalties. It will be my duty at a later stage to express my views on the conduct and the methods of the town clerk. It is not relevant at the moment. It only remains to add, for the purpose of dealing with the first main point of the case, that on or about Nov. 23, 1920, the defendant Fearby apparently sent an informal document to the town clerk with respect to his expenses and that on or about Feb. 23, 1921, the defendant Robinson sent a like document to the town clerk. Neither defendant has made at any time the declaration required by s. 21 (4) of the Act of 1884. The writ in each case was issued on Mar. 23, 1921.

On the above facts it would seem that each of the defendants is liable to the plaintiff for forfeitures or fines of £50 per day imposed by s. 21 (4).

Counsel for the defendants, however, in his able argument, raised a point which would, if sound, defeat in each action the plaintiff. He contends that the right of recovering a fine under s. 21 (4) of the Act of 1884 from a candidate who is in default is subject to and limited by the provision of s. 224 of the Municipal Corporations Act, 1882. That section provides:

"An action to recover a fine from any person for acting in a corporate office without having made the requisite declaration or without being qualified or after ceasing to be qualified or after becoming disqualified may not be brought except by a burgess of the borough and shall not lie unless the plaintiff has within fourteen days after the cause of action arose served a notice in writing personally on the person liable to the fine of his intention to bring the action, nor unless the action is commenced within three months after the cause of action arose."

It is common ground that the requirements of s. 224 of the Municipal Corporation Act, 1882, have not been complied with. The plaintiff's counsel contends that s. 224 has no application to the present case, but that it relates to a different subject-matter.

In considering the question it is necessary to observe that the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, only incorporates the Municipal Corporations Act, 1882, to a limited extent. Thus s. 34 of the Act of 1884 says that in this Act expressions have the same meaning as in the Municipal Corporations Act, 1882. So, too, s. 35 and s. 36 of the Act of 1884 apply Part 4 of the Act of 1882 to certain municipal and other elections. Part 4, however, of the Act of 1882 only covers s. 77 to s. 102 of that Act, which deal with corrupt practices and election petitions. There is nothing in the Act of 1884 which expressly incorporates s. 224 of the Act of 1882. If, then, there be no express incorporation of s. 224 into the structure of the Act of 1884, can I hold that there is an implied incorporation or that the two Acts are to be read as one? I do not overlook the passage in MAXWELL ON STATUTES, 6th Edn., p. 64, that

"Not only may the later Act be construed by the light of the earlier, but it sometimes furnishes a legislative interpretation of the earlier."

But the guiding and limiting rule is stated by LORD MANSFIELD in *R. v. Loxdale* when he said (1) (1 Burr. at p. 447):

"Where there are different statutes in *pari materia*, though made at different times or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other."

- A (See MAXWELL, p. 62 and the notes thereto.) Ere the above rule can be applied, however, the court must be satisfied that the statutes are in fact in *pari materia*. In my opinion, the subject-matter of s. 224 is quite distinct from the subject-matter of the Act of 1884. The latter relates to the conduct of elections and to corrupt practices, &c., in connection therewith, whereas the subject-matter of s. 224 of the Act of 1882 is clearly found in s. 35 and s. 41 of the same Act.
- B Section 35 provides:

"A person elected to a corporate office shall not, until he has made and subscribed before two members of the council or the town clerk a declaration as in Sched. 8, act in the office except in administering that declaration."

- C Section 41 provides:

"If any person acts in a corporate office without having made the declaration by this Act required or without being qualified at the time of making the declaration or after ceasing to be qualified or after becoming disqualified he shall for each offence be liable to a fine not exceeding £50 recoverable by action."

- D Section 35 and s. 41 are substantive sections, and s. 224 is the procedure section, which on the face of it is, I think, referable to and limited in operation to those two sections. I am unable to see any good reason for applying s. 224 of the Municipal Corporations Act, 1882, to s. 21 (4) of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884.

- E My opinion on the point is strengthened by a consideration of the course of legislation so concisely and clearly outlined by counsel for the plaintiff. First there are the provisions of s. 77 et seq. of the Municipal Corporation Act, 1882; secondly, there are the provisions of the Corrupt and Illegal Practices Act, 1883, with respect to Parliamentary elections, including s. 33 thereof, which provides for a return and declaration by a parliamentary candidate and which enacts (in substance) that the candidate shall not sit or vote in the House of Commons (after the period provided for the delivery of the return and declaration), and then says:

"If he sits or votes in contravention of this enactment he shall forfeit £100 for every day on which he so sits or votes to any person who sues for the same."

- G Thirdly, the scheme involved in the Corrupt and Illegal Practices Act, 1883, as to parliamentary elections was applied, with the appropriate variation, to municipal elections by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884. I am of opinion that s. 21 (4) of the Act of 1884 is unaffected by s. 224 of the Act of 1882. The view I have ventured to express is, I think, unimpaired by the decision cited for the defendants, viz., *A.-G. v. Moore* (2), *Re Elections of County Councillors* (3), and *Forbes v. Samuel* (4).

- H It follows, therefore, that the plaintiff, as a common informer, is entitled (subject to any question of relief by the court under sub-s. (7) of s. 21 of the Act of 1884) to recover penalties against the defendant under sub-s. (4) of that section. I may point out that the Treasury apparently have no power to remit any penalties incurred by the defendants. See *Todd v. Robinson* (5). To what penalties is he entitled? The point has been very well argued by counsel on both sides. It arises thus: sub-s. (4) says that "the defaulter shall forfeit £50 for every day on which he sits or votes in the council." These words seem simple until attention be given to the singular intricacy of English local government law. The dates in respect of which penalties are claimed because the defendants sat or voted may be classified under four heads: (i) the dates on which the defendants sat or voted at meetings of the municipal borough council as such; (ii) the dates on which the defendants sat or voted at committee meetings of the municipal

borough council as such; (iii) the dates on which the defendants sat or voted at meetings when the borough council met to exercise functions as if an urban district council under the Public Health Acts; and (iv) the dates on which the defendants sat or voted at meetings of the committees of the said council in their capacity as an urban district council under the said Public Health Acts. A

I cannot undertake to even sketch in this judgment the scheme of local government in English boroughs. It will suffice to say the following: Morpeth is a very old borough corporation. It was apparently created a corporation by a now lost charter. It fell, I assume, within the scope of the Municipal Corporation Act, 1835, which was a great reforming statute. It is not disputed that it falls within the scope of the Municipal Corporations Act, 1882. That Act is divided into thirteen parts and various schedules. Each part deals with a separate fasciculus of matters. The only part I need now specify is Part 2, which deals with the constitution and government of boroughs. In Part 2 appears s. 10, which provides (inter alia) that the municipal corporation of a borough shall be capable of acting by the council of the borough and that the council shall exercise all powers vested in the corporation by the Act or otherwise. That section also provides that the council shall consist of the mayor, aldermen, and councillors. In Part 2 also appears s. 22, which provides (inter alia) that B C D

“the council may from time to time appoint out of their own body . . . committees either of a general or special nature . . . but the acts of every such committee shall be submitted to the council for their approval.”

Counsel for the defendants submits that a committee is one thing and that the council is another thing. There seems much force in this contention. The committee is not a corporate body. It has, speaking broadly, no independent powers. It is a merely subordinate entity. In *Reynell v. Lewis* (6) POLLOCK, C.B., said: E

“The term ‘committee’ means an individual or a body to which others have committed or delegated a particular duty or who have taken upon themselves to perform it in the expectation of their act being confirmed by the body they profess to represent or act for.” F

See also STROUD’S JUDICIAL DICTIONARY, title “Committee,” and the useful matters there mentioned.

Throughout the Municipal Corporations Act, 1882, a clear distinction seems to be drawn between the borough council and a committee thereof—see, for example s. 22 (2). I may refer to the index to ARNOLD ON MUNICIPAL CORPORATIONS (5th Edn.), titles “Committees of Town Council” and “Joint Committee.” See, too, WRIGHT and HOBHOUSE ON LOCAL GOVERNMENT (4th Edn.), and the index thereto, and *R. v. Sunderland Corpn.* (7). It is also worthy of note that s. 34 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, says that “in this Act expressions have the same meaning as in the Municipal Corporations Act, 1882.” If so, the word “council” in s. 21 (4) of the Act of 1884 should bear the meaning given to that word in s. 10 of the Act of 1882, which (as already mentioned) says that the council shall consist of the mayor, aldermen, and councillors—that is, the entire corporate entity. It may well be argued, moreover, that if those who framed s. 21 of the Act of 1884 meant to provide a penalty for sitting or voting at a committee as distinguished from the council it would have been easy to say so. G H

I quite appreciate the contention of counsel for the plaintiff, but I must remember, ere reaching a conclusion, that I am dealing with a very stringent penal provision. I must construe it with strictness. It is at this point that *Tuck v. Priestler* (8) greatly assists the defendants. There LORD ESHER said (19 Q.B.D., at p. 638) on the statute there in question: I

“We must be very careful in construing that section because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two

A reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."

A still more emphatic view was expressed by LINDLEY, L.J. (ibid., at p. 645). While fully alive to the difficulties involved, I think that I ought here to apply the *Tuck v. Priestor* (8) rule of construction. In view of the doubts I feel as to the proper construction of the word "council" in s. 21 (4) of the Act of 1884, I shall hold that it only inflicts the penalty of sitting or voting in a meeting of the council as distinguished from a meeting of a mere committee of that body.

This leaves classes 3 and 4 to be briefly considered. The matter thus stands. The functions and powers of a borough council under the Municipal Corporations Act, 1882, as specified in that Act, do not include the broad range of powers given by the Public Health Act, 1875, and the later Public Health Acts. On turning to the Public Health Act, 1875, it will be seen that s. 5 provides for the creation of (a) urban sanitary districts and (b) rural sanitary districts, and that s. 6 provides that urban districts shall consist (inter alia) of boroughs and that the urban authority shall be the mayor, aldermen, and burgesses acting on the council. The word "borough" is defined in s. 4, and s. 200 provides for the power of the urban authority to appoint committees.

Time does not permit me to dwell on these points. I need only refer to LUMLEYS' PUBLIC HEALTH (8th Edn.), vol. 1, at pp. 4, 37, and 464. The effect of this legislation is to bestow on a borough unaffected by any special legislation two capacities, namely (a) capacities under the Municipal Corporations Act, 1882, and (b) capacities under the Public Health and cognate Acts (see WRIGHT AND HOBHOUSE ON LOCAL GOVERNMENT (4th Edn.), pp. 27 and 28). These functions, though they happen to be exercised by one body, are in truth fundamentally distinct. This will be seen on looking through the provisions of the several Acts. This, too, seems to be recognised by s. 198 of the Public Health Act, 1875, which provides:

"Where an urban authority are the council of a borough they shall, subject to the provisions of this Act, exercise and execute their powers, authorities, and duties under this Act according to the laws for the time being in force with respect to municipal corporations in England."

The council and the urban authority seem to be one body with two personalities: (see *Andrews v. Ryde Corporation* (9)). The general law, however, is sometimes subject to particular modification by Private Act or Statutory Order. I have no information before me at all as to the actual statutory position of Morpeth. I am left entirely in the dark except that I know that totally different books of minutes were (as may be usual) kept for the council as an urban district authority as distinct from a municipal corporation. Under these circumstances counsel for the plaintiff stated that he would not press the claim so far as the defendants sat or voted with respect to urban district matters whether dealt with by the council as a whole or by a committee thereof. Each statement of claim, seems, as counsel admits, to be framed on the footing only that the defendants sat or voted in the council acting in municipal corporation matters rather than with public health matters. He stated that he did not ask for an amendment of the statement of claim. I certainly would not grant an amendment in such actions as these: (see *Forbes v. Samuel* (4) ([1913] 3 K.B., at p. 739)). Apart, therefore, from any question of applying *Tuck v. Priestor* (8) to the points arising under classes 3 and 4 and holding the plaintiff strictly to the form of his pleading, I shall not award any sum in respect of classes 3 and 4.

It follows, then, that unless relief can be granted to the defendants, the plaintiff is prima facie entitled to recover £150 from the defendant Fearby, and £200 from the defendant Robinson, in respect of class 1.

I regret that it should have been thought desirable to bring these actions. The defendants are respectable and responsible citizens. They sought to serve the public on the Morpeth council. They were ignorant of the technical requirements

of sect. 21 of the Act of 1884. The town clerk of the council knew the requirements of that section perfectly well. It was his moral, though perhaps not his legal, duty to inform the defendants of their legal obligations. Unhappily, he harboured an animosity against both defendants, because they had, in pursuance of their duty as bugresses, been in opposition to him in the past. I am satisfied that he deliberately refrained from telling the defendants of their obligation in order that he might thereby secure a weapon against them and so gratify his unfortunate antagonism. I gravely deplore his conduct. His evidence at the trial was very unsatisfactory. I have no doubt that after the defendants had incurred the penalties the town clerk set himself out to find a common informer. He secured the present plaintiff, who was not called before me at the trial, and of whose antecedents nothing is known. The plaintiff is a mere puppet. I have no doubt that these actions have been brought at the instigation and with the support of the town clerk. They have been launched not in the public interest but for the purposes of revenge, and in order to effect (if possible) the financial ruin of two most reputable and worthy citizens of small means. The only redeeming features of the actions are the dignity and ability with which Mr. Paley Scott has fulfilled his duty as the plaintiff's counsel.

Holding, as I do, that each defendant is liable to the penalties I have stated, I yet abstain from entering judgment forthwith. I shall give the defendants a full opportunity of applying either to myself or to some other court for such relief as their counsel may advise. I express no opinion now on the unusual points which may arise on that application.

The cases at present will stand adjourned for further mention.

Order accordingly.

Solicitors: *Thos. Gee & Co.*, Newcastle-on-Tyne; *Torr & Co.*, for *T. & R. Nicholson*, Morpeth.

[*Reported by J. W. MORGAN, ESQ., Barrister-at-Law.*]

Re GRETTON'S INDENTURE. HOOD v. LADY BYRON AND OTHERS

[CHANCERY DIVISION (Romer, J.), June 23, 27, July 27, 1922]

[Reported [1923] 1 Ch. 77; 92 L.J.Ch. 49; 127 L.T. 817; 67 Sol. Jo. 47]

Income Tax—Deduction of tax—Annuity of reduced amount payable under deed in substitution for testamentary annuity—Testamentary annuity given free of tax—Substituted annuity agreed to be paid free of tax—Validity—Income Tax Act, 1842 (5 & 6 Vict., c. 35), s. 103.

By his will a testator bequeathed an annuity to F.L.R. of the "clear yearly sum . . . of £6,000 . . . during his life free of . . . income tax and all other duties whatsoever . . ." The validity of the will was disputed and by way of compromise the parties (including F.L.R.) agreed (by an indenture dated Feb. 14, 1883) that, in lieu of the annuity of £6,000 given to F.L.R. by the will, she would accept "an annuity of £5,000 clear of . . . income tax and all other duties whatsoever." By cl. 2 of the indenture it was agreed that named persons might transfer to trustees government stock the interest or dividends of which would amount to "the total of the said annuity of £5,000 and the tax . . . thereon . . . say £5,300, and the said trustees shall hold the said stock in trust . . . to pay the said annuity" and tax; and by cl. 4 the annuity was to be payable exclusively out of the said stock (with power if necessary to resort to the capital) in exoneration of the testator's

A estate. By cl. 5 of the indenture the other parties agreed to indemnify F.L.R. against all tax payable in respect of the said annuity. In 1888 cl. 2 of the indenture was implemented and the trustees appointed declared by deed poll that they would stand possessed of the government stock "in trust to pay the said annuity of £5,000 [to F.L.R.] during her life and the income tax and duties . . ." After some years during which F.L.R. received B the annuity of £5,000 without deduction, income produced by the government stock became insufficient to pay the annuity, and the question arose as to the validity of the provision in the indenture that the annuity should be paid free of income tax.

C **Held:** the annuity payable to F.L.R. was not the testamentary annuity bequeathed to her, but the annuity given to her pursuant to the indenture, and the agreement to pay the annuity free of tax was a violation of the Income Tax Act, 1842, s. 103, and, therefore, void.

Blount v. Blount (1), [1916] 1 K.B. 230, and *Re Peck's Settlement* (2), [1921] 2 Ch. 237, applied.

D **Notes.** The Income Tax Act, 1842, s. 103, was replaced by the Income Tax Act, 1918, All Schedules Rules, r. 23 (2), which in turn was replaced by the Income Tax Act, 1952, s. 506 (2)

Distinguished: *Re Gordon's Settlement, Hunt v. Mortimer*, [1924] 1 Ch. 146. Referred to : *A.-G. v. Gretton*, [1945] 1 All E.R. 628.

As to avoidance of agreements for payment without deduction of tax, see 20 HALSBURY'S LAWS (3rd Edn.) 366 et seq.; and for cases, see 28 DIGEST (Repl.) 195 et seq.

E Cases referred to:

(1) *Blount v. Blount*, [1916] 1 K.B. 230; 85 L.J.K.B. 230; 114 L.T. 176; 28 Digest (Repl.) 178, 716.

(2) *Re Peck's Settlement*, [1921] 2 Ch. 237; 90 L.J.Ch. 491; 125 L.T. 756; 65 Sol. Jo. 735.

F (3) *Meeking v. Commissioners of Inland Revenue* (1920), 7 Tax Cas. 603; 28 Digest (Repl.) 331, 1468.

(4) *Brooke v. Price*, [1917] A.C. 115; 86 L.J.Ch. 329; 116 L.T. 452; 61 Sol. Jo. 334, H.L.; 28 Digest (Repl.) 196, 817.

(5) *Booth v. Booth*, [1922] 1 K.B. 66; 91 L.J.K.B. 127; 126 L.T. 342; 66 Sol. Jo. 251; 28 Digest (Repl.) 179, 729.

G **Adjoined Summons.**

H The following facts are taken from his Lordship's judgment: Frederick Gretton by his will dated Aug. 26, 1882, "gave, devised, and bequeathed unto the said Fanny Lucy Radmall the clear yearly sum or annuity of £6,000 British sterling per annum during her life free of legacy duty, income tax, and all other duties whatsoever and directed his trustees at any time (if the said Fanny Lucy Radmall should so desire it) to lay out a sufficient portion of his estate in the purchase of such an annuity as aforesaid in her name either from the Commissioners for the Reduction of the National Debt or from any insurance or other public company or corporation approved of in writing by the said Fanny Lucy Radmall. And he directed and declared that the said annuity or yearly sum of £6,000 should be paid quarterly and that the first quarterly payment thereof should be due and be made at the end of three months next after his decease, and directed I and declared that the said annuity or yearly sum of £6,000 per annum should be in addition to, and not in substitution for, any gift or benefit theretofore derived or which during his lifetime might be derived by the said Fanny Lucy Radmall from him, but should include the sum of £1,000 per annum which he agreed to pay to the said Fanny Lucy Radmall by a bond dated April 10, 1880. And after giving, devising and bequeathing an annuity of £75 as therein mentioned, the testator gave, devised and bequeathed all his estate and property, both real and personal, and whether in possession, reversion, remainder or

expectancy or otherwise howsoever, unto and equally between his two sisters, the said Frances, otherwise Fanny Gretton and his said sister Clara Gretton." The testator died on Nov. 15, 1882, leaving surviving him his brother John Gretton, his heir-at-law, and the said John Gretton, the two sisters Frances and Clara Gretton, and another sister, Mrs. Mary Wigan, his sole next-of-kin. After the testator's death, questions appear to have arisen as to the validity of the said will, and, after an arrangement had been come to for satisfying any claims that Mrs. Mary Wigan might have, the brother and the two other sisters of the testator proceeded to come to terms with Lady Byron in respect of her annuity. Accordingly, by an indenture dated Feb. 14, 1883, and made between John Gretton of the first part, Frances Gretton of the second part, Clara Gretton of the third part, and Lady Byron, by her then name of Fanny Lucy Radmall, of the fourth part, after reciting the will, and the death of the testator, there are these recitals: "And whereas the said John Gretton, Frances Gretton, and Clara Gretton, have threatened to contest with the said Fanny Lucy Radmall the validity of the said recited will, and whereas to prevent any litigation and to compromise and settle all questions between the parties hereto in reference to the rights of the said Fanny Lucy Radmall under the said recited will and in the estate of the said Frederick Gretton, the said Fanny Lucy Radmall, while insisting that the said recited will is a good and valid testamentary disposition in all respects, has agreed to the arrangement hereinafter contained." Then it was witnessed as follows:

"(1) In lieu and satisfaction of the annuity of £6,000 by the said recited will given to her the said Fanny Lucy Radmall will accept an annuity of £5,000 clear of legacy duty, income tax and all other duties whatsoever, which said annuity shall be received by her out of the estate of the said Frederick Gretton as mentioned in the said will or out of the shares of the said estate as hereinafter mentioned, but nothing herein contained shall be taken to impose any personal liability on the said Frances Gretton and Clara Gretton, or either of them, to pay the said annuity or any part thereof, the said annuity shall accrue as from Nov. 15, 1882, and be payable quarterly," and so on. Then it says in the same clause: "And the said Fanny Lucy Radmall will for the period of five years from the day of the date hereof waive and release the right by such will given to her of calling upon the trustees thereof to purchase the annuity thereby provided for her or any part thereof." Clause 2 is: "Provided always and it is hereby agreed and declared that it shall be lawful for the said Frances Gretton, Clara Gretton, and John Gretton, or any or either of them, or their or any or either of their executors or administrators, at any time within the period of five years from the day of the date hereof to purchase or transfer into the names of two trustees the one to be chosen by the person or persons making such purchase or transfer and the other by the said Fanny Lucy Radmall such a sum of Stock of the Government of Great Britain the interest or dividends whereof will amount to the total of the said annuity of £5,000 and the tax and duties thereon as aforesaid, say, £5,300. And the said trustees shall hold the said stock in trust in the first place to pay the said annuity tax and duties and subject thereto as part of the residuary estate of the said Frederick Gretton." Clause 4 was in these terms: "Provided, further, that if such purchase or transfer as aforesaid shall be made within the said period of five years, then the right by the said recited will given to the said Fanny Lucy Radmall to call upon the trustees thereof to purchase an annuity shall absolutely cease and determine, and the said Fanny Lucy Radmall will if the persons or person making such purchase or transfer shall so require and at their, his or her expense execute a release of such right, and after such purchase or transfer the said annuity of £5,000 and the tax and duties thereon as aforesaid shall be payable exclusively out of the income of the funds purchased or transferred, or, if such income shall be insufficient, then out of the corpus thereof, and after such purchase or transfer the remainder of the estate

- A of the said Frederick Gretton shall be absolutely released and exonerated from the same annuity and from all claims and demands in relation thereto." Clause 5 is: "The said Frances Gretton and Clara Gretton and each of them will for ever hereafter indemnify the said Fanny Lucy Radmall against all tax, legacy and other duties which may be or become payable by the said Fanny Lucy Radmall in reference to the annuity given by the said recited will to the said
- B Fanny Lucy Radmall or in reference to other the benefits to which under such will or these presents the said Fanny Lucy Radmall is or may become entitled." Then: "And these presents further witness that the said John Gretton, Frances Gretton and Clara Gretton hereby withdraw all opposition to the admission of the said recited will to probate." Then later on it was further witnessed: "That in consideration of the premises the said Frances Gretton and Clara Gretton,
- C as beneficial owners, hereby charge all the shares and interests of them the said Frances Gretton and Clara Gretton respectively of and in the real and personal estate of the said Frederick Gretton as well under or by virtue of the said recited will or any other testamentary disposition of the said Frederick Gretton as also as two of his next of kin with the payment until the purchase or transfer hereinbefore authorised to the said Fanny Lucy Radmall of the annuity hereby
- D covenanted to be accepted by her as hereinbefore mentioned and the tax and duties thereon as aforesaid." Then it is witnessed: "That in consideration of the premises the said John Gretton, as beneficial owner, hereby charges all the estate share and interest of him the said John Gretton in the real and personal estate of the said Frederick Gretton as well as such heir-at-law and next of kin as aforesaid, and also under, or by virtue of any testamentary disposition of the
- E said Frederick Gretton with the payment until the purchase or transfer aforesaid to the said Fanny Lucy Radmall of the last-mentioned annuity and tax and duties thereon as aforesaid."

In pursuance of the power conferred by cl. 2 of this indenture, and within the period of five years computed from Feb. 14, 1883, Frances Gretton and John Gretton (Clara Gretton then being dead) in part purchased, and in part transferred, in or into the names of two trustees, one being chosen by them, and the other being chosen by Lady Byron, the sum of £176,700. Three per cent. Consolidated Bank Annuities, the gross dividends at the time of such purchase and transfer amounting to £5,300 a year, and by a deed poll dated June 8, 1888, and expressed to be supplemental to the indenture of Feb. 14, 1883, therein called the principal indenture, the two trustees declared that they would stand possessed

G of the said sum of bank annuities which by that time had been converted into $2\frac{3}{4}$ per cent. Bank Annuities: "In trust in the first place to pay the said annuity of £5,000 by the principal indenture provided for the said Fanny Lucy Brinckman during her life and the income tax and all duties whatsoever which will become payable in respect thereof such annuity tax and duties to be paid on or at the days or times therein mentioned, and in accordance in all respects with the

H terms of the principal indenture, and subject to the payment of the said annuity income tax and duties will hold the said sum of £176,700 $2\frac{3}{4}$ per cent. Bank Annuities and the dividends thereof as part of the residuary estate of the said Frederick Gretton." In accordance with the trusts of this deed poll, Lady Byron appears for some years to have received from the trustees a clear annuity of £5,000 per annum without any deduction. Having regard, however, to the high

I rate of income tax prevailing in recent years, the annual income produced by the trust funds now representing the Bank Annuities is not nearly sufficient to pay the annuity of £5,000. Lady Byron, moreover, claims that she is also entitled to be relieved out of the trust funds, not only of ordinary income tax, but also of super-tax in respect of her annuity. In view of the burden imposed on the trust funds if this claim is well founded, as to which see *Meeking v. Commissioners of Inland Revenue* (3), the persons now representing or claiming through John Gretton and his sisters have raised the question whether Lady Byron is legally

entitled to be paid the annuity of £5,000 free of income tax, or whether the provisions contained in the indenture and deed poll for the purpose of bringing about that result are not rendered void by s. 103 of the Income Tax Act, 1842, the relevant part of which is now replaced by r. 23 (2) of the general rules in the first schedule to the Income Tax Act, 1918. A

The summons also asked whether the covenants by Frances Gretton and Clara Gretton contained in cl. 5 of the indenture of Feb. 14, 1883 indemnifying the defendant Fanny Lucy Lady Byron against all tax, legacy, and other duties which might be or become payable by her in reference to the said annuity extended to: (a) the ordinary income tax payable in reference to the said annuity? (b) any and what part of the super-tax payable in respect of the total income of the said defendant, and if so whether such covenants in so far as the same related to such income tax and super-tax were valid and enforceable? B C

W. A. Greene, K.C. for the plaintiffs, the trustees of the indenture.

Barrington-Ward, K.C. and *Farwell* for the defendant Lady Byron.

Maugham, K.C. and *Bremner* for members of the Gretton family interested in the reversion to the capital of the annuity fund.

Cur. adv. vult. D

July 27. **ROMER, J.**, stated the facts and continued: Section 103 of the Act of 1842, and s. 102 which must be read in connection with it, have frequently been the subject of judicial consideration; and it is unnecessary to read them at length. It is sufficient to say that by s. 102 it is provided that on (inter alia) all annuities payable either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, there should be charged a tax at a certain rate for every 20s. of the annual amount thereof and it is provided that in every case where the annuity shall be payable out of profits or gains brought into charge by virtue of the Act, no assessment shall be made on the person entitled to such annuity, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, and that the person so liable to make such annual payment shall be authorised to make a deduction out of such annual payment at the said rate for every 20s. of the amount thereof. Section 103, after imposing a penalty on any person who (inter alia) should refuse to allow any such deduction, provides as follows: E F

"And all contracts covenants and agreements made or entered into or to be made or entered into for payment of any interest rent or other annual payment aforesaid in full without allowing such deduction as aforesaid shall be utterly void." G

It was suggested before me in argument by Lady Byron's counsel that the only object of these words that I have quoted was to protect the revenue, and that any contract, covenant, or agreement which in terms provides that the income tax shall be paid is not within the mischief of the statute. I cannot agree with this contention. The revenue is amply protected without these words. It is not, perhaps, easy to suggest any explanation for their insertion that is completely satisfactory, although as pointed out by **LORD FINLAY, L.C.**, in *Brooke v. Price* (4) ([1917] A.C. at p. 121), one reason may be that the amount of the income tax varies from year to year, and that the prohibition was deemed convenient in order to ensure that each beneficiary should bear his true proportion of the burden of the tax for the time being. But, whatever may have been the reason for the prohibition, it is clear that the words of it do not apply to an annuity given by a will by way of bounty. For in such a case there is no contract, covenant, or agreement. The direction in the testator's will that Lady Byron's annuity of £6,000 should be free of income tax was therefore valid in law, and if the parties to the deed of Feb. 14, 1883, had confined themselves to the agreement set out in the first clause of the operative part of that deed, the stipulation in H I

- A that clause that the annuity of £5,000 should be clear of income tax would not, in my opinion, have been rendered invalid by s. 103 of the Act. For Lady Byron would, I think, have taken the annuity of £5,000 under the will and the will alone, the effect of the deed being merely an agreement on her part to give up a portion of the £6,000 annuity bequeathed to her by the will. But the effect of the provisions contained in cl. 2 and cl. 4 of the deed if, as subsequently happened,
- B they were resorted to, was, in my judgment, to secure to Lady Byron an annuity which could no longer be regarded as an annuity derived under the will alone, but was an annuity that became payable by virtue of those clauses. It was admitted before me, on behalf of Lady Byron, that those clauses and the deed poll of the June 8, 1888, which gave effect to them, constitute an agreement within the meaning of that word in s. 103, but it was contended that they were
- C not in contravention of the section.

- There are two ways in which it is possible to provide by agreement for the payment of, in the one case, a minimum annual sum, and, in the other case, a fixed annual sum that will be unaffected by the rise or fall of income tax without infringing the provisions of s. 103. (i) The agreement may provide for a division between the parties of a net balance of the income of a fund which may remain
- D after income tax on the whole has been deducted and that the proportion paid to one of the parties shall not be less than a fixed sum, see *Brooke v. Price* (4). (ii) The agreement may provide for the payment of an annuity of such an amount as that after deduction of income tax thereon a fixed sum will be available for the annuitant: (see LORD PARKER in *Brooke v. Price* (4); and *Booth v. Booth* (5). Does the agreement constituted by cl. 2 and cl. 4 of the indenture of Feb. 14,
- E 1883, and the deed poll of June 8, 1888, fall within either of two classes of agreement that I have mentioned, or does it fall within the class of prohibited agreements such as existed in the cases of *Blount v. Blount* (1), and *Re Peck's Settlement*, *Peck v. Hamilton* (2)? It is impossible, in my opinion, to hold that the agreement falls within class (i). In the first place I cannot find any indication that the parties were contemplating the division of a fund after the tax had been
- F paid, and the fact that they were dealing with the gross income of the fund seems apparent from the circumstances of provision being made for the payment by the trustees, out of the fund, of the income tax on the annuity. But even if the parties could be treated as dealing with a net income after payment or deduction of the tax, it is impossible to suppose that, out of such net income, Lady Byron was to receive £5,000, and the tax thereon in addition. The agreement could only
- G mean that the trustees were to pay the £5,000 after making a deduction therefrom of the tax, and were then to pay over to her a sum equal to the tax for the purpose of putting her in the same position as though no such deduction had been made. This does not appear to me to be a reasonable construction, but, in any event, such an agreement would, in my opinion, be in contravention of s. 103. It would, in effect, amount to an agreement for payment out of the net income
- H of a fixed annuity without deduction, and I can find nothing in *Brooke v. Price* (4) to suggest that such an agreement is valid.

- It is, I think, equally impossible to hold that the agreement falls within class (ii). The trustees are to pay the annuity of £5,000 and the "tax thereon" (the impression used in the indenture) or "the income tax . . . which shall become payable in respect thereof" (the expression used in the deed poll). This means
- I the income tax on an annuity of £5,000, and not the income tax on an annuity of £6,666 13s. 4d., to take the figure appropriate to a year in which the tax was 5s. in the pound. The trustees are therefore out of the gross income to pay the annuity of £5,000, and the income tax at the current rate on £5,000. It is not expressly stated to whom the income tax is to be paid, but obviously it is to be paid to the revenue authorities, and will, in practice, be paid by deduction at the source. If, having so paid the tax, the trustees are to pay the £5,000 to Lady Byron without deduction, the agreement to do so would appear to be in direct

violation of s. 103, and therefore void. If the trustees are to pay the £5,000 after deducting the tax so paid, the agreement would be valid, but such construction would not help Lady Byron. I come, therefore, to the conclusion that Lady Byron is not entitled to have the annuity of £5,000 paid in to her free of either ordinary income tax or of super-tax, which it is admitted stands, for this purpose, on the same footing as ordinary income tax, and question (i) of the originating summons must be answered in the negative.

In the view that I have taken question (ii) does not arise.

The third question of the originating summons is as follows:

"Whether upon the true construction of the above-mentioned indenture the covenants by the above-named Frances Gretton and Clara Gretton contained in cl. 5 thereof indemnifying the defendant Fanny Lucy Lady Byron against 'all tax legacy and other duties which may be or become payable' by her in reference to the said annuity extend to (a) the ordinary income tax payable in reference to the said annuity? (b) any and what part of the super-tax payable in respect of the total income of the said defendant, and if so whether such covenants in so far as the same relate to such income tax and super-tax are valid and enforceable?"

Assuming that on the true construction of the indenture the covenants apply at all to the annuity provided by cl. 2 of the indenture and by the deed poll, as to which it is not necessary to express any opinion, it was admitted on behalf of Lady Byron that if she be not entitled to have the annuity of £5,000 paid without deduction the covenant indemnifying her against all tax is invalid and unenforceable. (See *Re Peck's Settlement*, *Hamilton v. Peck* (2)). I, therefore, answer the latter part of the third question in the negative.

Order accordingly.

Solicitors: *Dollman & Pritchard; Radcliffes & Hood.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]



